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2008-1511, -1512, -1513, -1514, -1595

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THERASENSE, INC. (now known as Abbott Diabetes Care, Inc.)
and ABBOTT LABORATORIES,

Plaintiffs-Appellants,

v.

BECTON, DICKINSON AND COMPANY,
and NOVA BIOMEDICAL CORPORATION,

Defendants-Appellees,

and

BAYER HEALTHCARE LLC,

Defendant-Appellee,

Appeals From the United States District Court for the Northern District of California in Consolidated Case Nos. 04-cv-2123, 04-cv-3327, 04-cv-3732, and 05-cv-3117, Judge William H. Alsup

OPPOSITION TO LAWRENCE S. POPE'S MOTION FOR LEAVE TO INTERVENE ON APPEAL

THERASENSE V. BECTON, 2008-1511, -1512, -1513, -1514, -1595

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BAYER HEALTHCARE LLC

Bayer HealthCare, LLC ("Bayer") respectfully files this Opposition to Lawrence S. Pope's Motion for Leave to Intervene on Appeal. In the underlying action, the district court found Abbott's patent, U.S. Patent No. 5,820,551 ("the '551 patent") unenforceable due to inequitable conduct. Mr. Pope was the Abbott attorney responsible for the prosecution of the '551 patent for the year before its issuance in October 1998. The district court made subsidiary findings about the conduct of Mr. Pope, as well as the Abbott scientist who worked with him on prosecution, in support of its ultimate findings and legal conclusion that Abbott's patent is unenforceable. Abbott has already advocated in its opening brief on appeal that Mr. Pope did not commit inequitable conduct. However, Mr. Pope is not a party to this litigation. He was not subject to formal judicial action by the lower court, and has suffered no legally cognizable injury. Accordingly, Mr. Pope lacks standing to intervene in this appeal, and his motion should be denied.

I. Under Governing Federal Circuit Law, Mr. Pope Lacks Standing to Intervene in this Appeal.

Mr. Pope was responsible for prosecuting the '551 patent from Fall 1997 until the U.S. Patent and Trademark Office's issuance of the patent in October 1998. On June 24, 2008, following a bench trial in which Mr. Pope testified, the U.S. District Court for the Northern District of California found the patent unenforceable due to inequitable conduct. In support of that ultimate conclusion of law, the district court made many subsidiary findings of fact. In pertinent part, the

district court found that Mr. Pope and Abbott scientist Dr. Gordon Sanghera consciously decided to withhold prior inconsistent statements about the key piece of prior art contradictory material from the PTO and acted with specific intent to deceive the PTO. *Therasense, Inc. v. Becton, Dickinson & Co.*, 565 F. Supp. 2d 1088, 1113-14 (N.D. Cal. June 24, 2008).

Abbott's appeal of the district court's judgment is now before this Court.[1] Mr. Pope seeks to intervene, contending that he has a "substantial interest" in the outcome of this appeal for two reasons: (1) the district court's findings were "specifically directed" to his conduct, and (2) the specificity of those findings constitutes a "public reprimand" that has caused him direct and substantial injury. (Lawrence S. Pope's Motion for Leave to Intervene on Appeal, hereafter, "Motion," at 1-6.) Nonetheless, the district court's subsidiary findings as to Mr. Pope do not confer on him standing to intervene in this appeal.

A. Unless A Non-Party Has Been Subject To The Court's Power to Sanction, He May Not Appeal From An Adverse Judgment.

The general rule is that a non-party to a lawsuit may not appeal from the judgment, even if he has been adversely affected by the judgment itself or an action taken by the court in reaching that judgment. *See, e.g. Marino v. Ortiz*, 484 U.S. 301, 304 (1988). There exists an exception to this rule: a non-party subject to

[1] In addition to the finding of inequitable conduct with respect to the '551 patent, Abbott also appeals the district court's finding that the same patent was invalid as obvious. Mr. Pope does not seek to intervene as to that portion of the appeal.

the court's power to sanction (*e.g.*, an attorney who is held in contempt or sanctioned in the course of litigation) may file an interlocutory appeal or an appeal after final judgment of the order imposing sanctions. *See, e.g. Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 395-98 (Fed. Cir. 1993). This exception exists because a court that sanctions a non-party is not adjudicating the parties' legal rights in the underlying case, but instead, is exercising its inherent power to regulate a pending case by punishing a non-party individual. *See Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316, 1319 (Fed. Cir. 2007) (internal citations omitted.) Thus, where a court has exercised its power to punish an individual, that matter becomes personal to the sanctioned individual and is treated as a judgment against him. *Id.* (internal citations omitted.) Absent such a sanction, the non-party has no right to appeal. *Id.*

B. An Inequitable Conduct Determination Is Not An Exercise of the Court's Sanctioning Power And Does Not Confer Appellate Jurisdiction On the Appeal of an Aggrieved Attorney.

The district court did not sanction Mr. Pope in this case. Thus, the exception to the rule that he lacks standing to intervene does not apply. A court does not exercise its power to sanction simply by criticizing the conduct of a non-party in the course of resolving the issues in the underlying case:

> Critical comments, such as in an opinion of the court addressed to the issues in the underlying case, are not directed at and do not alter the legal rights of the nonparty. We recognize that critical comments by a court may adversely affect a third party's reputation. But the fact that

> a statement made by a court may have incidental effects on the reputations of nonparties does not convert the court's statement into a decision from which anyone who is criticized by a court may pursue an appeal.

Nisus Corp., 497 F.3d at 1319. Under controlling Federal Circuit caselaw, Mr. Pope has no right to intervene.

In *Nisus*, this Court held that it lacked jurisdiction over the appeal of an attorney who was found by a district court to have engaged in inequitable conduct without an accompanying formal judicial sanction. *Nisus*, 497 F.3d at 1316. There, a patent prosecution attorney (Mr. Teschner) unsuccessfully moved the district court to intervene in the litigation after the court found the patent-in-suit unenforceable due to his inequitable conduct. *Id.* at 1318. Mr. Teschner appealed to the Federal Circuit on both: (1) the finding that he had engaged in inequitable conduct; and (2) the denial of his motion to intervene in the underlying action. *Id.*

The Federal Circuit found that Mr. Teschner had not been subject to the formal sanction power of the district court. Rather, the district court had simply made subsidiary findings concerning his actions in support of its ultimate conclusion that the patent-in-suit was unenforceable. *Id.* at 1320 (citing *Precision Specialty Metals, Inc. v. U.S.*, 315 F.3d 1346 (Fed. Cir. 2003)). The Court found :

> To allow appeals by attorneys or others concerned about their professional or public reputations, merely because a court criticized them or characterized their conduct in an unfavorable way would invite an appeal by any nonparty who feels aggrieved by some critical statement made by the court in an opinion or from the bench.

Id. Since the district court imposed no sanction affecting Mr. Teschner's legal rights or obligations, its finding of inequitable conduct did not confer jurisdiction over Mr. Teschner's appeal. *Id.* at 1321.

The *Nisus* panel distinguished *Precision Metals*, a case in which this Court upheld its jurisdiction to review the Court of International Trade's reprimand of an attorney for misquoting judicial opinions in her motion practice. 315 F.3d at 1347. Unlike Mr. Teschner, the *Precision Metals* attorney had standing to challenge the lower court's decision because it was a formal reprimand — an imposition of the court's inherent power to penalize those who appear before it. *Nisus*, 497 F.3d at 1321 (citing *Precision Metals*, 315 F.3d at 1352); *see also Penthouse Int'l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 391-92 (2nd Cir. 1981) (permitting an attorney to intervene on appeal from an order directing the attorney to pay the opposing party's expenses for his role in discovery abuses in the underlying case.) In contrast, the district court's finding that Mr. Teschner committed inequitable conduct was "no different from any other critical comment about a nonparty that a court might make in the course of resolving a dispute between the two parties before the court." *Id.* Further, Mr. Teschner's pre-litigation conduct was outside of the scope of the district court's disciplinary authority; thus, the court's later criticism of Mr. Teschner did not represent a disciplinary sanction against him. *Id.*

The *Nisus* case is directly on point.[2] Specifically, the district court's comments about Mr. Pope were subsidiary findings that were made in support of the court's ultimate legal conclusion that Abbott's '551 patent was unenforceable. Mr. Pope was not subject to any formal sanction or reprimand by the court for his conduct in the underlying action (in which he was not a party). Rather, the court simply commented on his conduct in 1997-98 in adjudicating the rights of the parties to the patent litigation dispute. Accordingly, Mr. Pope lacks standing to intervene in this appeal.

II. Intervention Is Governed By the Standard Outlined in *Nisus*, Not By A Standard Analogous to Federal Rule of Civil Procedure 24.

Ignoring *Nisus*, Mr. Pope contends that intervention in this appeal should be governed by standards analogous to Federal Rule of Civil Procedure 24. (Motion at 6.) However, there is no excuse for Mr. Pope's failure to cite this Court's controlling precedent, and each case that he does cite for the proposition that FRCP 24 governs here is inapposite.

Mr. Pope first contends that the Tenth Circuit held Rule 24 applicable in a "similar context" in *Elliott Indus. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1092 (10th

[2] The only difference between Mr. Teschner in *Nisus* and Mr. Pope in this case is that Mr. Pope did not even try to intervene formally at the district court level. If anything, failure to move the district court for intervention imposes a higher burden to show that intervention is appropriate on appeal, as described by the Tenth Circuit in *Elliott Indus. v. BP Am. Prod. Co.*, 407 F.3d 1091 (10th Cir. 2005), discussed *supra*.

Cir. 2005). (Motion at 6-7.) In *Elliot Industries*, the district court granted summary judgment in favor of defendant oil companies against a plaintiff class. *Id.* at 1102. Following the entry of final judgment, third-party litigants (who were unnamed members of the plaintiff class) unsuccessfully moved to intervene in the district court to challenge the court's subject matter jurisdiction. *Id.* On appeal, the Tenth Circuit found that the policies underlying mandatory intervention under Federal Rule of Civil Procedure 24(a) were relevant to its appellate jurisdiction, though where intervention was not sought below, it would be permitted "only in an exceptional case for imperative reasons." *Id.* at 1103 (citing *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000)).[3]

The court found that as unnamed members of the putative class, the third-party litigants had a sufficient underlying interest to justify intervention. *Id.* Their intervention was solely to challenge subject matter jurisdiction, which defendants had consistently contested at the trial court level. Since defendants' interest in the issue was vitiated by their success on the merits, the jurisdictional issue would not be raised or adequately briefed on appeal without the third-party litigants'

[3] The Tenth Circuit cited to the Supreme Court case of *Local 283 v. Scofield, et al.*, 382 U.S. 205 (1965). *Local 283* is even more clearly inapposite. In that case, the Supreme Court found that a party who was wholly successful in an unfair labor practice proceeding before the National Labor Relations Board had a right to intervene in the Court of Appeals review proceeding. *Id.* In a footnote, the Supreme Court noted that Federal Rule of Civil Procedure 24 supported its decision by analogy, because "the policies underlying intervention may be applicable in appellate courts." *Id.* at 216 n.10.

intervention. *Id.* at 1103-04. The Tenth Circuit permitted the intervention. *Id.*

Mr. Pope's situation is wholly distinguishable. The court in *Elliott Industries* found that a party seeking intervention on appeal must satisfy the prerequisites of Rule 24(a) – or mandatory intervention. *Id.* at 1102 (emphasis added). Mr. Pope does not even contend that he satisfies Rule 24(a)'s standard; rather, he suggests that he should be granted permissive intervention under Rule 24(b). Moreover, Mr. Pope seeks to intervene as to inequitable conduct, where his interests are aligned with Abbott's, such that his additional briefing would be superfluous at best.[4] Moreover, *Elliott Industries* is distinguishable for an additional reason: the third-party litigants were unnamed plaintiffs with a legally cognizable interest in the underlying action. In contrast, Mr. Pope – like the attorney in *Nisus* – is a non-party to the dispute.

The only other case that Mr. Pope cites for the proposition that Rule 24 should apply is *Canadian Tarpoly Co. v. U.S. Int'l Trade Comm'n*, 649 F.2d 855 (C.C.P.A. 1981). In the underlying action in *Canadian Tarpoly*, Canadian Tarpoly filed an International Trade Commission ("ITC") petition requesting that the ITC declare invalid its order extending a patent monopoly to another company, Sealed Air. The ITC denied the petition, and Canadian Tarpoly appealed to the Court of

[4] Counsel for Bayer inquired of counsel for Abbott whether Abbott was funding Mr. Pope's attempts to participate in the appeal, and counsel for Abbott declined to answer the question.

Customs and Patent Appeals ("CCPA"). *Id.* at 856. Sealed Air, the patent owner, moved to intervene in the appeal; the ITC did not oppose intervention. *Id.* The CCPA analogized to Rule 24 in allowing the intervention. *Id.* at 857. In particular, the CCPA found that Sealed Air had a legally cognizable interest in the patent as its owner; that those rights would be directly affected by the CCPA's disposition of Canadian Tarpoly's appeal; and that the ITC would not adequately represent Sealed Air's ownership interests, since the ITC did not itself have an ownership interest in the patent. *Id.*

Again, *Canadian Tarpoly* is clearly distinguishable from Mr. Pope's situation. First, *Canadian Tarpoly* did not involve an appeal from a district court decision. More importantly, an adverse decision by the CCPA in *Canadian Tarpoly* would directly have impacted Sealed Air's legal rights. In contrast, if this Court affirms the lower court decision that Abbott's patent is invalid due to inequitable conduct, this decision will not impact a legally cognizable interest of Mr. Pope's.[5] Lastly, Abbott's and Mr. Pope's interests are aligned; Abbott has every incentive to advocate vigorously for a finding that Mr. Pope did not commit inequitable conduct. Accordingly, *Canadian Tarpoly* does not apply here.

[5] Mr. Pope contends that the district court's findings about him have been the subject of two published articles, and that he may face disciplinary inquiries from the Illinois bar and the PTO. He cites no authority for the proposition that these potential extrajudicial consequences confer standing on him to appeal the decision in this case.

III. Mr. Pope's Remedy For Any Injury Caused By The District Court's Order Is To Petition For A Writ of Mandamus.

In *Nisus*, the Federal Circuit found that the dismissal of a non-party from the appeal does not leave the non-party without a remedy. Rather, an individual who believes he was harmed by the mere existence of a statement in an opinion "is free to petition for a writ of mandamus, *see* 28 U.S.C. § 1651, and request that offending commentary be expunged from the public record." 497 F.3d at 1321-22 (internal quotation omitted). If Mr. Pope believes that he has been injured by the district court's commentary on his actions in prosecuting the '551 patent, his remedy is to seek a writ of mandamus.

IV. Conclusion

Mr. Pope's situation is no different than that of any lawyer whose conduct is found to constitute inequitable conduct in the course of patent litigation to which the lawyer is not a party. Although Mr. Pope tries to disguise this fact by ignoring the relevant precedent of this Court, the holding he seeks in this case would overturn this Court's settled precedent and establish a new rule that any non-party attorney whose conduct is criticized as part of an inequitable conduct or other finding may intervene in the resulting appeal. There is no basis in law or policy to oppose such a rule. For these reasons, this Court should deny Mr. Pope's Motion for Leave to Intervene.

Dated: October 20, 2008

Respectfully submitted,

By: Rachel Krevans / JAD
Rachel Krevans

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Therasense v. Becton, 2008-1511, -1512, -1513, -1514, -1595

Affidavit of Authority

District of Columbia, ss:

Judith A. Jackson, being duly sworn, deposes and says that Rachel Krevans, after reviewing Opposition to Lawrence S. Pope's Motion for Leave to Intervene on Appeal, authorized me to sign this document on her behalf.

Judith A. Jackson
Litigation Docket Coordinator

Subscribed and sworn before
me on this 20th day of October 2008.

Teresa Burnett
Notary Public, D.C.

My commission expires 2/29/2012

CERTIFICATE OF SERVICE

I, Judith A. Jackson, hereby certify that on the 20th day of October 2008, I caused one original and three copies of the foregoing document:

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I declare I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on October 20, 2008, at Washington, DC.

Judith A. Jackson

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Therasense v. Becton

No. 2008-1511

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Bayer HealthCare LLC certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Bayer HealthCare LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Bayer AG

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

See attachment

9/26/2008
Date

Rachel Krevans/by
Signature of counsel
Rachel Krevans
Printed name of counsel
by Jason Bartlett

Please Note: All questions must be answered

cc:

CERTIFICATE OF INTEREST ATTACHMENT

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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