

United States District Court,
E.D. Pennsylvania.

KENSEY NASH CORPORATION, Sherwood Medical Company, and St. Jude Medical, Inc,
Plaintiffs.

v.

PERCLOSE, INC.. Defendant,
Counterclaimant.

v.

Kensey Nash Corporation, Sherwood Medical Company, TYCO International (U.S.) Inc. (dba The Kendall Company), and St. Jude Medical, Inc,
Counterdefendants.

Aug. 21, 2001.

Memorandum and Order

YOHN.

Plaintiffs Kensey Nash Corp., Sherwood Medical Co., and St. Jude Medical, Inc. (collectively "Kensey") move for reconsideration of this court's interpretation of claim terms "closure device," "closure means," and "location detector" in *Kensey Nash Corp. v. Perclose, Inc.*, No. 98-1629, 2000 WL 1868391 (E.D.Pa. Dec.22, 2000). Kensey, in its motion for reconsideration, argues that the court committed errors of law in its interpretation of these terms. As discussed below, Kensey's arguments do not reveal any errors of law in the court's interpretation. Accordingly, Kensey's motion will be denied.

I. Standard of Review

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). " 'Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.' " *Burger King Corp. v. New England Hood & Duct Cleaning Co.*, No. 98-3610, 2000 WL 133756, (E.D.Pa. Feb.4, 2000) (citation omitted). As such, district courts will grant a motion for reconsideration in any of three situations: (1) the need to correct a clear error of law or to prevent injustice; (2) the availability of new evidence not previously available; and (3) an intervening change of controlling law. *See NL Indus., Inc. v. Commeril Union Ins. Co.*, 65 F.3d 314, 324 n. 8 (3d Cir.1995).

II. Discussion

The court's interpretation of U.S. Patent No. 5,676,689 (" '689") claim term "closure device" and U.S. Patent No. 5,861,004 (" '004") claim term "puncture closure" relies in part on the patents' overlapping prosecution histories. Kensey argues that the court, as a matter of law, misconstrues the meaning and relevance of these patents' prosecution histories. Kensey further argues that the court erred in finding that the '689 patent term

"location detector" is a means-plus-function term.

A. "Closure Device" and "Puncture Closure" as Defined by the Series of Continuation Applications Prior to the '689 and '004 Patent Applications

The court found that the '689 patent term "closure device" refers "to the class of closure devices that use an anchor, plug, and filament bound together in a pulley like arrangement whereby the filament draws the anchor and the plug together so as to effectuate a seal." *Kensey Nash*, 2000 WL 1868391 at * 6. The grandparent and parent applications to the application that became the '689 patent both explicitly define the term "closure means." FN1 *See id.* On reviewing the application from which the grandparent application was a continuation in part and on reviewing the grandparent and parent applications, the court found that "in order for the '689 patent to refer to the '827 patent's inventive concept, 'closure device' must be understood to refer to 'closure means.' Were 'closure device' a broader term than 'closure means,' the '689 patent would refer to a different inventive concept." *Id.* 7.

FN1. The patent application that became U.S. Patent No. 5,282,827 (" '827 ") is the grandparent to the application that became the '689 patent, and the application that became U.S. Patent No. 5,441,517 (" '517") is the parent to the application that became the '689 patent. The application that became the '827 patent is a continuation-in-part from the application that became U.S. Patent No. 5,222,974 (" '974"). The court, in its prior interpretation, found that the '974 patent explicitly defines the term "closure means" and that '827 and '517 maintain this same definition. *See Kensey Nash*, 2000 WL 186891 at *6-7.

Furthermore, the application that became the '004 patent follows in the same line of continuation applications from which the '689 patent arose. In fact, the '004 patent's application immediately followed the submission of the '689 patent's application. Limitations imposed on the '689 patent by virtue of the prior line of continuation patents apply equally to the '004 patent. *See id.* at 14. In this motion for reconsideration, *Kensey* attacks the court's limitation of the '689 patent term "closure device" and the '004 patent term "puncture closure" based on analysis of the prior line of continuation applications.

First, *Kensey* argues here that the court erroneously held that terms in a patent arising from a continuation application are necessarily limited by the use of such terms in ancestral applications. *Kensey* is correct in arguing that a continuation application, although based on the ancestral applications' disclosures, may vary from the ancestral applications with respect to the scope of the subject matter claimed. *See, e.g.,* *Transco Products, Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 555 (Fed.Cir.1994). However, although there may be some variation in the scope of the claimed subject matter, a continuation application "and the application on which it is based are considered part of the same transaction constituting one continuous application." *Id.* at 557; *see also* *Applied Materials, Inc. v. Advanced Semiconductor Materials America, Inc.*, 98 F.3d 1563, 1579 (concurrency in judgment) ("By definition, a continuation adds no new matter and is akin to an amendment of a pending application."); *Godfrey v. Eames*, 68 U.S. (1 Wall.) 317, 324-26, 17 L.Ed. 684 (1864).

The '689 application's ancestral applications explicitly define "closure means" to cover devices that include "anchoring means, sealing means, and filament means. [Moreover, the] filament means is connected between the anchoring means and the sealing means.... The filament means is arranged to pull the anchoring means and the sealing means relative to each other to cause the sealing means to engage tissue contiguous with the puncture outside the vessel." *See Kensey Nash*, 2000 WL at *6. As such the applications disclose a

very particular class of closure means. Given that the '689 patent relies on nothing more than the disclosures in the prior line of continuation applications, were "closure device" construed to cover a class broader than that defined by "closure means" in the ancestral applications, the '689 patent would have to be understood to add something new to the matters disclosed by the ancestral applications. However, given that the '689 patent stems from a continuation patent, the patent must be understood not to add such new matters. And accordingly, "closure device" must be understood to be a synonym for "closure means" as used in the ancestral applications. Hence, the court did not commit legal error by limiting the '689 patent term "closure device" to the definition of "closure means" as disclosed by Kensey's prior line of continuation applications. Moreover, the limitations imposed by the continuation applications apply equally to the '004 patent term "puncture closure," and accordingly, the court did not commit legal error in imposing this limitation on "puncture closure."

Second, Kensey argues that it never explicitly defined the term "closure means" in any of the ancestral applications. A review of the relevant patent interpretation principles and of the ancestral applications disposes of Kensey's argument. First, a general claim term is ordinarily read to bear its ordinary meaning. *See Johnson Worldwide Assocs., Inc. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed.Cir.1999). However, even a general term will bear a specialized definition where a patentee clearly with reasonable clarity, deliberateness, and precision sets forth an explicit definition for the term. *See id.* at 990; *Renishaw PLC v. Marposs Societa' Per Azioni*, 158 F.3d 1243, 1249 (Fed.Cir.1998) (Where a patentee elects to be his or her own lexicographer, "the definition selected by the [patentee] controls.")

Here the '974 patent's "Summary of Invention" section states:

"These and other objects of this invention are achieved by providing a system for sealing a percutaneous puncture in a blood vessel by use of closure means. The puncture comprises a tract extending through tissue overlying the vessel. The system basically comprises carrier means and tamping means. *The closure means comprises anchoring means, sealing means, and filament means. The filament means is connected between the anchoring means and the sealing means.* The carrier means is arranged to be inserted into the puncture tract and through the puncture to expel the anchoring means therefrom and to draw the anchoring means into engagement with the interior tissue of the blood vessel contiguous with the puncture. *The filament means is arranged to pull the anchoring means and the sealing means relative to each other to cause the sealing means to engage tissue contiguous with said puncture out the vessel.* The tamping means is arranged to assist said sealing means to conform to said artery and to assist to lock said closure means in place."

'974 patent at 2:3-24 (emphasis added). It is apparent that this statement clearly, deliberately, and precisely narrowed the definition of "closure means" to refer to "the class of closure devices that use an anchor, plug, and filament bound together in a pulley like arrangement whereby the filament draws the anchor and plug together so as to effectuate a seal." *Id.* at 2000 WL 1868391, *7. It is equally plain that the language of the '827 patent and the '517 patent employ the very same, narrow definition of "closure means." *See* '827 patent at 2:10-34; '517 patent at 2:17-39. Accordingly, the court did not commit legal error in finding that Kensey selected a special meaning for "closure means."

Third, Kensey argues that the doctrine of claim differentiation makes clear that Kensey did not narrowly define "closure means" in the earlier line of continuation patents, and therefore a narrow definition cannot be imposed on "closure device." However, "[a]lthough the doctrine of claim differentiation may at times be controlling, construction of claims is not based solely upon the language of other claims; the doctrine cannot alter a definition that is otherwise clear from the claim language, description, and prosecution history." O.I.

Corp., 115 F.3d 1576, 1582 (Fed.Cir.1997); *accord* *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1480 (Fed.Cir.1998) ("[T]he doctrine of claim differentiation cannot broaden claims beyond their correct scope, determined in light of the specification and the prosecution history and any relevant extrinsic evidence.") Here, it would be inappropriate to use the doctrine of claim differentiation to undo the definition of "closure device" as provided by the '689 patent's prosecution history, or more specifically, by the series of applications of which the '689 patent's application is a part. Hence, again Kensey fails to find legal error in the court's interpretation.

Finally, Kensey argues that "closure means" is used as a general term throughout the prior continuation applications' specifications, and that this lends support to Kensey's contention that "closure means" and therefore "closure device" bear no special definition. However, as already discussed, the prior line of continuation applications explicitly defines "closure means." Moreover, the patents' specifications are wholly coherent if "closure means" is read to refer specifically to a closure means that includes an anchor, plug, and filament. Accordingly, Kensey again fails to show legal error in the court's interpretation.

B. "Closure Device" and "Puncture Closure" as Defined by Examiner's Interpretation

In addition to looking at the line of continuation applications that preceded the '689 and '004 patents' applications, the court also noted that the '689 patent application's examiner understood "closure means" and "closure device" to refer to the same class of devices. *See* *Kensey Nash*, 2000 WL 1868391 at *7. As is well established, claims may not be construed one way in order to obtain their allowance and in a different way against accused infringers. *See e.g.* *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed.Cir.1995); *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1562-63 (Fed.Cir.1991). In the court's interpretation, the court cited only *Southwall* for this well established proposition.

The examiner initially denied the '689 patent's application on double patenting grounds because he found that Kensey already held a patent that covered "closure means 'comprising' an 'anchoring means, sealing means, and filament means, wherein the filament means is operatively connected between the anchoring means and the sealing means for moving the anchoring means and the sealing means relative to each other...." *Id.* In patent law, an item that "comprises" some set of features includes all items with those features but does not exclude items that have other features in addition to those features. *See Moleculon Research Corp. v. CBS, Inc.*, 793 F.3d 1261 (Fed.Cir.1986). Hence, in order for the examiner to have held that approval of the '689 patent application would lead to double patenting, the examiner would have had to interpret "closure device" to comprise an anchor, plug or sealing means, and a filament. Were the examiner to have held that "closure device" did not comprise these features, the prior patent would not have necessarily covered the items referred to as "closure devices" in the '689 patent's application.

Kensey argues that the court erred because *Southwall* was a prosecution history estoppel case, not a patent interpretation case. Although Kensey is correct in its analysis of the particulars of *Southwall*, the proposition for which the court cited *Southwall* is a general and well established proposition in patent interpretation cases as a whole. The court's reasoning does not depend on the particular circumstances of the *Southwall* case. Furthermore, other cases, such as *Unique Concepts*, support the very same proposition in the context of patent infringement. Accordingly, the court did not commit legal error in finding that the patent examiner understood "closure device" as synonymous with "closure means" and in therefore limiting "closure device" to the definition of "closure means."

C "Location Detector" in '689 Claims 1 and 25

The court found that the term "location detector" is a means-plus-function term as used in Claims 1 and 25 of the '689 patent and is hence defined by the embodiments described in the '689 patent's specification and the equivalents to these embodiments. *See* Kensey Nash, 2000 WL 1868391 at *11. The court additionally summarized the general features of the "location detector" as described in each of the specification embodiments in the '689 patents. The location detector's features include a conventional hemostasis valve and a conventional stopcock. *See id.*

A claim is a means-plus-function claim when written in functional terms without reciting a definite structure for performing the specified function. *See* Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc., 145 F.3d 1303, 1307-08 (Fed.Cir.1998). The court found means-plus-function language in the section of Claim 1 of the '689 patent that states that the "location detector comprising means for insertion in the puncture tract to a position at which fluid within the vessel, duct or lumen is enabled to flow from the interior thereof into said location detector to provide a perceptible signal...." Kensey Nash, 2000 WL 1868391 at *8-9 (quoting '689 patent at 14:67-15:4). Also, no other portion of Claim 1 or Claim 25, the only other independent claim in the patent, provides any definite structure for the performance of the location detector's function. *See id.* The court found that "location detector" is therefore a means-plus-function term. Accordingly, the court limited "location detector" to the descriptions provided in the patent's specification or equivalents thereof. *See* WMS Gaming, Inc. v. International Gaming, Inc., 184 F.3d 1339, 1347 (Fed.Cir.1999).

Kensey argues that despite the clear use of the term "means" in Claim 1, "location detector" is not a means-plus-function term. However, Kensey fails to cite any language in the claim that attributes any structure to "location detector." Moreover, it is plain from the language of the claim that location detector is being defined in the claim by its function, not by its structure. Kensey also argues that "location detector" does not include a hemostasis valve or a stopcock because these items prevent blood visualization and therefore are not features of the location detector. Kensey's argument lacks merit. Every one of the specification embodiments of the location detector includes a hemostatis valve and a stopcock. Moreover, the specification explains how these features are integral to the functioning of the location detector. Hence, the court did not commit legal error in finding that the '689 claim term "location detector" is a means-plus-function term and is limited to the specification's descriptions of location detector or to equivalents thereof.

Finally, Kensey argues that Claim 25 is a method claim, not an apparatus claim, and that because Claim 25 is a method claim, it does not use "location detector" as a means-plus-function term. Kensey is correct in pointing out that the court's prior memorandum erred in describing both Claims 1 and 25 as including a section (c) that explicitly uses "means" language. In fact, only Claim 1 includes a section (c) that uses means language. However, this error has no impact on the court's interpretation of "location detector" as used in Claim 25.

The claim describes "[a] method for sealing a percutaneous puncture in the wall of a vessel, duct or lumen[.]" '689 patent at 16:48-49. The method includes "providing a closure device and location detector[.]" *Id.* at 16:55. The claim does not employ the term "means"-which would ordinarily signal the use of means-plus-function language. However, "merely because an element does not include the word 'means' does not automatically prevent that element from being construed as a means-plus-function element." *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 531 (Fed.Cir.1996). Moreover, a claim may be a means-plus-function-claim when it "invokes purely functional terms[] without the additional recital of specific structure or material for performing that function." *Al- Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 1318 (Fed.Cir.1999), *see also* *O.I. Corp. v. Tekmar Co. Inc.*, 115 F.3d 1576, 158 (Fed.Cir.1997). "Location detector" as invoked in Claim 25 is a purely functional term, and Claim 25 recites no specific structure or

material for performance of location detection. The claim does specify acts relating to the location detector's use:

"Introducing the location detector into the puncture to a position whereupon the fluid within the vessel, duct or lumen is enabled to flow from the interior of the vessel, duct or lumen into the location detector to provide a perceptible signal indicative of the location of the wall of the vessel, duct or lumen, whereupon a desired position for the closure with respect to the vessel, duct or lumen may be determined...."

'689 patent at 16:56-63. However, these acts do not specify the structure of the location detector in a manner sufficient for performance of the location detector's function, namely location detection. Were some structural specification of what constituted a location detector presumed, the cited material may provide enough information to enable one to understand how to operate a location detector. However, without any structural specification for the device that enables location detection, the term "location detector" can be understood as nothing more than some device that enables location detection when used in the manner specified. As used in claim 25, the function to be performed by the "location detector" can only be understood by reference to the patent's specification. Accordingly, the court interprets "location detector" as used in Claim 25 as a means-plus-function term under 35 U.S.C. s. 112, para. 6. Kensey has again failed to articulate a ground for legal error.

III. Conclusion

Kensey fails to state any grounds for legal error in the court's interpretation of the patent terms "closure device," "puncture closure," and "location detector." Accordingly, Kensey's motion for reconsideration will be denied.

Order

And now, this day of August, 2001, upon consideration of plaintiffs' motion for reconsideration (Doc. 65) defendant's response (Doc. 67), and after oral argument, it is hereby ORDERED AND DECREED that plaintiffs' motion for reconsideration is denied.

E.D.Pa.,2001.

Kensey Nash Corp. v. Perclose, Inc.

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