

Opinion Underlying Judgment as a Matter of Law (JMOL) May Still Provide Basis for a New Trial, Even if JMOL Is Defective

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Medisim Ltd. v. BestMed LLC

Addressing preservation of the right to submit post-trial motions, the U.S. Court of Appeals for the Federal Circuit vacated a lower court's rulings on **judgment as a matter of law (JMOL)** of anticipation under Rule 50(b), based on the movant's failure to first move for JMOL under Rule 50(a), but affirmed the conditional grant for a new trial on anticipation based on the same reasoning, finding that the analysis on JMOL could be applied to the new trial request. *Medisim Ltd. v. BestMed LLC*, Case No. 13-1451 (Fed. Cir., July 14, 2014) (Prost, C.J.).

Medisim sued BestMed, alleging infringement of a patent directed to a thermometric device that displays a core body temperature. When placed against the skin, the device takes temperature readings and calculates a core body temperature by correcting for the difference between the deep-tissue temperature and the core body temperature.

Following a jury verdict, BestMed moved for JMOL on the issues of anticipation and no unjust enrichment under rule 50(b). The district court granted the JMOLs, finding that Medisim's own FHT-1 thermometer anticipated the asserted patent claim. The district court also granted BestMed a new trial on anticipation in the event an appellate court found that BestMed failed to preserve its right to bring a post-trial JMOL motion. Finally, the district court granted BestMed's JMOL of no unjust enrichment for lack of evidence that BestMed received any incremental benefit from Medisim's allegedly proprietary water bath procedure. Medisim appealed.

The Federal Circuit found that BestMed failed to move for JMOL on anticipation under Rule 50(a), forfeiting its right to move for JMOL under Rule 50(b). In opposition to Medisim's motion for JMOL of no anticipation, BestMed's counsel stated, "On ... anticipation, I submit that the jury can readily find that the FHT-1 product ... is anticipatory.... it's definitely something for the jury." The Court found this language contrary to a motion for JMOL and could not itself be a motion for JMOL under Rule 50(a). The Court thus vacated the JMOL for anticipation under Rule 50(b).

However, the Federal Circuit affirmed the grant of a new trial on the same anticipation grounds. Medisim argued that the district court only addressed the request for a new trial in a footnote within

the same section as its discussion of the JMOL for anticipation and that the district court failed to provide any legal or evidentiary ground to support the conditional grant of a new trial. The Federal Circuit disagreed and affirmed the grant of a new trial, finding that the footnote, given the context and surrounding discussion in the district court's opinion regarding JMOL on anticipation, was clear enough to pass Rule 50(c)(1) muster for a conditional grant of a new trial.

Regarding unjust enrichment, the Federal Circuit found that BestMed had preserved that issue by adequately moving for JMOL under Rule 50(a). On appeal, Medisim based its unjust enrichment argument on misappropriation of a water-bath testing procedure. Following the trial, BestMed contended "[t]here is no evidence of unjust enrichment" and challenged Medisim's evidence on each element of the claim. On review, the Federal Circuit could find no precise presentation of Medisim's unjust enrichment claim based on a water-bath testing procedure. Hence the Federal Circuit concluded that BestMed's "generic motion" was sufficient as it was confronted only with a "generic case." Even viewing all the evidence in the light most favorable to Medisim, the Court could not "conclude that equity and good conscience require restitution."

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