

2019-1224

---

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

---

ARSUS, LLC, A Utah entity,

Plaintiff-Appellant,

v.

JOHN H. FIRMAGE, INC., a Utah entity, dba BMW of Murray,

Defendant-Appellee,

Appeal from the United States District Court for the District of  
Utah, case no. 1:17-cv-125, Judge Dee Benson

---

**CORRECTED PETITION FOR REHEARING**

**AND/OR REHEARING *EN BANC***

OF PLAINTIFF-APPELLANT-PETITIONER ARSUS, LLC

---

WAGNER, ANDERSON & BRIGHT, P.C.  
Patrick F. Bright, Esq.  
10524 W. Pico Boulevard #214  
Los Angeles, CA 90064  
(213) 700-6637  
pbright@patentattorney.us

*Attorneys for Plaintiff-Appellant-Petitioner  
ARSUS, LLC*

**CERTIFICATE OF INTEREST**

Counsel for Plaintiff-Appellant ARSUS, LLC certifies the following:

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

ARSUS, LLC, a Utah corporation

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:

ARSUS, LLC, a Utah corporation

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:

N/A

4. The name 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 appearing in this Court are:

Patrick F. Bright, Esq. of Wagner, Anderson & Bright, P.C. and Todd Zenger, of Duren IP.

//

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47(a)(5) and 47.5(b):

None.

Dated: October 15, 2019

/s/ Patrick F. Bright \_\_\_\_\_

Patrick F. Bright, Esq.  
*Attorneys for ARUS, LLC, the  
Plaintiff-Appellant-Petitioner for  
Rehearing and/or Rehearing En Banc*

**TABLE OF CONTENTS**

Certificate of Interest..... ii

Table of Contents to Petition.....iv

Table of Authorities to Petition.....vi

Rule 35(b) Statement of ARSUS, LLC, By Its Counsel of Record on This Petition for Rehearing, and/or Rehearing En Banc.....1

Petition for Rehearing and Rehearing En Banc of Plaintiff/Appellant/Petitioner ARSUS, LLC.....5

I. Grant of Rehearing, and/or of Rehearing En Banc, is Necessary and Appropriate, for Six Separate Reasons Allowed by FRAP Rule 35(b) and by Federal Circuit Rule 35(b).....5

II. While Denying it was Doing Claim Interpretation, the District Court, (affirmed by the Panel), Did Do Claim Interpretation, and that Claim Interpretation was Error of Law, violating Controlling Federal Circuit Decisions on Claim Interpretation; then the District Court (Affirmed by the Panel) Relied on the Error-of-Law Claim Interpretation, to Grant MSJ Summary Judgment of Non-infringement to BMW.....12

III. Detail on Why Affirmance by Panel, of DC's Order Granting Defendant's MSJ, Violated Controlling SCOTUS and Federal Circuit Decisions, and FRCP Rule 56(a) and (c).....14

A. Infringement Admissions by BMW's general counsel in deposition, Plus Admissions by Fox, (BMW's Only Declarant on MSJ), Required Denying MSJ.....14

B. Inventor Schramm's Detailed, Uncontroverted Declaration, Established Infringement, Precluding MSJ of Non-infringement to BMW.....16

IV. Rehearing, and/or Rehearing En Banc, Should Not be Denied Merely  
Because the Panel’s Affirmance of Summary Judgment was *Per Curiam*...17

Certificate of Compliance.....19

**Addenda to Petition:**

Copy of the **Panel Decision** is attached as **Addendum A**..... .20-22

Copy of **District Court Decision** is attached as **Addendum B** .....23-28

Certificate of Service.....29

**TABLE OF AUTHORITIES**

**CASES**

*Adickes v. S.H. Kress & Co.*, 398 US 144, 90 S.Ct. 1598 (1970) .....2, 11

*Anderson v. Liberty Lobby, Inc.*, 477 US 242, 106 S.Ct. 2505 (1986) .....2, 8-11

*Brilliant Instruments, Inc. v. Guidetech, LLC*,  
707 F.3d 1342 (Fed. Cir. 2013) .....1, 3, 8, 9, 17

*Bucklew v. Precythe*, \_\_\_ US \_\_\_, 139 S.Ct., 1137 (2019) .....2, 11

*Celotex Corp v. Catrett*, 477 US 317, 106 S.Ct. 2548 (1986) .....2, 10

*First National Bank of Arizona v. Cities Service Co*, 391 US 253,  
88 S.Ct. 1575 (1968) .....2, 11

*Frolow v. Wilson Sporting Goods Co.*,  
710 F.3d 1303 (Fed. Cir. 2013).....1, 3, 8, 16, 18

*IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1429 (Fed.Cir.2000).2, 9

*Johnson Worldwide Associates, Inc. v. Zebco Corp*,  
175 F.3d 985 (Fed Cir. 1999) .....1, 3, 5, 6

*Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1260 (Fed.Cir.1985).....1, 9

*Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238 (1977).....17

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574,  
106 S.Ct. 1348 (1986).....2, 10, 11

*Pfaff v. Wells Electronics, Inc.*, 5 F.3d 514, 519 (Fed. Cir. 1993).....1, 3, 8, 9, 16

*Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005 en banc) .....1, 3, 5-7

*Renishaw PLC v Marposs Societa per Azioni*,  
158 F.3d 1243 (Fed.Cir. 1998) .....1, 3, 6-7

*Salazar-Limon v. City of Houston, Tex*, \_\_\_US\_\_\_, 137 S.Ct. 1277 (2017) .....2, 11

*Tolan v. Cotton*, 572 US 650,134 S.Ct. 1861 (2014) .....2, 11

*Uniloc USA, Inc. v. Microsoft Corp.*,  
290 Fed. Appx. 337 (Fed. Cir. 2008) .....1, 3, 7, 8, 16

*Uniloc USA Inc. v. Microsoft Corp.*,  
632 F.3<sup>rd</sup> 1292 (Fed. Cir. 2011) .....1, 3, 7, 8, 16

**RULES OF PROCEDURE**

Fed. Cir. Rule 35(b).....1, 5

FRAP Rule 35(b) .....1, 5

FRCP Rule 56(a) and (c) .....2, 10, 14

**RULE 35(b) STATEMENT OF ARSUS, LLC, BY ITS COUNSEL ON THIS  
PETITION FOR REHEARING, AND/OR REHEARING EN BANC**

Based on my professional judgment, I believe that the Panel decision  
(issued 10/4/19):

1. Is contrary to the following controlling precedents of this Court governing **claim interpretation**: *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir., **en banc** 2005) ; *Johnson Worldwide Associates, Inc. v Zebco Corp*, 175 F.3d 985,989-90 (Fed Cir. 1999); and cases cited in *Johnson Worldwide*, including *Renishaw PLC v. Marposs Societa per Azioni*, 158 F.3d 1243 (Fed.Cir. 1998). The District Court (DC), affirmed by the Panel, performed claim interpretation that was **error of law**, and then used the erroneous claim interpretation as the basis for granting MSJ of non-infringement to Defendant.

2. Is additionally contrary to the following controlling precedents of this Court governing **summary judgment**: *Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. Appx. 337 (Fed. Cir. 2008) (reversed grant of summary judgment due to movant's admissions); cited with approval in *Uniloc USA Inc. v. Microsoft Corp*, 632 F.3<sup>rd</sup> 1292 (Fed. Cir. 2011); *Frolow v. Wilson Sporting Goods Co.*, 710 F.3d 1303, 1308, 1310 (Fed. Cir. 2013); *Pfaff v. Wells Electronics, Inc.*, 5 F.3d 514, 519 (Fed. Cir. 1993); *Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1260 (Fed.Cir.1985); *Brilliant Instruments, Inc. v. Guidetech, LLC*, 707 F.3d 1342, 1344 (Fed. Cir.



2013); *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1429 (Fed.Cir.2000). *The Panel and lower court ignored Defendant’s admissions of infringement.*

3. Is additionally contrary to the following decisions of the Supreme Court of the United States (SCOTUS) governing **summary judgment**: *Celotex Corp v. Catrett*, 477 US 317, 322, 106S.Ct. 2548 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 595-98, 106 S.Ct. 1348 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 106 S.Ct. 2505 (1986) (the “trilogy”); is contrary to: SCOTUS cases governing summary judgment, following the “trilogy”, including *Salazar-Limon v. City of Houston, Tex*, \_\_\_US\_\_\_, 137 S.Ct. 1277 (2017), *Bucklew v. Precythe*, \_\_\_ US \_\_\_, 139 S.Ct., 1137 (2019), and *Tolan v. Cotton*, 572 US 650,651, 134 S.Ct. 1861 (2014); SCOTUS cases regarding summary judgment, cited in the “trilogy”, including *Adickes v. S.H. Kress & Co.*, 398 US 144, 90 S.Ct. 1598 (1970) and *First National Bank of Arizona v. Cities Service Co*, 391 US 253, 88 S.Ct. 1575 (1968); and to FRCP Rules 56(a)&(c), governing summary judgment. The Panel’s MSJ affirmance was contrary to Fox’s declaration, BMW’s video, and BMW’s manual. All admit the ADAP system self-steers BMW cars, which BMW’s counsel **argued falsely** at the Panel hearing. See *Petition*, p13, *infra*.

4. Seeks an answer to three precedent–setting questions of exceptional

importance, as follows:

(1) Should controlling Federal Circuit cases (*Phillips*, *Johnson Worldwide*, *Renishaw* supra, (and cases cited in those cases) that govern **claim interpretation**, be enforced, so that the Panel decision here will comply with these cases, to prevent a court from **improperly adding words to asserted claims**--contrary to these controlling cases--and then **granting summary judgment of non-infringement**, because (as happened here) the improperly added words were held to prevent the asserted claims from reading on the infringer's apparatus. This is a vitally important question to the integrity of the patent system. Any patent claim can be kept from reading on an infringing apparatus, product, or system, if enough extraneous words are improperly added to that patent claim, by a Court. Failure to correct this error of law guts enforceability of patents.

(2) Should this Circuit enforce its own controlling cases governing **summary judgment**, including *Uniloc*, *Frolow*, and *Pfaff*, supra (plus the cases those decisions cite), to reverse the Panel decision, so that: (1) *Uniloc* and *Frolow*, supra, are followed, so that **admissions** by the movant preclude granting summary judgment; (2) *Brilliant*, supra, is followed, so that a detailed, uncontroverted, expert declaration opposing summary judgment, establishing infringement, precludes granting summary judgment; and (3) *Pfaff*, supra, is followed, so that resolving disputed issues of fact is done at trial, not on MSJ.

(3) Should controlling SCOTUS cases governing summary judgment (the trilogy, and their progeny, supra) be enforced in the Federal Circuit, to achieve compliance with these controlling SCOTUS decisions, so that, on MSJ, evidence must be viewed in the light most favorable to non-movant, and weighing evidence requires a trial.

5. Each ground is detailed in Petition infra.

Dated: October 15, 2019

\_\_\_/s/ Patrick F. Bright\_\_\_

Patrick F. Bright, Esq.

WAGNER, ANDERSON & BRIGHT, P.C.

Counsel of Record for Plaintiff/Appellant/Petitioner ARSUS, LLC

**PETITION FOR REHEARING, AND/OR REHEARING *EN BANC*,  
OF PLAINTIFF/APPELLANT/PETITIONER ARSUS, LLC**

**I. GRANT OF REHEARING, AND/OR OF REHEARING *EN BANC*, IS NECESSARY AND APPROPRIATE, FOR SIX SEPARATE REASONS ALLOWED BY FRAP RULE 35(b) AND BY FEDERAL CIRCUIT RULE 35(b)**

Rehearing and/or rehearing *en banc*, of the Panel’s 10/4/19 decision [See Addendum A] is appropriate and necessary here, for six separate reasons allowed by FRAP Rule 35(b) and by Federal Circuit Rule 35(b), to prevent violation of decades of Federal Circuit decisions controlling **claim interpretation**, and to prevent violation of controlling SCOTUS and Federal Circuit decisions governing summary judgment. The Panel’s affirmance of MSJ in favor of defendant-appellee (“BMW”), against plaintiff-appellant-petitioner ARSUS, LLC (“ARSUS”) meets the standard of FRAP Rule 35 for when rehearing and/or rehearing *en banc* is properly ordered, because the Panel’s affirmance of summary judgment against ARSUS violated controlling SCOTUS and Federal Circuit cases, for 6 separate reasons:

**Reason (1)**: The Panel’s affirmance of summary judgment of non-infringement to BMW, against ARSUS, conflicts with decades of controlling Federal Circuit decisions regarding proper **claim interpretation**, including *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-1313 (Fed. Cir., *en banc* 2005); *Johnson*

*Worldwide Associates, Inc. v Zebco Corp*, 175 F.3d 985,989-90 (Fed. Cir. 1999); and *Renishaw PLC v Marposs Societa Per Azioni*, 158 F.3d 1243 (Fed.Cir. 1998) (quoted/relied on in *Johnson Worldwide*). Here, the District Court (“DC”), affirmed by the Panel, denied doing claim interpretation, but in actuality, did claim interpretation, and did so in error, contrary to these controlling Federal Circuit cases, by improperly adding the words *driver* and *physically* to the asserted claims. No such words appeared in any asserted claim. *Physically* doesn’t appear anywhere in the specification or prosecution history. *Driver* appears only in the patent specification’s prior art discussion. Nothing in the intrinsic evidence supports adding these words to the asserted claims.

Then, the DC, affirmed by the Panel, granted MSJ of non-infringement, based on these words the DC erroneously added to ARSUS’s asserted claims. Adding these words violated *Phillips*, *Johnson Worldwide* and *Renishaw*, supra, and cases cited therein. *Johnson Worldwide*, at 989-990, states:

“We begin, as with all claim interpretation analyses, with the **language of the claims**. See *Renishaw*, 158 F.3d at 1248, 48 USPQ2d at 1120;...General descriptive terms will ordinarily be given their full meaning; **modifiers will not be added to broad terms standing alone**. See, e.g., *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 865–66, 45 USPQ2d 1225, 1229 (Fed.Cir.1997) (unmodified term “reciprocating” not limited to linear reciprocation); *Bell Communications*, 55 F.3d at 621–22, 34 USPQ2d at 1821 (unmodified term “associating” not limited to explicit association); *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 987, 6 USPQ2d 1601, 1606 (Fed.Cir.1988) (unmodified term “plasticizer” given full range of ordinary and accustomed meaning). ...

“In order to overcome this **heavy presumption** in favor of the ordinary meaning of claim language, it is clear that ‘a party wishing to use statements in the written description to confine or otherwise affect a patent's scope **must, at the very least, point to a term or terms in the claim with which to draw in those statements.**’ *Renishaw*, 158 F.3d at 1248, 48 USPQ2d at 1121. That is, claim terms cannot be narrowed by reference to the written description or prosecution history unless the language of the claims invites reference to those sources. *See, e.g., McCarty v. Lehigh Val. R.R.*, 160 U.S. 110, 116, 16 S.Ct. 240, 40 L.Ed. 358 (1895) (“**[I]f we once begin to include elements not mentioned in the claim in order to limit such claim ..., we should never know where to stop.**”); *Renishaw*, 158 F.3d at 1249, 48 USPQ2d at 1121. In other words, there must be a textual reference in the actual language of the claim with which to associate a proffered claim construction.” [emphasis added].

Nor does *Phillips*, supra, allow adding words to a claim, which (as *Renishaw* states) have no textual reference in the actual language of the claim. *Phillips*, at 1312-1313 states:

“Because the patentee is required to ‘define precisely what his invention is,’ the Court explained, it is ‘**unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.**’ *White v. Dunbar*, 119 U.S. 47, 52, 7 S.Ct. 72, 30 L.Ed. 303 (1886); *see also Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 419, 28 S.Ct. 748, 52 L.Ed. 1122 (1908)(“the claims measure the invention”); *McCarty v. Lehigh Valley R.R. Co.*, 160 U.S. 110, 116, 16 S.Ct. 240, 40 L.Ed. 358 (1895) (“**if we once begin to include elements not mentioned in the claim, in order to limit such claim ..., we should never know where to stop**”); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 339, 81 S.Ct. 599, 5 L.Ed.2d 592 (1961) (“the claims made in the patent are the sole measure of the grant”).”

**Reason (2):** The Panel’s affirmance of MSJ to BMW **violates the controlling Federal Circuit decisions on summary judgment**, including *Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. Appx. 337 (Fed. Cir. 2008), reaffirmed by

*Uniloc USA Inc. v. Microsoft Corp*, 632 F.3<sup>rd</sup> 1292 (Fed. Cir. 2011); *Frolow v. Wilson Sporting Goods Co.*, 710 F.3d 1303, 1308, 1310 (Fed. Cir. 2013); *Pfaff v. Wells Electronics, Inc.*, 5 F.3d 514, 519 (Fed. Cir. 1993); *Brilliant Instruments, Inc. v. Guidetech, LLC*, 707 F.3d 1342, 1344 (Fed. Cir. 2013), and cases cited therein.

*Uniloc* reversed grant of MSJ of non-infringement to Microsoft, because Microsoft had made **admissions** of facts establishing infringement. Here, BMW's general counsel (Firmage), and sole declarant (Fox), made **admissions** admitting infringement, which precluded granting BMW's non-infringement MSJ. **DC's decision ignored these admissions.**

Like *Uniloc*, *Frolow* reversed MSJ of non-infringement, because accused infringer's marking its product with patentee's patent number was an **admission** of infringement sufficient to defeat summary judgment. *Frolow, supra, at 1308, 1310*, quotes SCOTUS cases that hold:

“At the summary judgment stage, we **credit all of the nonmovant's evidence** and **draw all justifiable inferences in his favor**. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). **Our function is not to ‘weigh the evidence and determine the truth of the matter’** but instead to determine whether there is a genuine issue for trial. *Id.* at 249, 106 S.Ct. 2505. . . . It is the **job of the fact-finder—not the court at summary judgment—to weigh that evidence and render a decision**. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.” *Frolow v. Wilson Sporting Goods Co.*, 710 F.3d 1303, 1308, 1310 (Fed. Cir. 2013) [emphasis added]

In *Pfaff*, *supra*, at 519, this Circuit reversed a grant of summary judgment, reiterating that **fact finding** must be done in trial, not on MSJ:

“[B]y making such a factual finding the court **improperly resolved a disputed material factual issue**. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (“**at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial**”); *Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1260, 225 USPQ 697, 701 (Fed.Cir.1985) (“**fact-finding is an inappropriate exercise on summary judgment; “[i]f a dispute requiring a finding exists as to any material fact, summary judgment is improper.**”).”

*Brilliant Instruments*, *supra*, at 1342, 1344, reiterates that:

“...on appeal from a grant of summary judgment of non-infringement, we must determine whether, **after resolving reasonable factual inferences in favor of the patentee**, the district court correctly concluded that **no reasonable jury could find infringement**.’ *Id.* (quoting *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1429 (Fed.Cir.2000))”.

*Brilliant* reversed MSJ of non-infringement as to one patent, because the **expert declaration**, opposing MSJ there, was sufficient to establish infringement as to that one patent. *Brilliant* requires reversal here, because inventor Schramm’s detailed declaration opposing MSJ below established infringement, and was **uncontroverted**. BMW’s sole declarant, Fox, didn’t deny infringement of the asserted claims. The **admissions** in deposition, of BMW’s general counsel, Firmage, coupled with the **admissions** in Fox’s declaration, also preclude granting MSJ of non-infringement.



Inventor Schramm's declaration, opposing MSJ below, shows Schramm is skilled in the art. Schramm's declaration explains in detail why BMW's ADAP system literally infringes the asserted claims, and is consistent with Defendant's general counsel's admission of infringement. Schramm's declaration was **uncontroverted** by BMW's Fox declaration, or any other evidence below.

The DC (affirmed by the Panel) granted MSJ that BMW's ADAP system did not infringe the asserted claims, because of the DC's error of law, of improperly adding the words "*driver*" and "*physical*" to the asserted claims. Panel rehearing, or en banc rehearing, is needed to correct those errors.

**Reason (3)**: The Panel's affirmance of **summary judgment** to BMW violates the *Celotex/Matsushita/Liberty Lobby* "trilogy" of SCOTUS decisions, and SCOTUS cases cited in/issued after, the trilogy. The SCOTUS cases prohibit granting summary judgment where-as-here, there are one or more genuine issues of material fact, due to BMW's **admissions** of infringement, and due to inventor Schramm's detailed, **uncontroverted declaration** that established literal infringement of ARSUS's asserted claims.

**Reason (4)**: The Panel's affirmance of **summary judgment** to BMW, against ARSUS, violates FRCP Rule 56(a) and (c), as interpreted in the SCOTUS "trilogy" and their progeny, which hold that FRCP Rule 56(a) only allows summary judgment to be granted where there is "no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law”, a standard NOT met here.

**Reason (5)**: The Panel’s affirmance of **summary judgment** to BMW, against ARSUS, violates the SCOTUS trilogy, particularly *Liberty Lobby*, at 106 S.Ct. 2511, which cites citing *Adickes v. S.H. Kress & Co.*, 398 US 144, 90 S.Ct. 1598 (1970) and *First National Bank of Arizona v. Citie Service Co*, 391 US 253, 88 S.Ct. 1575 (1968), for the proposition that on summary judgment motions, judges must limit themselves, to determining whether there is a genuine issue of material fact, and “that at the summary judgment phase the judge’s function is **not himself to weigh the evidence and determine the truth of the matter** but to determine whether there is a genuine issue of fact”. *Salazar-Limon v. City of Houston, Tex.*, \_\_\_US\_\_\_ 137 S.Ct. 1277, 1280 (2017) quotes this language from *Liberty Lobby*, with approval.

**Reason (6)**: The Panel’s affirmance of summary judgment to BMW, against ARSUS, violated SCOTUS cases holding that on a summary judgment motion, the **evidence must be viewed in the light most favorable** to the non-movant (here ARSUS), a requirement promulgated by SCOTUS in *Matsushita*, supra and in *Adickes*, supra. The requirement that the evidence, on a motion for summary judgment, must be viewed in this way, is repeated in *Bucklew v. Precythe*, \_\_\_ US \_\_\_, 139 S.Ct., 1137 (2019), and in *Tolan v. Cotton*, 572 US

650,651, 134 S.Ct. 1861 (2014). The DC MSJ order (See Addendum B), affirmed by the Panel, did the opposite, drawing inferences in favor of movant BMW.

**II. While Denying it was Doing Claim Interpretation, the DC, (Affirmed by the Panel), Did Do Claim Interpretation, and that Claim Interpretation was Error of Law, Violating Controlling Federal Circuit Decisions on Claim Interpretation; then the DC (Affirmed by the Panel) Relied on the Error-of-Law Claim Interpretation, to Grant MSJ of Non-infringement to BMW**

Granting MSJ of non-infringement to BMW (affirmed by the Panel) did more than violate the many SCOTUS and Federal Circuit cases that required denying MSJ. The DC granted MSJ of non-infringement to BMW, because the DC (affirmed by the Panel), erroneously added words to ARSUS's asserted claims, and then relied on these erroneously added words to grant MSJ of non-infringement to BMW.

ARSUS's asserted claims cover an **apparatus**. Asserted Claim 1 of ARSUS's '989 patent is:

*“A rollover prevention **apparatus** that allows a vehicle to be steered within a non-rollover steering range of motion of said vehicle but prevents said vehicle from being steered beyond a rollover threshold of said vehicle”.*

The DC's MSJ order [Appx19-23, attached as Addendum B hereto], affirmed by the Panel, erroneously interpreted this ARSUS claim, at Appx 22, as

follows:

“The plain and ordinary meaning of the asserted claims requires that the apparatus (here the ADAP systems) prevent the vehicle from being steered beyond a rollover threshold. However, unlike Plaintiff’s [BMW’s] anti-roll steering apparatus, ADAP never **physically** prevents or restricts **drivers** from steering ADAP-equipped vehicles beyond the rollover threshold.”

Then, the DC granted MSJ of non-infringement to BMW (affirmed by the Panel), based on the DC’s error-of-law claim interpretation.

No asserted ARSUS claim contains the words “**physically**” or “**driver**”, or any word of like import. The word **physically** doesn’t appear in the ARSUS patent specification or in its prosecution history. The word **driver** appears only in the specification’s discussion of the prior art. No asserted claim calls for a **driver** to do, or not to do, anything. Nothing in the intrinsic evidence supports adding the word **driver**, or the word **physically**, to any asserted claim. No asserted claim precludes turning the apparatus on or off. No asserted claim states how the claimed apparatus is to be turned on or off. No asserted claim precludes infringement when, and so long as, the apparatus is on/activated.

The violation of controlling Federal Circuit cases on claim interpretation that occurred here is a serious problem, meriting rehearing or rehearing *en banc*. Any district court which erroneously adds enough words to any patent claim, in violation of the controlling Federal Circuit cases, can cause the claim not to read on an infringer’s product, when the claim, interpreted as this Circuit’s controlling

claim interpretation cases require, does read on the infringer's product.

**III. DETAIL ON WHY AFFIRMANCE BY PANEL, OF DC'S ORDER GRANTING DEFENDANT'S MSJ, VIOLATED CONTROLLING SCOTUS AND FEDERAL CIRCUIT DECISIONS, AND FRCP RULE 56(a) AND (c)**

The DC MSJ of non-infringement in favor of BMW, against non-movant ARSUS, affirmed by the Panel, qualifies for rehearing and rehearing *en banc*, for violating controlling Federal Circuit cases on claim interpretation, controlling Federal Circuit cases on summary judgment, and controlling SCOTUS cases on summary judgment (itemized in (1) to (6) of I., supra.)

**A. Infringement ADMISSIONS by BMW's general counsel in Deposition, plus ADMISSIONS by Fox (BMW's only Declarant on MSJ), Required Denying MSJ**

BMW's general counsel, Firmage, **admitted** in deposition [quoted at ARSUS'OB15-18], that Schramm's infringement chart for ARSUS's asserted **Claim 1** was accurate, with only one exception. That exception was that, when Firmage drove an ADAP equipped BMW car, it seemed to Firmage that the ADAP system only provided recommendations to the driver, but didn't drive the car.

Fox's declaration corrected Firmage's misperception. Fox's declaration [Appx438, paragraphs 3&4], admits that Defendant's ADAP system "**intervenes**"

to drive the car, and continues to drive the car unless and until the driver overrides, i.e. turns off, the ADAP system.

So also say BMW's Video and Manuals: ARSUS's Reply Brief (at 5&19) filed in the Circuit, cites a BMW produced video, giving website link: <https://www.youtube.com/watch?v=JGcvbRCgiSk#t=1m18s>. That BMW video (at 11 second mark of video) states, regarding the ADAP system, that: "Whenever required, the **system steers the vehicle** and keeps it in the middle of the lane".

See also BMW's Technical Training manual entitled, "*G12 Driver Assistance Systems*", stating that "*The system assists the driver in keeping the vehicle in lane by initiating corrective steering **interventions** if required*". [See ARSUS's OB37, at 153.]

At the oral argument to the Panel, BMW's counsel falsely said (at 14:22 and 15:10 of the argument recording)--contrary to Fox, BMW's video and BMW's manual--that accused, ADAP equipped, BMW vehicles have **no self-steering** mode. DC makes that same error, by finding [Appx22-23], *contrary to the evidence*, and contrary to Fox's Declaration, and the BMW video, and BMW's manual, that ADAP doesn't prevent a vehicle from being steered beyond the threshold of rollover, **even when ADAP is engaged**. The Panel affirmed, deciding this issue against ARSUS, contrary to the evidence, and contrary to Defendant's admission of infringement.

The fact that BMW tried, in its briefing/oral argument, to impeach BMW's own general counsel, Firmage, shows how damaging Firmage's infringement admissions are to BMW, and raises reasonable inferences in ARSUS's favor that the DC didn't adopt. BMW's **admissions** precluding granting summary judgment of non-infringement to BMW, per the SCOTUS trilogy, and its progeny, *supra*, and per this Circuit's *Uniloc*, *Frolow*, and *Pfaff*, decisions, *supra*.

DC (affirmed by the Panel), violated all these cases, by granting summary judgment to BMW, *ignoring* BMW's admissions. BMW's admissions of infringement entitle ARSUS to a trial on the merits, just as *Uniloc* and *Frolow* received.

Summary judgment is reviewed ***de novo***. No deference is given to the DC grant of MSJ, or to the Panel's affirmance, which stated no reason for affirming. These erroneous rulings meet the standard for granting rehearing, and for rehearing ***en banc***.

**B. Inventor Schramm's Detailed, UNCONTROVERTED Declaration Established Infringement, Precluding MSJ of Non-infringement to BMW**

ARSUS's Opposition to BMW's MSJ also included a **detailed declaration** [Appx589-606, quoted at ARSUS'sOB37-39], of ARSUS' inventor, Schramm, a person skilled in the art. Schramm stated in detail why there is infringement, *based*

*on BMW manuals, and on the BMW produced video that state ADAP self-drives a car. Per Brilliant, supra, Schramm's declaration alone required reversal.*

Neither the Fox Declaration, nor any other evidence below, denied infringement. Further, Fox's declaration relied on unauthenticated, inadmissible as hearsay, pages from BMW manuals. The DC erroneously ignored ARSUS's timely filed hearsay Objection.

**IV. REHEARING, AND/OR REHEARING *EN BANC*, SHOULD NOT BE DENIED MERELY BECAUSE THE PANEL'S AFFIRMANCE OF SUMMARY JUDGMENT WAS *PER CURIAM***

The Panel's affirmance [Addendum A hereto] is *per curiam*. *Per curiam* affirmance (summary) affirms the **result** below, but not necessarily the reasoning for the result. *Mandel v. Bradley*, 432 U.S. 173, 175-176 (1977).

Precedential or non-precedential, the Panel affirmance needs correction, because it guts the integrity of the patent system, where, as here, a district court erroneously adds words to asserted claims, contrary to the controlling Federal Circuit cases governing **claim interpretation**, and then grants summary of non-infringement, based on the erroneously added words. Rehearing, or rehearing *en banc*, is necessary here, to correct the Panel's erroneous affirmance of the DC's [Addendum B hereto] grant of MSJ to BMW.

Moreover, affirming the DC's MSJ to BMW violated controlling SCOTUS and Federal Circuit cases governing **summary judgment**, because DC (affirmed



by the Panel): (1) ignored infringer BMW's **admissions** admitting infringement, (2) ignored inventor Schramm's detailed, **uncontroverted** declaration establishing BMW's ADAP system infringes ARSUS's patent claims in suit, (3) failed to view all evidence in the light most favorable to ARUS, and (4) weighed the evidence against ARSUS, when weighing evidence requires a trial.

Follow *Frolow*, follow *Uniloc*, reverse the DC and the Panel's erroneous affirmance. Repudiate opposing counsel's lies in oral argument to the Panel. The record evidence shows that, when engaged, ADAP self-steers an accused car, but prevents steering beyond the threshold of rollover. No evidence shows otherwise.

Dated: October 15, 2019

/s/ Patrick F. Bright

Patrick F. Bright, Esq.  
WAGNER, ANDERSON & BRIGHT, P.C.  
10524 W. Pico Boulevard #214  
Los Angeles, CA 90064  
Telephone: (213) 700-6637  
Facsimile: (310) 559-9133  
pbright@patentattorney.us  
*Counsel for Plaintiff-Appellant-Petitioner*  
ARSUS, LLC

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a), in part because it contains 3,892 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(a) & (b), and with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14-point font.

Dated: October 15, 2019

/s/ Patrick F. Bright

Patrick F. Bright, Esq.  
WAGNER, ANDERSON & BRIGHT, P.C.  
10524 W. Pico Blvd. #214  
Los Angeles, CA 90064  
Telephone: (213) 700-6637

# ADDENDUM A

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

---

**ARSUS, LLC, A UTAH ENTITY,**  
*Plaintiff-Appellant*

v.

**JOHN H. FIRMAGE, INC., A UTAH ENTITY, DBA  
BMW OF MURRAY,**  
*Defendant-Appellee*

---

2019-1224

---

Appeal from the United States District Court for the  
District of Utah in No. 1:17-cv-00125-DB, Senior Judge Dee  
V. Benson.

---

**JUDGMENT**

---

PATRICK BRIGHT, Wagner, Anderson & Bright, PC, Los  
Angeles, CA, argued for plaintiff-appellant. Also repre-  
sented by TODD E. ZENGER, Duren IP, PC, Salt Lake City,  
UT.

JOSEPH P. LAVELLE, DLA Piper US LLP, Washington,  
DC, argued for defendant-appellee.

---

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, WALLACH and HUGHES, *Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

October 4, 2019  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

# ADDENDUM B

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

---

ARSUS, LLC, a Utah entity,

Plaintiff,

v.

JOHN H. FIRMAGE, INC. dba BMW of  
Murray, a Utah entity,

Defendant.

**MEMORANDUM DECISION AND  
ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**

Case No. 1:17-cv-00125-DB

U.S. District Judge Dee Benson

---

Before the Court is Defendant’s Motion for Summary Judgment (Dkt. No. 40) of no infringement, filed on January 30, 2018. On March 16, 2018, Plaintiff filed a timely memorandum in opposition to Defendant’s motion. (Dkt. No. 58.) On April 6, 2018, Defendant submitted a reply to Plaintiff’s opposition. (Dkt. No. 65.) On October 25, 2018, the Court heard oral argument on the motions. At the hearing, Plaintiff was represented by Todd E. Zenger and Patrick Bright, while Defendant was represented by Brent O. Hatch, Joseph P. Lavelle, and Andrew N. Stein. At the conclusion of the hearing, the Court granted Defendant’s Motion for Summary Judgment based on the parties’ written and oral arguments and the relevant law, with a written order to follow. The Court now enters the following order memorializing the Court’s ruling GRANTING Defendant’s Motion for Summary Judgment.

**BACKGROUND**

Defendant sells and distributes automobiles that are manufactured by Bayerische Motoren Werke of Germany (“BMW”) and imported by BMW of North America. (Dkt. No. 2, Compl. ¶ 6.) Some of these vehicles include BMW’s Active Driving Assistance Plus (“ADAP”) features, which Plaintiff alleges prevent vehicles from being steered beyond a rollover threshold

of the vehicle. (*Id.* ¶¶ 6-8.) Specifically, Plaintiff asserts that “when ADAP is operative the vehicle automatically imposes a steering angle limitation so that the vehicle is prevented from being steered beyond a rollover threshold of the vehicle.” (*Id.* ¶ 9.) Accordingly, Plaintiff argues that the vehicles sold by Defendant infringe Plaintiff’s claims 1 to 4 of the ‘989 patent, and claims 1 to 5, 7 to 11, 13 to 18, 20 and 21 of the ‘103 patent (collectively Plaintiff’s “asserted claims”); these claims include a “rollover prevention apparatus that allows a vehicle to be steered within a non-rollover steering range of motion of said vehicle but prevents said vehicle from being steered beyond a rollover threshold of said vehicle,” as well as a “vehicle having a first mode and a second mode and adapted such that when said vehicle is in said first mode, said vehicle is manually steerable within a non-rollover steering range of motion of said vehicle, and such that when said vehicle is in said second mode, said vehicle automatically imposes a steering angle limitation such that said vehicle is prevented from being steered beyond a rollover threshold of said vehicle.” (*Id.* ¶¶ 11-14.)

In his supporting memorandum, Defendant argues that based on the plain language of Plaintiff’s asserted claims, he is entitled to summary judgment of no infringement and that there is no need for the Court to engage in claim construction. (Dkt. No. 40-2 at 15.) Specifically, Defendant contends that none of the ADAP systems prevent the vehicle or the driver from steering it beyond a rollover threshold, relying primarily on the declaration of BMW of North America Product Requirements & Development Manager Frederick W. Fox (“the Fox Declaration”) to support this contention.

Relying primarily on a declaration from Michael R. Schramm (the inventor of the two patents at issue for Plaintiff’s anti-roll steering apparatus), Plaintiff responds that as long as an ADAP-equipped vehicle is in the ADAP engaged mode, that vehicle is prevented from being



steered beyond a rollover threshold. (*See* Dkt. No. 58-1, Ex. A.) Plaintiff further contends that Mr. Fox’s declaration is insufficient to obtain summary judgment because it does not establish that Fox has adequate personal knowledge of the ADAP system, and doesn’t seek to qualify him as a witness, but merely shows that he is “familiar” with the system. (Dkt. No. 58 at 4.)

Defendant counters that Fox has personal knowledge of ADAP from his job responsibilities, his consultation of the applicable BMW manuals, and his own first-hand experience driving cars with ADAP features. (Dkt. No. 40-12 at ¶ 8.)

### DISCUSSION

As the moving party, Defendant bears the burden of establishing that there is no genuine issue of material fact in this case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007). A movant who does not bear the burden of persuasion at trial may satisfy this burden "by pointing out to the court a lack of evidence on an essential element of the nonmovant's claim." *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. Defendant has met his burden, and is thus entitled to summary judgment. Defendant has demonstrated that ADAP systems (Evasion Aid, Traffic Jam Assistant, and Lane Keeping Assistant) assist drivers through various “mild torque” steering interventions, but that none of these features restrict or otherwise limit the driver’s ability to steer the vehicle through the entire range of steering motion available in the vehicle, including beyond the rollover threshold. (Dkt. No. 40-2 at 9.) Defendant has also shown that even when ADAP is in the engaged mode, a driver is not relieved of his or her duty to steer the vehicle in order to stay on the roadway. (*Id.* at 12.)

As an initial matter, Plaintiff’s contention that the Fox Declaration is inadmissible is without merit. “Testimony should not be excluded for lack of personal knowledge unless no

reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about. Weinstein, *Weinstein's Evidence* ¶ 602[02], at 602-8 to 11 (1988).” *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990). Defendant has shown that Fox in his capacity as Product Requirements and Development Manager for BMW of North America is responsible for testing and validating Driving Assistance packages and features offered in BMW-brand vehicles, including the 2018 and 2017 5-Series (G30) and 2017 7-Series (G12), and thus has personal knowledge of ADAP operations. (Dkt. No. 65 at 9; Dkt. No. 40-12 at ¶¶ 1-2.) He holds a Mechanical Engineering degree, leads a team composed mostly of engineers in carrying out his management duties, and has worked for BMW since 1990. (Dkt. No. 40-12 at ¶¶ 1-2.) He is also familiar with the applicable BMW manuals and has first-hand experience driving cars with ADAP features. (Dkt. No. 65 at 9.) Defendant has clearly met his burden of showing that a reasonable juror could find that Fox has personal knowledge of ADAP’s operations, and Plaintiff has failed to rebut this.

Even if fully credited, Plaintiff’s arguments do not establish facts sufficient for a prima facie case of patent infringement, and thus cannot overcome summary judgment. The plain and ordinary meaning of the asserted claims requires that the apparatus (here the ADAP systems) prevent the vehicle from being steered beyond a rollover threshold. However, unlike Plaintiff’s anti-roll steering apparatus, ADAP never physically prevents or restricts drivers from steering ADAP-equipped vehicles beyond the rollover threshold. While Plaintiff claims that ADAP in the engaged mode prevents the vehicle from being “self-steered” beyond the point of rollover, (Dkt. No. 58 at 3), Plaintiff does not contest that a driver can always manually override the ADAP steering interventions and steer the vehicle beyond the rollover threshold. (*Id.* at 2.) Simply put, ADAP never actually prevents the vehicle from being steered beyond a rollover

threshold at any point, including when ADAP is in the engaged mode. Plaintiff has thus failed to show infringement of the asserted claims.

Finally, claim construction is “not an inviolable prerequisite” to granting summary judgment in patent cases. *See Genetic Techs. Ltd. V. Merial L.L.C.*, 818 F.3d 1369, 1373-74 (Fed. Cir. 2016). If (as here) a nonmovant fails to show that claim construction is relevant to resolving issues of law, a court may proceed without conducting a formal claim construction. *See, e.g., Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1291 (Fed. Cir. 2015) (“Because the plain and ordinary meaning of the disputed claim language is clear, the district court did not err by declining to construe the claim term.”) The Court accordingly holds that no claim construction is necessary to resolve this dispute, and that Defendant is entitled to summary judgment of non-infringement.

#### **ORDER**

IT IS HEREBY ORDERED that Defendant’s Motion for Summary Judgment is GRANTED, and Plaintiff’s Complaint is dismissed with prejudice.

Dated this 15th day of November, 2018.

BY THE COURT:



---

Dee Benson  
United States District Judge

### CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system. Participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

I further certify that I am causing 16 paper copies of the foregoing to be delivered to the United State Court of Appeal for the Federal Circuit.

Dated: October 17, 2019

/s/ Patrick F. Bright

Patrick F. Bright, Esq.  
WAGNER, ANDERSON & BRIGHT, P.C.  
10524 W. Pico Blvd. #214  
Los Angeles, CA 90064  
Telephone: (213) 700-6637  
Facsimile: (310) 559-9133  
pbright@patentattorney.us  
*Attorneys for Plaintiff-Appellant-Petitioner*  
*Arsus, LLC*