UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NAZIR KHAN

Plaintiff-Appellant

v.

MERIT Medical System Inc

Defendant-Appellee

2023-2329



On Appeal from the United States District Court of Utah Central Division in civil action No2:21-cv-00337 -HCN-CMR District Judge Howard C. Nielson Jr.

Combined Petition for Panel Rehearing and Rehearing En banc

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## CERTIFICATE OF INTEREST

Nazir Khan is the real party of interest.

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**STATEMENT OF THE PETITIONER - APPELLANT**

35 b)

(A) The Plaintiff-Appellant makes the statement that there is a conflict with the decision of the United States Supreme Court or of the court to which the petition is addressed. The conflict arises with regard to Doctrine of Equivalent Estoppel which does not exist under Supreme Court Ruling in Festo and under Patent Trial Appeal Board written decision where the disposed about limitation was not surrendered. The concentration of the full court is necessary to secure and maintain uniformity of the court's decision.

35 b) (B) the proceeding involves one or more questions of exceptional importance.

The questions of exceptional importance are:

1. Ownership of the patent
   Plaintiff is the owner of the US patent 8,747,344 B2 (344) issued on June 10, 2014. Accused device HeRO graft has no patent. It is a steel device of patent 344.
2. Violation of the constitutional rights of the plaintiff's under Constitution Art 1 clause 8, §8. The Constitution gave exclusive rights to the petitioner for making useful and a new patented invention in pursuit of progress of science see U.S. PTOS letter Appx47 Appeal Brief. Merit Medical accused HeRO graft has no patent, no exclusionary constitutional standing. Their claim should have been dismissed by the district court see **Raniere v. Microsoft Corp.** 887F.3d 1298 (Fed. Cir. 2018) decided on April 18, 2018. While Raniere petitioner had not patent, case was dismissed by the district court with sanctions under §285. This court affirmed that whosoever does not have a patent, petitioner or a defendant. The case should be dismissed and sanctioned under §285. In intellectual Tech LLC V. Zebra District Court dismissed claims of intellectual Tech LLC for having no patent ,lacking constitutional standing this Court affirmed see CaseNo22-22079Fed.Cir.2024) decided on May 1,2024
3. Violation of congressional act which authorized statutorily claim 35 U.S.C. 112(f). The statutory law conflicts with the federal circuit court decisions and the decisions of the supreme court. This court made the decision contrary to the statutory

requirements of 35 U.S.C. 112(f). Petition for rehearing or en banc determination and Merit Pannel should take all these questions into consideration while ruling the decisions in case no. 2023-2329. There has been error in facts and law. En banc court is requested to correct those errors and reverse the decision of the Federal Circuit Appeals Court.

Signed by /s/ Nazir Khan

Federal Circuit Court of Appeals overlooked the constitutional law article 1 clause 8 §8 and overlooked the statutory requirement of 35 U.S.C. 112(f) under Federal Rule of Appellate Procedure 40(a)(2).

## ARGUMENTS

## BACKGROUND

Plaintiff- Appellant'Owns two patents US8,282,591(591) issued on Oct9,2012and Continuation patent US 8,747,344 (344) issued on June10,2014 Both are titled as Khan Hybrid Arteriovenous shunt where blood continuously flows in to Right Atrium of Heart with no contact with Vein wall, avoiding 80% Arteriovenous shunt failure, which results from vein wall damage from high Arterial pressure.Patent591 is parent Patent, and patent 344 is a Continuation Patent ,both have claims 1-20 and same specification, Both have patent term 20 yrs. plus adjusted period 1407days that extends till Feb 2028.the claim in suit ispatent344 this patent is NOVEL.undersec102 and un unobvious under sec103 Merit Medical inc did not challenge Validity of patent 344 .The claimed invention has three parts:

1. Graft connected to the artery (2 - 8mm in diameter, preferably 6mm).
2. Cuff disposed about connecting the graft and venous outflow catheter.
3. Venous outflow catheter going to the right atrium of the heart.

80% of the classical arterial venous shunt fail because the blood flows into the vein causing vein damage. This problem was solved by Khan hybrid arterial venous shunt (patent 344) by inventing venous outflow catheter #12 see specifications of patent 344 Fig. 1 and Fig. 2. In the prior art of Squitieri patent US 6,582,409 B1 (409) issued on June 24, 2003. Squitieri also had an earlier patent 6,102,884 dated August 15, 2000. This court has made reference with regards to patent (884). In both of these patents the venous outflow catheter is of shorter length. Blood flows into the vein. In these two prior arts of Squitieri does not disclose venous outflow catheter that reaches to the right atrium of the heart. In accused HeRO graft Merit Medical Inc. used plaintiff's Khan hybrid arteriovenous catheter # 12 in the construction of accused HeRO graft. Thereby stole Khan's invention patent 344 and copied Khan arteriovenous shunt patent 344 in the name of unpatented copied accused HeRO graft. Khan hybrid arteriovenous shunt came to the public notice and is used exclusively in the United States and Europe as a hemodialysis device in chronic renal failure patients.

## DISCUSSION

The Khan hybrid arteriovenous shunt US patent 8,747,344 B2 (patent 344) issued on June 10, 2014, a hemodialysis device, is a continuation patent of parent patent. The parent patent being US 8,282,291 B2 issued on October 9, 2012. Patent 344 is at issue en suit in this litigation.

During prosecution of the patent application, in response to examiner's rejection of Squitieri's device **disposed in limitation**, plaintiff amended the patent application with two limitations on 7/25/2007: both limitation were present in patent application published applicationUs2005/0215938 AI sep,29,2005 see col3para{0048} seeDoc46 at9,in Doc46 at 10 plaintiff stated that idid not made any amendments except two in specification. Merits attack on plaintiff is unwarranted .This is an undisputed fact plaintiff made two limitation and also amended claim 13 of patent 344 adding means on all three elements, 0f Claims 13 of patent344as means Graft, Cuff disposed about limitation ,venous out flow catheter means. plaintiff did not lie ,Merit pannel should have looked in to Doc45 at 9,10 carefully before attacking plaintiff of lying.

On 7-25-2007 patent applicant made two amendments

1. , one cylindrical cuff disposed about connecting the graft and venous outflow catheter (disposed about limitation).
2. Squitieri's device does not disclose direct deposit of blood into the right atrium (right atrium limitation).

The plaintiff did not surrender disposed about limitation. The case was decided by Patent Trial Appeals Board (PT AB). On 07-27-2012, the Board reversed examiner's rejection of disposed in and stated that Squitieri does not disclose disposed about limitation, see Appeal Brief Appx 66 – Appx 73. Board also rejected Squitieri and Twardowski reference. The claims 1-20 were allowed and patent 591 was issued. Patent 591 and 344 have same specifications and the claims 1-20. When the Patent Trial Appeals Board makes a written decision, the estoppel does not arise. Here the estoppel of disposed about limitation did not

arise,also supreme court ruled in Festo,Corp v.SHoketsu Kogyo Kabushiki co 535U.S,722(2002) ,when patent is not issued on Prio art there is no estoppel. Here patent was not issued **on Disposed in Limitation of Squitieri prior art 488** and accused HeRO Graft estoppel on Disposed about limitation did not exists. District Court of Utah recognized estoppel error, striked out Judgement order 74 on[1/3/2023 [DKT 105] Judgement order74 was an Order of Summary Judgement on non infringement ,dismissing all plaintiffs claims Striking out order means there is no Summary judgement of non infringement and all plaintiffs claims remain valid Merit panel did not pay attention to District courts order of stricking out Order 74.Federal circuits decision to affirm summary judgement on non infringement amounts to affirming Merits Counter claim of summary Judge for Declaratory Judgement of noninfringement see Appx34 App .Brief

Plaintiff filed Reissue application to broaden the connector in scope so that it could be used in disposed about way and in disposed way. That was rejected by the Patent Board and this court. Plaintiff stated that he cannot sue literally the infringer and also under doctrine of equivalent, unless the connector is broadened, see SAppx348. Khan's hybrid arteriovenous shunt (patent 344). Squitieri's prior art reference (patent 884) does not disclose Right atrial limitation and is therefore an indefinite art, in accused HeRO graft Right atrial limitation is present, Merit Medical stole venous outflow catheter of patent 344 in the construction of accused HeRO graft and thus deprives the plaintiff of the benefits of the invention of patent 344.

**District Court Judge Howard C. Nielson on 01/03-2023 Dkt 105 opened the prosecution, striked out the Judgement 74, see Order # Dkt 105 01-03-2023, Appeal Brief Appx36.when Federal circuit court stated it lacked Jurisdiction because counter claims were not decided**

Thus, the summary judgement of non-infringemen court's order is essentially affirmation of Counter claim where summary Judgement of non infringement was granted on counter claim see Appx34 appeal brief

In infringement of the claims of patent 344, the plaintiff asserted infringement of patent 344 under the following claims as described in the complaint Dkt 9 at appeal brief at 5:

1. Literal Claim 13 of patent 344 under 35 U.S.C. 112 para (f) is based on the identical function of the claimed invention and the accused HeRO Graft, along with structural equivalents under §112 §(f).
2. Direct infringements under 35 U.S.C. §271(a).
3. Induced infringement under 35 U.S.C. §271(b).
4. Contributory infringement under 35 U.S.C. §271(c).
5. Willful infringement.
6. Violations of the constitutional rights under Art 1 Clause 8, Sec 8, and the 14th Amendment of the Constitution, specifically the due process clause.

Plaintiff - appellant never asserted infringement claim under literal infringement on element by element basisis or doctrine of equivalents. This court was deceived by Merit Medical that the patent holder asserted infringement under literal and doctrine of equivalents. This is an undisputed fact that plaintiff asserted infringement under 35 U.S.C. 112 para 6 ,Direct andindirect infringement and willful infringement. These claims.were not adjudicated after Court striked out Judgement 74, under which Summary Judgement of non infringement was striked out

**INFRINGEMENT UNDER 35 U.S.C. §112 (f)**

This claim is written in means plus function limitation formate based on identical function of hemodialysis between the claimed device claim 13 of patent 344 and accused HeRO graft. Accused HeRO graft structure is structurally equivalent to the structure of claim 13 of patent 344. The structure of claimed invention that performs the act of hemodialysis is described in the specification patent 344 Appx50 Appeal Brief and Fig.2 performs the act of hemodialysis as described in column 5 line 45 – 65. The blood is taken from the graft to the dialysis machine and after purification, blood is returned back to the graft to venous outflow catheter where the connector forms the deposition into the right atrium. Accused HeRO graft performs the act of hemodialysis in the same way as described by the Fig. 2 of the specifications, meeting all requirements of status 35 U.S.C. §112 (f).

Statutory language under 35 U.S.C. §112 (f) recites an element in a claim for combination may be expressed as a means or step for performing a specified function without recital of structure material or acts in support thereof and such claim shall be constructed to cove the corresponding structure material or acts described in the spe cification and equivalent thereof.

The accused HeRO connector **disposed in** performs the function of transmitting blood from the graft to the venous outflow catheter and claimed disposed about limitation performs the same function of transmitting blood from the graft to the venous outflow catheter see Exhibit A fig1 appx74 and alsoExhibit A Fig3 Appx76. Under Supreme Court ruling under function way, result test if substituted element performs the same function of claimed element, then both are equivalent under insubstantial difference test. Supreme Court ruled in Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17 (1997) and Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 609.

Claimed device and accused HeRO graft are literally equal in diameter of the graft and venous outflow catheter and the connector disposition is an insubstantial change. Both are equivalent. For infringement analysis there must either literal or equivalent limitations in the accused graft and the claimed invention., under all element rule as described by Supreme in Warner-Jenkinson co,inc.v.Hilton Davis chemical co,520U.S17(1997)Court because there is identical function of hemodialysis between HeRO graft and claim 13 of patent344 ,both structures are equivalent, HeRO infringes upon claim 13 of patent 344, see Odetics Inc. v. Storage Tech Corp 185F3d 1259, 1267, 51uspq2d, 1229 (Fed.cir.1999). Pennwalt Corp v. Durand-Way Land, Inc. 83F2d.931, 934, 4USPQ2d 1737, 1739 (Fed.cir 1987).

Reviewing the claim a jury will easily infer that there is no absence of disposed about limitation in claim 13 of patent 344 as was alleged by the defendant Merit Medical Inc. in response brief at 32. A reasonable jury will find that all elements of claim 13 are present both literally and equivalence in claim 13 of patent 344 and also accused HeRO graft, see Odetics, Inc. v. Storage Tech. Corp., 185 F.3d 1259, 1268 (Fed. Cir. 1999). This court should allow claim 13 of patent 344 under statue 35 U.S.C. §112 (f).

**SUMMARY DECLARATORY JUDGEMENT OF NON-INFRINGEMENT ON COUNTER-CLAIM I**

The claim was allowed by the district court in violation of rules and law.

The claim was based on summary judgement of non-infringement (67 and 72) which was already strike Appea Briefd out by the district court, see Dkt 105 on 01-03-2023 Appx36, and there was no justification for summary judgement under rule 56 (a) because there are material issues of fact with respect to six claims as described above. The district court magistrate Judge Romero made it very clear see Appx31 that" Defendant does not identify the applicable standard or provide any authority for granting such a request , court notes motion for judgement appears to be procedurally improper for failure to to comply with requirement Federal rule ofcivil procedure 56 and DUcivR56-1.also during prosecution Merit Medical cannot claim summary judgement under rule 56 (a) because there are material issues of fact with respect to plaintiffs 6 claims. Construing motion under Fed .R.Civ procedure 1 as amotion for Summary Judgement was wrong that constituted misuse of Fed.R.Civ1 Summary judgement therefore was improper on counterclaim and this court should therefore reverse the judgement, se Dkt 116 Appx34.

**VIOLATION OF THE CONSTITUTIONAL PROPERTY RIGHTS OF THE PLAINTIFF and also Merit Medical ,infringed under statue 35271(a),(b) ,andc and willful infringement**

Under article 1 clause 8 §8 of Constitution, patent 344 was granted on June 10, 2014 with patent term up to February 2028 from March 29, 2004. The patent was granted as a useful and new invention in the progress of science with exclusive rights that no one can make, sell, or import into the United States the invention 344 during the patented term. Merit Medical, Inc. incorporate, manufactured and sold accused HeRO graft which is copied device of Khan shunt patent 344, from May 6, 2016till now. Thus, the Merit Medical violated the constitutional property rights of the plaintiff and is liable for damages from May 6th 2016.till the time Merit is making and selling HeRo Graft This court should allow damages against Merit Medical, Inc.for Violating Constitutional property rights of Plaintiff because Merit made and sold HeRO Graft during term of patented invention344 it violated statue 35USc 271(a) also caused induced infringement by supply 3 parts of HeRo Graft to Hospitals to make HeRO graft and implant on patients by hospital physicians Merit used venous out flow catheter in construction HeRoGraft violated statue271(c), because Merit used willfully copied Venous out flow catheter this constituted willful infringement.

violated statue271(c), because Merit used willfully copied Venous out flow catheter this constituted willful infringement.

**STANDING**

Merit Medical's accused HeRO graft has no patent and no standing .under Federal Appeals Court Precedent in Raniere V. Microsoft This court should dismiss the claims of Merit Medical, see Raniere v. Microsoft Corp. 887 F.3d 1298 (decided in April 2018). Where District Court of Northern District of Texas dismissed plaintiff Raniere for have no patent no standing and sanctioned under §285 This Court affirmed also in intellectual Tech LLC V, Zebra Technologies Corp No22-2207 decided on May1,2024 That patent owner has exclusionary rights District Judge dismissed Claims of Intellectual Tech LLC(IT) having no patent no Constitutional standing .

CONCLUSION

This Court should reverse the judgement on counterclaim.[DKT 116] Enbanc Court should over rule Merit panel decision ,allow all six infringement claims of patent344 .Merit panel and Enbanc Court should dismiss Merts Claims as Merit has no patent on HeRO Graft and therefore has, no constitutional standing . Enbanc Court should reverse Judgement on claim 35USC112(f) as there was no missing of disposed about limitation in claim 13 of patent344 on the ground of estoppel which did not exist

Submitted today

Signed by /s/ Nazir Khan

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**CERTIFICATE OF COMPLIANCE**

This is to certify that this petition contains 3009 words.

Signed by /s/ Nazir Khan

**CERTIFICATE OF SERVICE**

This is to certify that copy of the petition was sent to defendant attorney on

8/13/2024

Brent P. Lorimer (USB No. 3371)
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NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**NAZIR KHAN,**
*Plaintiff-Appellant*

**IFTIKHAR KHAN,**
*Plaintiff*

**v.**

**MERIT MEDICAL SYSTEMS, INC.,**
*Defendant-Appellee*

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2023-2329

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Appeal from the United States District Court for the District of Utah in No. 2:21-cv-00337-HCN-CMR, Judge Howard C. Nielson, Jr.

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Decided: July 16, 2024

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NAZIR KHAN, Burr Ridge, IL, pro se.

BRENT P. LORIMER, Lorimer Ip, PLLC, Midvale, UT, for defendant-appellee. Also represented by DAVID R. TODD, THOMAS R. VUKSINICK, Workman Nydegger, Salt Lake City, UT.

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> intake end and depositing end . . . ; and
>
> iii. a *cuff means* comprising an inlet and an outlet, wherein:
>
> 1. said cuff is *disposed about* said terminal end of said subcutaneous graft; and
>
> 2. said cuff is *disposed about* said intake end of said venous outflow catheter; and
>
> 3. wherein the cuff provides a secure fit for said arterial graft first diameter and said venous outflow catheter second diameter; and
>
> b. a hemodialysis apparatus.

U.S. Patent No. 8,282,591 (the "'591 patent") is the parent to the '344 patent. Initially, the claims contained in the application that eventually yielded the '591 patent required the "inlet" and "outlet" of a "cuff" to be "connected to" a graft and a catheter, respectively. *See* S. App'x 424-27.[2] These claims were rejected by a patent examiner as obvious over U.S. Patent No. 6,102,884 ("Squitieri"), which disclosed a device "connected to" a graft and a catheter. In response to the rejection, Khan proposed amended claims, which required that in addition to being "connected to" a graft and a catheter, the cuff also be "disposed about" the ends of the graft and catheter. After the examiner rejected these proposed amended claims, Khan appealed to the Board of Patent Appeals and Interferences ("Board"),

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[2] We refer to the appendix attached to Khan's Opening Brief as "App'x" and to the supplemental appendix filed by Merit Medical as "S. App'x."

connector that is "disposed within" or "in" the ends of the graft and catheter. S. App'x 70. This is in contrast to claim 13 of the '344 patent, which requires a connector "disposed about" the graft and catheter.

Khan's complaint alleged that the HeRO Graft infringes the '334 patent literally and under the doctrine of equivalents, directly and indirectly, and willfully. The district court granted Merit Medical's motion for summary judgment of non-infringement, as well as its counterclaim for declaratory judgment of non-infringement, after concluding that no reasonable juror could find that the accused HeRO Graft met the "disposed about" limitation, under any of Khan's theories of infringement.

After we dismissed a premature appeal by Khan, *see Khan v. Merit Medical Systems, Inc.*, No. 23-1054 (Fed. Cir. Dec. 29, 2022), the district court entered final judgment of non-infringement and Khan timely appealed.[3]

II

We review a grant of summary judgment applying the law of the regional circuit, here the Tenth Circuit, which reviews a grant of summary judgment de novo. *See D Three Enters., LLC v. SunModo Corp.*, 890 F.3d 1042, 1046 (Fed. Cir. 2018). Summary judgment is appropriate if the movant "shows that there is no genuine dispute as to any

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[3] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). We have jurisdiction under 28 U.S.C. § 1295(a)(1). However, to the extent Khan is challenging the district court's order requiring him to pay Merit Medical's attorney fees, pursuant to 35 U.S.C. § 285, we lack jurisdiction, as the district court did not enter a final order with respect to attorney fees. *See Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1303-06 (Fed. Cir. 2019).

catheter. Khan does not challenge the district court's (correct) construction that "disposed about" requires a cuff means that is "wrapped around, encircles, and covers the *outside* of the outlet end of an arterial graft and the inlet end of a venous outflow catheter." App'x 4. It is further undisputed that the HeRO Graft has a cuff that is "disposed within" the graft and catheter and, therefore, is not literally "disposed about" the graft and catheter. *See* S. App'x 70.

These realities are not dispositive, Khan contends, because he also asserts infringement under the doctrine of equivalents. Under the doctrine of equivalents, "a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997). Among the several fatal deficiencies to Khan's contention is that he, during prosecution of both the '344 patent and the parent '591 patent, amended his proposed claims and made arguments disclaiming cuffs that are connected within the graft and catheter, as in Squitieri.[4] A patentee may not rely on the doctrine of equivalents to assert infringement against a device that falls within the scope of what the patentee disclaimed during prosecution. *See Spectrum Int'l, Inc. v. Sterilite Corp.*, 164 F.3d 1372, 1378-79 (Fed. Cir. 1998) ("[B]y distinguishing the claimed invention over the prior art, an applicant is indicating what the claims do not

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[4] Khan's contention that he did not amend his claims during prosecution is plainly belied by the prosecution history. *See* S. App'x 468-74, 505-14, 516-21; *see also* App'x 20 ("Plaintiff['s] claim that [he] did not amend Claim 13 to overcome Squitieri by adding the 'disposed about' limitation is false.").

Therefore, Khan's inability to prove infringement likewise dooms his other claims.

We have considered Mr. Khan's other arguments and find them unpersuasive. We affirm the district court's grant of Merit Medical's motion for summary judgment of non-infringement.

**AFFIRMED**