Federal court strikes expert's reply report in its entirety

April 20, 2020

***Bauer Hockey Ltd v. Sport Maska Inc.*, 2020 FC 212**

Bauer Hockey Ltd. (Bauer) and Sport Maska Inc., d.b.a. CCM Hockey (CCM) are hockey companies in the midst of a patent infringement dispute. This decision concerned the defendant CCM's motion under rule 248 of the *Federal Courts Rules* to exclude the plaintiff Bauer's expert report, and both parties' motions to exclude other expert reports for various reasons in the context of this patent infringement dispute. The Court dismissed Bauer and CCM's motions to strike portions of opposing expert reports, while allowing CCM's motion to strike the reply report of one of Bauer's experts.

Rule 248 motion

Rule 248 prohibits a party from bringing evidence of certain facts when it refused to answer questions concerning those facts during examination for discovery. Regarding CCM's rule 248 motion, CCM alleged that Bauer's expert provided evidence on Bauer's lost profits, despite the fact that Bauer refused to answer questions about its profits during discovery. Allegedly, this refusal was made because Bauer had stated that it would not be seeking damages based on lost profits, but on the basis of a reasonable royalty. On this basis, CCM sought to exclude Bauer's expert report.

The Court dismissed CCM's motion on two grounds. First, Bauer's expert relied on two documents for his "lost profits" calculation that Bauer did disclose during discovery. Second, the Court drew a distinction between the use of lost profits for seeking damages and the use of lost profits for determining a reasonable royalty. Since Bauer's expert provided evidence on lost profits for the sole purpose of demonstrating what a reasonable royalty would be, the Court found that Bauer did not breach its undertaking not to claim any lost profits, and therefore did not contravene rule 248.

Improper expert evidence motions

CCM's motions

CCM alleged that Bauer's expert's reply report drafted by Dr. Berkman constituted improper reply evidence, and therefore should be struck. The Court agreed. The Court found that the report reinforced evidence already given. In addition, although CCM's expert introduced different bases for calculating a reasonable royalty, these were within the bounds of the method described by Dr. Berkman. These bases could have been discussed in Dr. Berkman's first report. Dr. Berkman provided no reasons in his reply report as to why those bases could not have been anticipated, and therefore, addressed in his first report. Simply disagreeing with the other party's expert does not give rise to a right of reply.

Furthermore, CCM alleged that portions of Bauer's expert reply report drafted by Mr. Ross constituted improper reply. The Court decided that the basis for distinguishing between the portions of the report that were improper versus proper was unclear. Furthermore, the Court exercised its discretion to admit the report in spite of a potential breach of the rules regarding reply evidence. Mr. Ross' report provided the Court with useful information comparing the parties' accounting of profits positions. Furthermore, it would not have caused CCM any prejudice to admit the report.

Bauer's motion

Bauer similarly brought a motion alleging that portions of CCM's expert report should be struck. CCM's experts were supposed to opine on claim construction and invalidity in their first reports. CCM's expert Mr. Holden did not opine on "essential elements" in that first report, which is part of the claim construction analysis, but responded to Bauer's expert's opinion on essential elements in his responding report. The Court refused to strike this portion of Mr. Holden's report. The Court reasoned that since Mr. Holden's report is a responding report, not a reply report, the rules regarding reply evidence are not at play. Mr. Holden was entitled to respond to Bauer's expert's report.

Conclusion

Parties should be cautious when relying on reply expert reports. If a reply report is tendered, experts should explain why this reply evidence could not have been anticipated, and therefore was not included in their first expert report.

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