

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOYOTA MOTOR CORPORATION,

Petitioner

v.

AMERICAN VEHICULAR SCIENCES LLC,

Patent Owner

Patent No. 8,036,788

Issue Date: October 11, 2011

Title: VEHICLE DIAGNOSTIC OR PROGNOSTIC MESSAGE
TRANSMISSION SYSTEMS AND METHODS

**PETITIONER'S MOTION FOR OBSERVATIONS ON THE CROSS-
EXAMINATION OF LAWRENCE KENNEDY**

Case No. IPR2013-00417

Pursuant to the scheduling order in this case (Paper 15) and the Office Trial Practice Guide, Petitioner Toyota Motor Corporation (“TMC”) submits this motion for observations on the cross-examination of Patent Owner American Vehicular Sciences, LLC’s (“AVS’s”) reply witness (in support of AVS’s Motion to Amend, Paper No. 29), Lawrence Kennedy, which took place July 3, 2014. The transcript of the cross-examination is submitted as Exhibit 1030. TMC requests that the Board enter this motion and consider the below observations and cited testimony in rendering its decision on AVS’s motion to amend.

OBSERVATIONS

1. In Exhibit 1030, from page 27, line 9 to page 30, line 6,¹ Mr. Kennedy was unable to testify as to whether or not he compared the prior art references to the specific limitations of the proposed amended claims. Mr. Kennedy would only state very generally that he “reviewed the prior art with respect to the ’210 and ’788 amended claims to make sure that those amendments were *still* patentable and that no prior art would invalidate them” and that he “reviewed the prior art to verify that . . . the amended claims were *still* patentable.” (emphasis added). This testimony is relevant to Mr. Kennedy’s credibility as an expert on validity issues and to the strength of, for instance, his opinions on anticipation and obviousness set forth in paragraphs 52-78 of his Reply Declaration (Exhibit 2027). In particular, the testimony is relevant

¹ Citations refer to the page numbers in the upper right corner of the pages.

because it demonstrates that Mr. Kennedy inappropriately analyzed the issues of anticipation both by failing to compare the claims to the prior art, limitation by limitation, and also by failing to differentiate between the claim limitations that must concededly be present in the prior art, and the limitations that AVS proposes adding via amendment in an attempt to distinguish the prior art.

2. In Exhibit 1030, from page 161, line 24 to page 162, line 5, Mr. Kennedy testified that “Bryant does not disclose that . . . sensor data is used to predict service requirements. In 1992, messages indicating that a tire needs to be replaced or rotated in a certain number of miles would typically have been generated based on vehicle mileage, not based on sensor data.” This testimony is relevant to Mr. Kennedy’s opinions relating to the Bryant reference, including those in paragraphs 45-47 and 74-77 of his Reply Declaration (Exhibit 2027). In particular, the testimony shows that Mr. Kennedy improperly based his opinions on the state of the art when Bryant published, and not the state of the art when the invention of the ’788 patent was made.

3. In Exhibit 1030, from page 101, line 12 to page 102, line 5, Mr. Kennedy testified that “Low tire pressure is not necessarily caused by a component that has failed or is expected to fail.” And, in Exhibit 1030, from page 118, line 3 to page 120, line 25, when addressing the prior art Bryant article, Mr. Kennedy testified that “Tire rotation is not necessarily identifying a particular component that’s forecast to fail” because “Tire rotation due in 1,000 miles does not specifically identify *which tire*

needs to be either repaired or replaced.” (emphasis added) This combined testimony is relevant to Mr. Kennedy’s Reply Declaration, Exhibit 2027, paragraph 18, wherein he declares that his proposed construction for the proposed “repair” or “replace” amendments is consistent with the ’788 patent specification, citing only column 13, lines 30-40 of the ’788 patent (Exhibit 1001). The testimony has bearing on the credibility of Mr. Kennedy’s opinions because it shows his inconsistent analysis and treatment of the prior art versus the ’788 patent with respect to the level of disclosure or support needed in connection with the limitations added to the proposed amended claims.

4. In Exhibit 1030, from page 114, line 6, to page 116, line 21, Mr. Kennedy testified that Bryant discloses informing the driver of the need to replace a specific tire and that the “tire rotation” disclosed in Bryant “could be a form of repair” and “could be interpreted as a type of repair.” However, from page 126, line 14 to page 127, line 7, Mr. Kennedy testified that “tire rotation is not an identification of a specific component that has failed or is expected to fail and an identification of whether the component that has failed or is expected to fail should be either repaired or replaced” because “tire rotation is a standard and accepted maintenance procedure for vehicles.” This testimony has bearing on the credibility of Mr. Kennedy’s opinions, including those set forth in paragraphs 52-78 of his Reply Declaration (Exhibit 2027), in that it shows the inconsistency of his testimony regarding what

constitutes the claimed “identification of whether the at least one component or subsystem should be either repaired or replaced.”

5. In Exhibit 1030, on page 198, lines 14-25, Mr. Kennedy testified, in response to questions addressing both the '210 and '788 patents, that “The starter is a component. . . . I believe the starter would be a component as described in the '210 patent.” Further, in Exhibit 1030, from page 209, line 6 to page 210, line 3, Mr. Kennedy testified that “The starter system is an assembly of parts and components” and that it meets the definition of “component” that is set forth in the '210 patent (which is identical to that set forth in the '788 patent). And, in Exhibit 1030, on page 220, lines 17-22, Mr. Kennedy testified that his opinion regarding Crane does not depend on whether a starter system is a “component.” This testimony is relevant to and conflicts with the opinion set forth in paragraph 50 of Mr. Kennedy’s Reply Declaration, Exhibit 2027, to the effect that “Crane does not disclose a system that identifies for any particular component whether the component needs to be repaired as opposed to replaced.” In particular, the testimony shows that, in arriving at this opinion, Mr. Kennedy has interpreted the term “component” in the “identification of whether the at least one component or subsystem should be either repaired or replaced” limitation in a very narrow and inconsistent manner such that it does not embrace components like Crane’s starter system, but instead only very specific parts of such a system that are themselves able to be either repaired or replaced.

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