

TESCO v. NATIONAL OILWELL VARCO, Appeal No. 2015-1041 (Fed. Cir. October 30, 2015). Before Newman, O'Malley, and Chen. Appealed from S.D. Tex. (Judge Ellison).

Background:

Ballard and Luman were attorneys for Tesco in a patent infringement suit against National Oilwell Varco ("NOV"). During discovery, NOV repeatedly filed motions requesting the production of brochures detailing the claimed subject matter for their on sale bar defense. Tesco insisted that all documents had been produced. However, a black and white copy of the brochure was found, which Ballard stated unequivocally did not show the claimed invention. The jury then concluded that because the brochure was not enabling, NOV infringed the patents.

During post-trial discovery on the brochure, the animators denied the attorneys' statements during trial, and the attorneys further admitted that they became aware of the falsity of the assertions shortly after the testimony. In view of this, the District Court dismissed the case with prejudice and sanctioned Tesco, stating that the attorneys' conduct was "troubling" and had "significant and costly ramifications to the Court and Defendants." In response to NOV's motion for \$5 million in damages, Tesco, with new counsel, made a settlement agreement with NOV, which was also signed by Ballard and Luman, and subsequently dismissed their appeal. Ballard and Luman, continued with the appeal because the statements made in the district court's opinion constituted sanctions and caused reputational harm to them.

Issue/Holding:

Do Ballard and Luman have the right to appeal to "clear their name"? No, appeal dismissed.

Discussion:

The Federal Circuit stated that in order to have jurisdiction over the dispute, it had to determine 1) whether the sanction order issued against Tesco could be considered a formal reprimand against the attorneys to provide them standing to pursue the appeal, and 2) what is the effect of the settlement by all parties on the redressability of the attorneys' request for relief. The Federal Circuit turned to two cases for guidance. In *Precision Specialty Metals* and *Nisus*, the court held that because there was no formal judicial action against the attorney, it did not have jurisdiction over the appeal. Although it acknowledged that the district court's statements could cause reputational harm, the Federal Circuit held that it did not have jurisdiction to hear Tesco's attorneys' appeal because after the settlement, there was "no remaining sanction which could be vacated or punishment imposed upon the Attorneys which could be reversed."

In dissent, Judge Newman argued that the attorneys should at least be allowed to present their side of the story with exonerating evidence that was not admitted by the district court. Judge Newman further stated that it was prejudicial and unfair for the Federal Circuit to deny jurisdiction due to settlement, but make adverse findings while simultaneously denying all opportunity of exculpation. In addition, Judge Newman also pointed to various courts, such as the Second, Fifth and Eight Circuits, who have held that injury to an attorney's professional reputation is a cognizable and legally sufficient cause for appellate review.