

UPON REMAND FROM THE UNITED STATES SUPREME COURT

95-1066

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FESTO CORPORATION,
Plaintiff-Appellee,

v.

SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD.
A/K/A SMC CORPORATION and SMC PNEUMATICS, INC.,
Defendants-Appellants.

APPEAL FROM A DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
ENTERED OCTOBER 31, 1994
JUDGE PATTI B. SARIS

**FESTO'S BRIEF PURSUANT TO THE
FEDERAL CIRCUIT ORDER DATED SEPTEMBER 20, 2002**

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I. INTRODUCTION

In *Festo*, the Supreme Court rejected the absolute bar and limited the effects of prosecution history estoppel, thereby restoring the right of patentees to assert equivalents for claim elements amended during prosecution. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. ___, 122 S.Ct. 1831, 1842 (2002). By this restoration of the doctrine of equivalents for amended claim elements, *Festo*, upon remand, will present the necessary factual evidence such that the jury's verdict of infringement will also be restored.

The Supreme Court created a rebuttable presumption that a patentee's narrowing amendment limits the application of estoppel and identified several criteria under which the presumption could be rebutted. *Festo*, 122 S.Ct. at 1842. This rebuttable presumption was not part of the patent jurisprudence when this case was before the district court and no record regarding the new issues raised by the Supreme Court has been established. In fact, during trial, SMC's counsel told the district court judge, "[t]hat's what I wanted to tell you about, your Honor, and that's why I brought these cases up here. This is not really a prosecution history estoppel case." A1153. The history of this case is a meandering and vacillating journey of modifications to the relationship between prosecution history estoppel and the doctrine of equivalents where a rebuttable presumption has now only become relevant. Accordingly, this case must be remanded to the district court so

that Festo can present the evidence which will rebut this new presumption and properly restore the jury verdict of infringement.

II. **FEDERAL CIRCUIT ISSUE 1**

A. Rebuttal of the Presumption of Surrender Is A Question of Fact

Prior to the Supreme Court's introduction of the rebuttable presumption, determining whether estoppel applied included reviewing the file history to ascertain the reason for the amendment and any surrender of equivalents. This approach to prosecution history estoppel has been significantly changed with the creation of a new presumption and an expansion of fact intensive inquiries extending well beyond the confines of the file history to determine if the presumption can be rebutted. While the ultimate question of whether estoppel applies may be a question of law, the underlying issue of whether a patentee can rebut the presumption is clearly a question of fact. To determine if the presumption can be overcome, the district court should make such findings in the first instance based upon factual submissions on behalf of the patentee. Then, these factual findings may be given the appropriate deferential standard of review by this Court.

The Supreme Court enumerated several factual inquiries to determine whether the patentee can overcome the presumption that prosecution history estoppel bars a finding of equivalence. These inquiries include foreseeability,

tangentialness and the reasonable expectation of those skilled in the art. It is important to note that a “presumption” by definition is “a rule of law, statutory or judicial, by which findings of a basic fact gives rise to the existence of presumed fact until the fact is rebutted.” Black’s Law Dictionary, 6th Ed. 1990. The Federal Rules of Evidence also recognize the factual nature of a presumption stating “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.” Fed. R. Evid. §301.

This Court has recognized that when a presumption arises, a party has the opportunity to offer evidence to rebut that presumption. *Hilton Davis Chemical Co. v. Warner-Jenkinson Co.*, 114 F.3d 1161, 1163 (Fed. Cir. 1997); *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (*en banc*). This Court has further adopted the “bursting bubble” theory with respect to presumptions such that “a presumption is not only rebuttable but completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact.” *A.C. Aukerman*, 960 F.2d at 1037.

The fact issues now in question, *i.e.*, foreseeability, tangentialness, and reasonableness, require the submission of evidence in order to make these factual findings, preferably by a jury at trial or by special verdict questions presented to a jury. Foreseeability of an equivalent depends on the state of the art at the time of

the application and whether one could foresee the equivalent in question. Judge Lourie correctly recognized the factual aspect of foreseeability and that “[f]oreseeability is not solely a question of law.” *Johnson & Johnson Associates Inc. v. R.E. Service Co., Inc.*, 285 F.3d 1046, 1063 (Fed. Cir. 2002) (Lourie concurring).

Tangentialness requires an inquiry into the underlying reason for making the amendment, analysis of the prior art and the state-of-the-art at the time of the invention, and the relationship of the amendment to the equivalent in question. This too is subject to factual determinations. For example, if a claim is amended to comply with the enablement requirement of 35 U.S.C. §112, paragraph 1, then it must be determined whether the equivalent in question was related to the reason for the amendment, i.e, whether one skilled in the art could practice the claimed invention without undue experimentation. Such an inquiry would require an investigation into facts outside the file history to determine the level of one skilled in the art at the time of the amendment and whether one skilled in the art would consider the element in question to be central or peripheral (tangential) to the enablement requirement. Where the rationale underlying the amendment is determined to bear no more than a tangential relation to the equivalent in question, the presumption has been rebutted and the accused device which includes structure

insubstantially different from the claim structure is an infringement. *Festo*, 122 S.Ct. at 1842.

Moreover, the reasonable expectations of those skilled in the art to have described the insubstantial substitute is also a fact inquiry. Such an inquiry requires first establishing the level of knowledge of one skilled in the art, and what they would or would not reasonably be expected to know during the application process. These factual determinations can only be made in the first instance by the district court.

The Supreme Court has also indicated that a patentee may present evidence “that at the time of the amendment one skilled in the art could not reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent.” *Festo*, 122 S.Ct. at 1842. Once again, issues of the level of one skilled in the art and whether it could have been reasonably expected to draft a claim in a certain manner are issues of fact to be decided upon the inspection of documents and witness testimony at the trial level. Thus, determining what a particular patentee could or could not be reasonably expected to know or do is clearly a fact intensive inquiry.

Accordingly, providing a patentee with a fair opportunity to rebut the newly created presumption requires factual determinations to be made based upon the

introduction of evidence (both documentary and witness testimony) to be determined in the first instance by the district court.

B. The Role of the Jury

While the application of prosecution history estoppel is a question of law, the significant underlying factual issues created by the new presumption should be given to a jury for determination. This Court's precedent supports the submission of factual questions to a jury even when the overriding question is one of law. For example, the issue of obviousness is a question of law based on underlying factual determinations. *Graham v. Deere*, 383 U.S. 1, 18, 86 S.Ct. 684, 694 (1966). In determining issues of obviousness (not entirely dissimilar to the issue of foreseeability now raised by the Supreme Court), factual questions are routinely submitted to the jury. These factual determinations are often submitted to a jury in the form of special verdicts under Fed. R. Civ. P. Rule 49.

Even in areas traditionally governed by principles of equity, such as inequitable conduct, the jury has been permitted to participate in the determination of underlying facts. In order to find inequitable conduct, factual findings of materiality and intent are balanced to determine if inequitable conduct has occurred.

There are a variety of ways in which the district court may choose to handle the issues of inequitable conduct during a jury trial, as the Federal Circuit has recognized. Some

courts have reserved the entire issue of inequitable conduct to themselves; some have submitted special interrogatories to the jury on the facts of materiality and intent; and some have instructed the jury to find and weigh the facts of materiality and intent and decide the ultimate question of inequitable conduct, as in the case at bar. . . . Absent a clear showing of prejudice, or failure to achieve a fair trial, the district court's choice of procedure will not be disturbed.

Hebert v. Lisle Corp., 99 F.3d 1109, 1114 (Fed. Cir. 1996). Similarly, in determining if the presumption has been rebutted, the district court should be given the choice as to how the trial is to be best conducted to make the findings of fact in the first instance.

The factual nature of issues such as foreseeability, tangentialness and reasonable expectations of those skilled in the art lend themselves to determination by a jury. As with inequitable conduct and obviousness, this Court should give district courts the flexibility to use a jury in a manner which best fits the particular circumstances of any given case.

III. FEDERAL CIRCUIT ISSUE 2

The Supreme Court in rejecting the complete bar held that “[t]here are some cases, however, where the amendment cannot reasonably be viewed as surrendering a particular equivalent.” The Court specifically identified circumstances which would overcome the presumption. Any evidence, whether it be documentary or testimonial (inventors, persons skilled in the art, and/or

experts), relevant to the factual issues set forth for overcoming the presumption should be considered by the district court. While various factors are encompassed by the criteria to determine if the presumption can be overcome, any such list is certainly not exhaustive and will likely depend on the specific facts of the particular case at issue.

A. Factors Relating To Foreseeability

The presumption can be overcome if the equivalent was “unforeseeable at the time of the application.” *Festo*, 122 S.Ct. at 1842. Foreseeability is entirely new to the issue of prosecution history estoppel.

It is important to note that the issue of foreseeability is to be examined at the time of the application. Courts should be careful not to use hindsight in making such determinations. To determine the foreseeability of an equivalent at issue, a court must examine the state-of-the-art at the time of the invention and what an inventor, e.g., one skilled in the art, could have reasonably foreseen. Such an examination would likely include consideration of:

the field and level of training and knowledge of the inventor or another skilled in the art at the time of the application;

the relationship of the technology related to the equivalent to the overall invention and the level of skill in the art;

whether the inventor or another skilled in the art could reasonably expect the equivalent to adequately function;

whether the equivalent was disclosed in the specification;

whether the specification teaches away from the accused equivalent.

B. Factors Relating To Tangentialness

The presumption is also overcome when “the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question.” *Festo*, 122 S.Ct. at 1842. Therefore, a court must determine the reason for the amendment and the relationship between that reason and the equivalent.

Factors relevant to this inquiry include:

identification and analysis of the rejection, if any, to the claim in question, i.e., a rejection based on clarity (§112) or prior art (§§102, 103);

analysis of the state-of-the-art and the cited prior art;

to what extent does the amended element in question relate to the reason for the amendment;

would the claim have overcome the rejection without the amended element;

was the element at issue central to the argument by the applicant to obtain the patent claim.

In the present case, the Stoll claims were rejected under 35 U.S.C. §112, first paragraph. The original independent claim was cancelled and a new, rewritten claim submitted in response to address the examiner's confusion regarding the mode of operation. Thus, the new claim was drafted to specifically address the 112 rejection. However, certain elements in the new claim were only "peripheral" or "tangential" to the rejection. Festo will prove that the sleeve material and the sealing rings limitation are exactly the circumstances envisioned by the Supreme Court as "tangential" to overcome the presumption.

C. Factors Relating To "Some Other Reason"

In rejecting the absolute bar, the Supreme Court recognized that prosecution history estoppel "requires an examination of the subject matter surrendered by the narrowing amendment." *Festo*, 122 S.Ct. at 1840. "The narrowing amendment may demonstrate what the claim is not; but may still fail to capture precisely what the claim is." *Id.* at 1841. Therefore, in order to permit the requisite examination to determine exactly "what the claim is", the Court presented specific criteria, but chose not to set a limit on how a patentee may establish that an equivalent was not surrendered. The Supreme Court stated that "there may be some other reason

suggesting that the patentee could not reasonably be expected to have described the insubstantial substitute in question.” *Id.* at 1842.

In the present case, the insubstantial difference between the scope of the original claim and the issued claim falls under the “some other reason” criteria. In *Stoll*, original claim 1 defined “a means at each end for [w]iping engagement with an internal surface of the tubular part and so as to form a seal for the pressure medium.” Accordingly, original claim 1 required a sealing ring at each end of the piston. Likewise, issued claim 1 includes this same requirement. SMC’s proven insubstantial substitute is a single two-way seal on the piston. It would be unreasonable to expect the patentee to have broadened the revised claim (which was amended to address a §112 rejection) to describe a single two-way seal on the piston. Furthermore, it would be unreasonable for SMC to have expected a surrender of all equivalents when the limitation at issue was both in the original claim and the issued claim.

IV. FEDERAL CIRCUIT ISSUE 3

A. Remand Is Necessary To Permit Festo To Rebut The Presumption

The Supreme Court’s rebuttable presumption presents material factual issues heretofore unknown in patent jurisprudence. Accordingly, these issues were never determined by the district court, nor was the record below sufficiently developed to permit such a determination. To deny Festo a full and fair opportunity to present

its evidence in the district court, as SMC has moved for, would work a grave injustice upon Festo.

The assumption in Issue 3 that a rebuttable determination requires factual findings is itself dispositive of the issue. The Federal Circuit is a court of review, not a fact finding court. *See Fromson v. Western Litho Plate and Supply Co.*, 853 F.2d 1568, 1570 (Fed. Cir. 1988). This Court has recognized that fact-finding is the function of the district courts and has properly refrained from such activity. *Atlantic Thermoplastics Co., Inc. v. Faytex Corp.*, 5 F.3d 1477, 1479 (Fed. Cir. 1993); *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 20 (Fed. Cir. 1984) (“We do not pretend that we ourselves should act as fact-finders....”). The Supreme Court has cautioned appellate courts against engaging in resolving factual disputes not resolved in the first instance in the district courts. *Icicle Seafoods, Inc. v. Worthington et al.*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530 (1986); *DeMarco v. United States*, 415 U.S. 449, 450 n.1, 94 S.Ct. 1184-1186 n.1 (1974). Accordingly, this case must be remanded to the district court to make findings of fact and conclusions of law in the first instance.

Even if the question of estoppel is viewed as one of law, the underlying factual issues must still be determined by the district court. This Court has recognized that if the record below is not sufficient, remand is necessary to determine the underlying factual issues. For example, in deciding issues of

patentability on obviousness, which is a legal question, this Court routinely remands cases to the district court for additional factual findings if the various *Graham* factors are not properly considered below. *See e.g., Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 667 (Fed. Cir. 2000); *Custom Accessories, Inc. v. Jeffrey-Allan Industries, Inc.*, 807 F.2d 955, 964 (Fed. Cir. 1986).

Even claim construction, which is entirely within the purview of the court and reviewable by this Court *de novo*, is based on underlying facts, such as the level of skill in the art and how claim terms would be understood by those persons. If those facts have not been established below, then meaningful appellate review is impossible and this Court has remanded such cases for further findings of fact. *See e.g., Bayer A.G. v. Biovail Corp.*, 279 F.3d 1340, 1348 (Fed. Cir. 2002).

The record in this case was closed at the end of trial in 1994. The current presumption did not exist, SMC did not raise prosecution history estoppel as a defense during the jury trial, (in fact, SMC did not believe the case included a prosecution history estoppel issue) and Festo did not develop a record relating to any of the issues now created by the Supreme Court decision. This Court should heed the guidance of the Supreme Court which recognized the effect of changing

the rules at this late stage in the case at bar:

The Court of Appeals ignored the guidance of *Warner-Jenkinson*, which instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community. See 320 U.S. at 28.

* * *

As *Warner-Jenkinson* recognized, patent prosecution occurs in the light of our case law. Inventors who amended their claims under the previous regime had no reason to believe they were conceding all equivalents. If they had known, they might have appealed the rejection instead. There is no justification for applying a new and more robust estoppel to those who relied on prior doctrine.

Festo, 122 S.Ct. at 1841.

Moreover, this Court has acknowledged the difficulties encountered by a patentee when a substantive change in the law is effected after the patent has issued and trial on the merits is completed. Specifically, in *Warner-Jenkinson*, this Court addressed the new rebuttable presumption by permitting the patentee an opportunity to present evidence to the district court on the substantive law change.

Thus, we conclude that when the prosecution history is silent or unclear, the district court should give a patentee the opportunity to establish the reason, if any, for the change. *See Id.* (urging the Federal Circuit to “bear [] in mind the prior absence of clear rules of the game”).

Hilton Davis v. Warner-Jenkinson, 114 F.3d at 1163.

Accordingly, Festo must be provided the same fair opportunity to address the newly created presumption by the Supreme Court. Festo is prepared and intends to present evidence in the form of documents and witness testimony sufficient to meet one or more of the ways a patentee can overcome the new presumption. To preclude Festo of such an opportunity would be clear error in view of the Supreme Court decision.

The mandate from the Supreme Court is to determine whether Festo can demonstrate that the narrowing amendments did not surrender the particular equivalents at issue. *Festo*, 122 S.Ct. at 1842. Festo is prepared to clearly show that under the Supreme Court's criteria, the proven equivalents in the SMC product were not surrendered during prosecution.

1. Foreseeability

The presumption may be overcome by the patentee if evidence is established that the insubstantial substitute, i.e., equivalent, was not foreseeable at the time of the application. *Festo*, 122 S.Ct. at 1842. With respect to the issue of the sleeve made of a magnetizable material, the specification defines that such a sleeve helps to keep magnetic leakage fields in the vicinity of the driven member to a minimum. A93. The Stoll patent does not specifically disclose making the sleeve from an aluminum alloy, which was found by the jury to be an insubstantial substitute to the magnetizable sleeve material of the claims. Festo intends to present

documentary and testimonial evidence regarding the primitive knowledge of persons skilled in the art of magnetically coupled rodless cylinders at the time of the application. Festo will prove that one skilled in the art at that time of the application would not have foreseen the interchangeability of an aluminum alloy sleeve with the sleeve of magnetizable material in the Stoll small gap design involving newly developed rare earth magnets. For instance, Dr. Stoll as a mechanical engineer designing the small gap rodless cylinder had limited knowledge in the field of magnetism and particularly the flux fields associated with extremely strong rare earth magnets. Thus, Festo will prove that the equivalent in question was unforeseeable at the time of the invention.

Likewise, Festo intends to present new documentary evidence and witness testimony to establish that SMC's proven insubstantial modification of Festo's four ring combination for wiping, guiding and sealing the piston (a guide ring and one-way sealing ring at each end of the piston) to an inferior, but equivalent, three ring combination (two guide rings and one, two-way sealing ring) was not foreseeable at the time of the application.

The record before the Court has not yet been developed with respect to these new fact issues raised by the Supreme Court. Accordingly, the case must be remanded to the district court for presentation of new evidence and findings in the first instance.

2. The Rationale Underlying The Amendments Bear No More Than A Tangential Relation To The Equivalent In Question

Festo will also overcome the presumption of estoppel by showing that the rationale underlying the amendments bear no more than a tangential relation to the equivalents in question. *See Festo*, 122 S.Ct. at 1842. Festo intends to present evidence in the form of documents regarding the state-of-the-art at the time of the invention as well as fact and/or expert witness testimony analyzing the prior art and the reasons for the amendment, i.e., whether the amendment was necessary to overcome a rejection of the patent office or was the amended element merely tangential to the patentability of the claim.

With respect to the Stoll patent, the claims were rejected under 35 U.S.C. §112, first paragraph as being unclear. The examiner's rejection stated "[e]xact method of operation unclear. Is device a true motor or magnetic clutch?" A8224. Festo then amended the application by canceling and completely rewriting the sole independent claim to address this rejection. Festo intends to introduce evidence that the rationale for the amendment was to address the examiner's specific clarity concern. Whether a claim satisfies §112, first paragraph, is determined through the eyes of one skilled in the art at the time of the invention. Thus, Festo will introduce documentary and testimonial evidence that one skilled in the art would view the limitation regarding the sleeve made of magnetizable material to be unnecessary to define whether the invention was a motor or clutch.

Similarly, Festo intends to present evidence (both documentary and testimonial) to establish that the sealing rings limitation was tangential to the reason for the amendment. Such evidence will prove that both original claim 1 and newly submitted claim 13 in the amendment (which became claim 1 of the Stoll patent) included the sealing rings limitation. More specifically, original claim 1 defined a piston inside the tube “which has sealing means at each end for [w]iping engagement with an internal surface of the tubular part so as to form a seal for the pressure medium” and a driven assembly slideable on the outside of the tube “which has means at each end for [w]iping engagement with external surface of the tubular part.” A8216. Thus, the limitation at issue was originally presented in means-plus-function format.

Claim 13, which became Stoll patent claim 1, eliminated the “means” language and specifically defined the structure. Issued claim 1 defines a piston inside the tube including “plural guide ring means encircling said piston body... and first sealing rings located axially outside said guide rings for wiping said internal wall” and a driven member including a sleeve having “second sealing rings located axially outside said second permanent annular magnets for wiping the external wall surface of the tube.” A8325. Thus, Festo will establish that the rationale underlying the amendment, which was merely to clarify the invention in view of the §112 rejection, bears no more than a tangential relation to the

equivalent in question. Stated differently, both original claim 1 and issued claim 1 define two sealing rings. No subject matter was surrendered with respect to the sealing rings limitation during prosecution and the prior art, which also disclosed two sealing rings, was not motivation for the amendment. Under the spirit of the Supreme Court decision, Festo cannot be estopped from asserting the doctrine of equivalents under such circumstances.

Similarly, Festo will prove that the submission of the new claim in the Carroll reexamination did not surrender the proven SMC equivalent. Specifically, the material prior art disclosed a pair of sealing rings and Festo did not, and could not argue that the sealing rings rendered the claim patentable. To support Festo's position, the statement of reasons for allowance by the examiner did not mention the sealing rings. Accordingly, the underlying rationale for the sealing rings limitation bears no more than a tangential relation to the SMC equivalent and the presumption is overcome.

3. Other Reasons Suggest That The Patentee
Could Not Reasonably Be Expected To Have
Described The Insubstantial Substitute In Question

Based upon the new evidence Festo intends to introduce to respond to the Supreme Court presumption, it will become apparent that other reasons support a finding that the presumption has been overcome. For example, Festo intends to provide evidence that the SMC products including the three ring combination do not work as well as a device made in accordance with the literal scope of the claimed invention, *i.e.*, the four ring combination. Such circumstances would suggest that the patentee could not reasonably be expected to have drafted a claim to cover what was thought to be an inferior, unacceptable design which is a later proven at the time of infringement to be an insubstantial substitute from the element in question. Thus, the new evidence will establish that the presumption has been rebutted, and the finding of infringement under the doctrine of equivalents by the jury must be upheld.

Festo further intends to provide evidence of the primitive state-of-the-art at the time of the invention, and that the Stoll patent was a breakthrough invention of a small gap, compact design, rodless cylinder. In view of the state-of-the-art at the time of the invention, one cannot sit in judgment more than twenty years after the application was filed using hindsight to argue that the patentee could have done this, or should have done that. Festo's evidence will establish that the patentee

could not reasonably have been expected at the time of the application to describe the insubstantial substitutes SMC chose in a feeble attempt to avoid literal infringement. Thus, such circumstances would fall under the “some other reason” category enumerated by the Supreme Court to allow a patentee to overcome the newly created presumption.

In addition, with regard to the sealing rings of the Stoll patent, as set forth above in Section II, C, it would not be reasonable to expect Stoll to broaden the original claim to cover the insubstantial substitute, *i.e.*, a single two-way seal. Stoll merely eliminated the “means” clause from the original claim and instead recited the structure to accomplish the function in the newly drafted claim.

Accordingly, Festo must be given a full and fair opportunity to develop a record on these issues not previously known due to the Supreme Court’s substantive change in the law.

V. **FEDERAL CIRCUIT ISSUE 4**

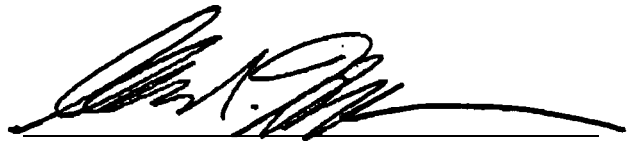
Remand To The District Court Is Necessary To Prevent Gross Injustice

The Supreme Court has substantively changed the law with respect to the application of prosecution history estoppel as a limitation on the doctrine of equivalents. Festo did not and could not develop the record to address issues only created for the first time long after prosecution of the patents at issue, more than fourteen (14) years after the suit was filed, and more than eight (8) years after the jury trial finding infringement by SMC under the law at that time. Festo is confident it can overcome the new presumption and restore the jury verdict whatever path is presented. Festo must be provided an opportunity to develop the record pertinent to the new issues. An appeal court is not the proper venue to make the requisite findings in the first instance as mandated by the Supreme Court decision. Accordingly, remand to the district court is necessary.

VI. CONCLUSION

For the foregoing reasons, SMC's motion for judgment should be denied and Festo's motion that the case be remanded to the district court should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Charles R. Hoffmann', written over a horizontal line.

Dated: November 18, 2002

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