

# MORRISON FOERSTER

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Unknown Speaker 1 (00:00):

Good morning. Our next case is CR Bard, Inc. Vs. AngioDynamics, Inc. Case number 19-1756. Counselor Maynard. Are you are you ready?

Deanne Maynard (00.16)

Yes, Your Honor.

Unknown Speaker 1:

Okay. You may proceed. Now, let me make sure you, you reserve five minutes for rebuttal time, correct?

Deanne Maynard:

Just three minutes Judge Reyna. Yes, please.

Unknown Speaker 1:

Three minutes. Okay. You may proceed.

Deanne Maynard:

Thank you very much. May it please the court. Deanne Maynard for Bard. The district court erred in taking this case away from the jury at the end of Bard infringement case in chief. Bard had entered ample evidence from what the reasonable jury could conclude that AngioDynamics infringes all the claims here and the corner prematurely. Yes.

Judge Schall (00.52):

Maynard, excuse me. This is a Judge Schall here. Leaving aside for the moment infringement. I wanted to ask you a question, kind of a procedural question. There are two issues here. Well, let me, let me back up and ask this way. Do you believe that the district court ruled that the claims that issue were ineligible for patenting under 101? Or do you believe that the district court held the claims were invalid because they were obvious or anticipated?

Deanne Maynard (01:31):

You could not have, sorry, go ahead.

Judge Schall:

No, I'm just saying I'm puzzling a little bit over that and I'm interested to see if there was a 101 decision here in your view.

Deanne Maynard:

I think that the Judge did rule on 101, Your Honor. I think it could not have ruled on obviousness because that issue was, had not been raised at all yet at the trial. And indeed there's, even if there's not, was not ever a summary judgment motion on obviousness from the other side. So obviousness can't meet a basis for the decision. I don't think summary judgment on anticipation is the basis for the decision either because the courts at the end of the trial, when he, when he ended the trial after our infringement case, the court said nothing about anticipation or, and the follow-up order, didn't say to you the granting any kind of summary judgment motion.

Deanne Maynard (02:23):

So the first—

Judge Schall:

Ms. Maynard, excuse me, I'm sorry to jump in on you, but where do you see the Judge ruling on 101, cause I looked at—the it came up at 25850-851. There seems to be a reference to the claims being abstract, but then in looking at the actual ruling, the written ruling that came down later, I didn't see any reference to 101 in there.

Deanne Maynard:

Well, I grant you that the, that it's not a model of clarity, Your Honor. And you know, if the court were to read this as simply a grant of JMOL of non-infringement and nothing else, well, that's clearly wrong. Out of an abundance of caution, we briefed all the issues it could possibly be. Because we didn't want to have waived anything by not presenting it to this court because the district court's ultimate order, it mentioned ineligibility.

Deanne Maynard (03:30):

It mentioned invalidity in the very ultimate order when it explain the rule 54B judgment. But if the court went to read the court that, sorry, go ahead, your Honor.

Judge Schall:

When I—it's a little bit difficult when we can't see each other. So I apologize for the cutting in but at appendix page 18, it seemed to me that the Judge at that page was suggesting that the claims were invalid. He references these other—these other pieces of prior art. The Vortex Smart Port. And it seems to me that he was maybe saying "Alright, the labeling or the printed matter didn't have patentable weight. So it didn't help you against these other, other things." It's a little bit unclear, but I read that 18 is sort of getting it possibly validity by anticipation or obviousness, although it wasn't stated,

Deanne Maynard (04:34):

I don't think so. You're—it can't be getting an obviousness for the reasons I say, and your dynamics never moved for summary judgment on obviousness. And that was never mentioned that the trial, I mean, the questions you're asking, I think sort of highlight the problem here with the procedural

posture of this case. The district court prematurely ended the trial. There's not a basis to grant JMOL of non-infringement because we put on ample evidence that AngioDynamics infringes and AngioDynamics had the burden by clear and convincing evidence of proving ineligibility or invalidity. And it hadn't even put on its case yet. And we hadn't had a chance to defend our patents. And I think that the court could just reverse on that procedural ground alone. And that would be, oh, sorry.

Judge Reyna (05:26):

This is Judge Reyna. This, the court rule should correspond to, you know, after, after you, after a **[inaudible]** was presented, the court will show spontaneous that the patents were not vote eligible under any circumstances. And at that point—

Deanne Maynard (05:41):

He did say that, Judge Reyna. So he, he brought up the—AngioDynamics moved for JMOL at the close of our evidence on infringement only on non-infringement and the Judge then asked the parties, could he address eligibility now? Was that right to be ruled on? And AngioDynamics said, yes, it was. And he said, no, it's not it's premature. There are at least facts in dispute on that issue. And it's AngioDynamics' burden and they haven't gone. I do think that, you know, it does seem like the Judge at the end of the trial terminated it because he thought these patents didn't survive 101. And I think that's clearly wrong. I think these patents are eligible at step one of 101. And if the court reaches that issue, it should so hold.

Deanne Maynard (06:33):

But these are claims to improve medical devices. They recite specific means the combination of a power injectable port and a radiographic marker. That must be perceivable.

Judge Reyna :

What's the legal basis that we would make, make that type of a determination. I'm just the procedural problem I have with the case. I don't know what the Judge did, and because I don't know what the Judge did. I have difficulty saying, this is what I'm going to do, and this is the basis upon which I'm gonna do it. And so this was not a section 101 decision on a JMOL. That's what you're saying. Correct?

Deanne Maynard:

I think it was improperly time if it was Judge Reyna, because there were disputes of fact about eligibility. So we had moved before trial for summary judgment of eligibility at step one. And they had counter moved on 101, but the Judge had sent it to trial on the grounds that there were disputes of fact under 101, and as this court has held in Berkheimer, there can be disputes of fact, especially at step two of the inquiry and AngioDynamics under Berkheimer for the burden to prove that by clear and convincing evidence.

Deanne Maynard (07:51):

And at this point in the trial, it had—AngioDynamics hadn't even put on its case. And so, you know, the Judge faulted us in the colloquy that I think you're referring to Judge Reyna for failing to prove our patents valid and that's error in itself. And that alone would be a basis to reverse without having to decide any of the ineligibility or invalid decisions.

Judge Stoll (08:17):

Ms. Maynard, this is Judge Stoll. Do you think that the best place in the court's written decision for at least for thinking that it addressed eligibility would be at page A15 at the top? Where that to me seems to be the most clear section of the, of the court's opinion that addresses eligibility. Of course it does. The Judge's opinion does go on to make other assertions as well, but at least here it says the court agrees. This is ineligible patent subject matter.

Deanne Maynard (08:57):

You're looking at—let's see, I'm sorry. I'm going to, while you're looking at page 15 at the top, Right. Yes, your Honor. Yes, your Honor. And—but I think that that's, that's clearly—he's wrong about that. For two reasons. One—

Judge Stoll :

I'm sorry. Can I ask you something else? I'm not saying that I agree with him. I just wanted to say that's where I think maybe it's the clearest, but I just want to make sure I ask you this question. I want to know what your view is on printed matter. If we don't think this is printed matter, how does that related to the 101 decision? It's kind of a complicated situation where first we have to see where there's something printed matter and then we have to look at whether the claims are directed to an abstract idea with or without the printed matter, I guess.

Deanne Maynard (09:50):

Well, so first, and so I think at the first step of Alice, it doesn't play any role, the printed matter. AngioDynamics has never argued that these claims are directed solely to printed matter. And under this court cases, then—you just look—you look in this report. You look at the claim as a whole. And as I started to say earlier, the claim as a whole is directed to a very concrete, specific invention and improved port that has self-identifying radiographic features and methods for using it. And then the method claims are—have an additional reason for being valid, which is that they require a step of power injecting the patient and under Vanda natural alternatives, that's an additional reason to hold them valid at that point.

Deanne Maynard (10:38):

So it's step one of Alice, I think you could hold these patents eligible to be patented without considering printed matter. I think the printed matter potentially comes in at step two of Alice, Your Honor, but I think you could also find that they have failed to show that there's a lack of an invented concept here. That would be their burden. And here as an initial matter, the idea of power injectable ports itself was an inventive concept. This was something that the FDA warned against AngioDynamics recognized that our ports were an innovation. And so—and the fact that, you know, ports were later found to be able to withstand power injectability shows that it wasn't routine and conventional and well understood at the time of these patents to have power injectable ports at all, much less power injectable ports.

Deanne Maynard (11:33):

Yes, your Honor.

Judge Schall(?) (11:36):

At page, what do you think if you could please maybe turn to page 18 of the joint appendix. We have this large paragraph that starts off "The court finds this case is nothing but labeling issue." And then it goes on. What do you read the district court is getting at in that paragraph? In other words, what is the Judge district court saying or ruling in that paragraph?

Deanne Maynard (12:02):

I think the Judge—sorry, Your Honor.

Judge Schall:

No, no, that's I—I was just saying—I'm trying to figure that out.

Deanne Maynard (12:10):

Again. I think to the extent this is a mystery, it's all a reason to reverse and send it back. But, I think—my interpretation of that paragraph is that its further explanation of to the extent the Judge ruled on patent eligibility as Judge Stoll points out. But, the flaw in this rationale is that the Judge—at step one, you don't focus in just on one element and that is **[inaudible]**.

Deanne Maynard (12:35):

You're supposed to look at the claim as a whole to decide whether it's directed to an abstract concept. And these claims clearly aren't.

Judge Schall:

Let me ask you if I—let me ask you—if I could indulge my panel colleagues and ask one question here. We have a decision of the magistrate in which she ruled that there was a printed matter problem here. She said the printed matter didn't have patentable weight as I understand it. And then after that, the district court Judge, without going into any details said he adopted the magistrate's decision on that issue. Where are we on that?

Deanne Maynard (13:22):

Well, I think the court doesn't mean to reach printed matter to reverse for the procedural errors and the 101 step one issue I just discussed with Judge Stoll. But if the court does want to clarify that, I think the district court is wrong in finding that these claims that the radiographic letters in these claims do not receive patentable weight. The material here—the radiographic marker is interrelated in the substrate. It's both structurally and functionally related to the other elements of the claim and review—and receives patentable weight because of that. This is—it's—in some cases it is the very structure it's the shape—

Judge Reyna:

But the printed matter does not include the radiographic markers. The way I understand it, the printed matters directed to the contents of the information and not even to the means of delivering that information, which is a radiographic marker.

Deanne Maynard (14:20):

I agree with that completely.

Judge Reyna:

Okay. My next question is if we were to send this back wouldn't we have to make some sort of comment as printed matter to give guidance to the court.

Deanne Maynard (14:34):

I think it would be helpful to do that Judge Reyna. And first I want to say, I agree with you that even if the information conveyed by the radiographic marker is not given patentable weight, I agree with you that the radiographic marker itself must be and that the—there must be a marker on the port that identifies the port as something, even if not as power injectable. But here I said, what's powering—sorry.

Judge Reyna (14:58):

One last, very quick question is do you agree that this court has never addressed the printed matter doctrine under the Alice 101 analysis at step one?

Deanne Maynard (15:15):

I do agree with that, Your Honor. And I think in fact the court has suggested it doesn't come into play at step one in Miller and in Kane. I know I must be out of time, but if I could, I would like to say that I think the method claims get a different printed matter analysis and that under Praxair, the method claims are clearly functionally related to the rest of the claim because they require it actually injecting the fluid. And I do think that this court would clarify that the district court made an error when it remands that would help proceedings going forward. My time has expired, so

Judge Reyna (16:04):

Yes it has. We've got your arguments. So thank you.

Deanne Maynard (16:07):

Thank you, Your Honor.

Judge Reyna (16:18):

Vincenti Tully?

Danielle Vincenti Tully (16:20):

Yes, your Honor. I'm here.

Judge Reyna (16:22):

You may proceed.

Danielle Tully (16:25):

Thank you, your Honor. May it please the court. This is Danielle Tully arguing on behalf of AngioDynamics. Judgment was proper here because there were no disputed facts and all the evidence

showed that the claims amounted to nothing more than patents on the abstract idea of identification itself. All of the asserted claims are directed to the abstract idea of identifying information about prior art ports using industry standard labels. The claims recite no improved port structure.

Judge Reyna (16:51):

This is Judge Reyna. Is it your position that the court address the section 101 issue in its entirety and resolved it?

Danielle Tully (17:02):

Yes, it is. Your Honor. As the court noted, the court first raise it at appendix 25851 during the JMOL argument. At that point, Your Honor, but the court reiterated that all of the trial evidence made it clear that the patents were directed to an abstract idea. At that point, Bard's council was invited to argue, and rather than addressing step one at that point, Bard's counsel moved on to step two. The fact that the court addressed step one is further confirmed at Ja15 of the court's opinion, which Judge Stoll pointed to. The court expressly addresses the abstract idea of identification of a label. And then the court moves through doing a step two analysis. For instance, if we look at Ja12 to 13, the court correctly held that each of the claim elements are directed to generic recitations of prior art ports, industry standard labels, and standards of care that were routine, well understood, and conventional. At Ja14 to 15, the court says that the evidence of trial supported identifying ports capable of power injection by means of the medical record, the patient history, the product materials, or radiograph was routine conventional and required by the standard of medical care existing at the time of the alleged invention. The court agreed—

Judge Stoll (18:26):

Ms. Tully?

Danielle Tully (18:25):

Yes.

Judge Stoll (18:28):

Excuse me. This is a Judge Schall here. Yeah, this is to me is an interesting question. Picking up on what Judge Reyna asked you. At page 13, the Judge said the court concludes that the method claims recite, the recites claims that they're routine well understood and conventional, and then sort of ties that in to a printed matter question by saying not entitled to patentable weight because such information is not patent eligible subject matter. So I was trying to—I—you're absolutely right in terms of what the Judge said there, but I was trying to think when I was preparing the case and looking at this and saying, you know, is the Judge saying here, these claims fail because they don't meet 101 or is the Judge saying these claims involve printed matter? And it doesn't rise to patentable weight because it's not functional.

Danielle Tully (19:34):

I think here, Your Honor, the court is citing in re Marco Guldenaar and the court is recognizing that the only inventive concept that Bard pointed to throughout this case is actually the printed matter. So throughout trial, Bard has pointed to two inventive concepts, and one is the identification of the ports. And that's the abstract idea itself. The second is the information that's conveyed by the identifiable features, but as this court recognized and in re Marco Guldenaar, the printed matter itself can't be what

provides the inventive concept. And that's in line with the courts cases, such as [inaudible], where the court reason that to hold otherwise it'd be allowed to allow patentees to simply provide new instructions for an old product and continue to patent them. And that's just can't be the inventive concept. And here, I think the court is recognizing that fact. That the printed matter can't be what the inventive concept is. And the abstract idea of identification can't be what the abstract con—what the inventive concept is. So where the claims themselves recite no inventive technology for improving prior art ports structure or functionality or improving the marker structure—functionality that printed matter can't be what is the inventive concept. And in fact, what we look at—oh, I'm sorry.

Judge Reyna (21:01):

What's the printed matter—Judge Stoll, do you want to ask a question?

Judge Stoll (21:07):

That's okay. You go ahead. I'll ask next, please.

Judge Reyna (21:09):

Okay. I'll be done here real quick. What if the printed matter is connected to a—there's a functional relationship between the printed matter and a function?

Danielle Tully (21:23):

Well, it's actually the information that has to have the functional relationship. So it's not enough that the radiographic marker is itself located on the port. For instance, in AstraZeneca, the court held that it doesn't matter. What—where the instructions are located? If they're on a label. The instructions must actually be related to the underlying substrate to cause it to become a manufacturer with new functionality and—

Judge Reyna (21:48):

A new situation—in this situation, doesn't the functioning of one of one depend on the other?

Danielle Tully (21:55):

No, your Honor. It doesn't. Just because the radiograph—and that's actually highlighted by the fact that the claims also include separated features. The separated features are claimed at the exact same way as the radiographic markers. They provide no structural details for either. And the separated features are things like stickers and key chains and labels. So the fact that those are separated from the port, but serve the exact same function as the radiographic marker undercuts any argument that there—the radiographic marker itself creates some kind of functional relationship. Also the radiographic markers, the way it's claimed, the claims recite no structural details at all about how this radiographic marker has to be applied, how it has to be viewed. So there's no structural elements to the—to that claim element. Instead, the claims—

Judge Stoll (22:51):

Why, why, excuse me counsel, why isn't the phrase radiographic marker itself structural.



Danielle Tully (22:56):

Because there's no dispute your honor, that radiographic markers have long been known in the art. So that the fact that.

Judge Stoll (23:03):

Wait, just a minute, you said it's not structural at all. I don't know the fact that it's known doesn't indicate whether structural or not, it's certainly a structure and you got to reclaim from the point of view of [inaudible] in the art, right.

Danielle Tully (23:17):

I agree, your honor, the radiographic marker itself is structural, but it's the information that has to have some kind of connections, functional relationship with the port. So again, the fact that the radiographic marker itself is, it might be a structural element. It doesn't mean that it then has a structural relationship. For instance, the, the magistrate reasons that these claims here are unlike the claims and Rica, because the x-ray, doesn't actually transform the information that's conveyed by the radiographic marker. Instead it merely conveys that information so.

Unknown speaker (23:48):

I'd like to ask you another question, if I could about the material appendix A18 here at the very end of the opinion, the court has this paragraph that Judge Shall referred to earlier during argument about, you know, the court finds this case, nothing but a labeling issue. And this whole paragraph really seems to be talking about the printed matter issue. How do you read this paragraph?

Danielle Tully (24:18):

So, I read that paragraph again, as saying that the only inventive concept that Bard has pointed to throughout this litigation is the, the content of this information. But again, because of the content of the information, isn't what makes the port power injectable. It's not—it's not, it can't be enough here. So, we're just like in re Marco Guldenaar are where the fact that the, the etchings were on the dice, didn't transform the dice into something new. The dice, always the dice was exactly the same as it existed in the prior art. And here we have admissions that this was the ports themselves are admitted prior art here. We can go through the patents to say that the port structure was long known in the art and admissions came in at trial that Bard actually did its own power injection testing in off the shelf prior art ports. So it made no structural improvements to the, the, the ports themselves in its pre-trial admissions and at trial Bard also admitted that it made no structural improvements to the radiographic markers themselves. Again, it just use industry standard, labeling techniques, the same thing.

Judge Schall

Ms. Tully?

Danielle Tully

Yes.

Judge Schall (25:31)

Judge Schall here. First of all, Don't be bashful about telling me if you think what I'm going to say is totally wrong. That's your job at this point, but the way, the way I was looking at this case, I was thinking to myself, okay, first question I have to decide is, do we have patent eligible subject matter? Okay. That's question one, then question two is all right. You would dispute this, but assume for the moment there is patent eligible subject matter under 101. The next thing I have to decide is whether the printed matter here bears a functional relationship to the underlying substrate in line with say, Praxair and DeStefano so that it can be used to withstand a validity challenge in the face of prior art. Okay. That's the way I was looking at the, the analytical construct, am I right or wrong, or half right, half wrong.

Danielle Tully (26:37):

So, I understand what you're saying. So printed matter is actually relevant to both the in validity and the eligibility context. It, it does come up in and out in, in validity cases where it can't be used to distinguish the art. And those are the cases like the Praxair cases that you just referenced, but it also comes up in 101 cases such as Guldenaar are where it can't be relied on to supply the investment concept. And I think that that's really what the court's opinion was getting at in citing Guldenaar.

Judge Schall (27:13)

But what about saying, in this case, you don't have a 101 issue because you've got a physical object, you've got these vascular ports. There's nothing you know, there's nothing abstract about them. They serve a very physical purpose. Now they may, well, there may well be a validity issue in terms of prior art, but why, why are these vascular ports ineligible under 101? Why are they abstract if physical or tangible?

Danielle Tully (27:46):

Your honor. And I, I would say that this case, we are like Charge Point where the patents, he argued that improvement to the, the, the patents, he argued improvements to tangible items, but the claims didn't recite any improvements to tangible items. So in Charge Point where the, the claims didn't recite any improvements to the tangible items themselves, and here, the claims don't recite any improvement to the structure or function of the ports themselves. Then again, this can, this is still ineligible subject matter where the only inventive concept, again, comes back to the abstract idea of identification.

Judge Schall (28:23)

Thank you for indulging my question.

Danielle Tully (28:28):

Oh, no, thank you, your honor. And I just want to get, get back to the issue of whether Bard had a chance to address in eligibility at trial. Bard was not prevented from introducing evidence at trial especially not evidence of its inventive concept and its case in chief. Bard in his case in chief affirmatively told its invention story and in telling its story Bard introduced evidence that it used off the shelf ports for its power injection testing, and that had to make no structural changes to its off the shelf ports, to have them structure for power injection, as, as the claims were construed. It also introduced evidence that it used industry standard labels and industry standard radiographic markers to identify its ports. It introduced evidence that its ports were already being identified in conjunction with CT procedures and just as a noble pharma, having introduced this evidence, if there was any evidence

related to an improvement, it was incumbent on Bard to raise it at that point. AngioDynamics was able to get further admissions on cross, but in all instances, Bard had a chance to redress to bring in any evidence that his thought was in dispute to show what improvements it actually added to either the structure or function of prior art ports or radiographic markers. The—in Bard's brief, it points to examples of where it says that it was precluded from raising evidence related to invalidity or ineligibility.

Judge Reyna (30:03)

Counselor let's focus a little bit on the red graphic marker. Now, you said, or you inferred about it, that it was routine and conventional. Isn't that question whether something is routine or conventional, a fact question?

Danielle Tully (30:18):

Okay. Your honor the question of whether something is routine and convention—well-understood and conventional does have underlying factual issues as this court recognized in Berkheimer, but here we're actually like the situation in Berkheimer where the court found that the learning of the claims did not survive step two. So at step two in Berkheimer, the patentee admitted that the claim components existed for years before his patents. And those limitations combined with limitations of analyzing and comparing did not transform the abstract idea into something patent eligible. So here we are just like that. The, the patent itself admits that all of this all of the port structure was known in the art and that the radiographic labels and the separated features are all known in the art. And then at trial, the same admissions came in that no changes had to be made for ports to be structured for power injection. And that Bard actually knew that doctors were already using prior art ports for power injection procedures. So here, while step two may have a factual component, there are no facts in dispute. And, I understand that I'm out of time, your honor.

Judge Reyna (31:33)

Okay. We have your case, and we thank you very much for your argument, Ms. Maynard, do you have three minutes?

Deanne Maynard (31:46)

Thank you, Judge Reyna. I appreciate it. So, I just want to say first, the printed matter inquiry is irrelevant to step one of Alice, and I think these patents are eligible under step one. If the court goes on in, and decides the printed matter issue to clarify matters for remand, I think the printed matter should be given patent of await. The structure here so first the combination was inventive. It was by combining power injectable ports to the radiographic markers that we introduced new functionality and it became so at beforehand— before this intervention, the FDA warned against power injecting. And after this invention, Bard's inventions became the accepted industry standard. This is like the functionality in Miller. So counsel, my friend wants to say, well, it didn't create increase the power injectable of the port. Well, the functionality here though is like the combination in Miller, the measuring cup case there, the measuring receptacle. Yes you honor.

Judge Reyna (32:40)

One question. Am I correct in thinking, and please tell me if I'm wrong that the significance of printed matter is if something is—if printed matter is found to have patentable weight, the significance of that

finding is that it can be used possibly to, as a factor in distinguishing over prior art. Am I right or wrong on that?

Deanne Maynard (33:08):

That's correct, your honor. And that's correct. And that's why it would be helpful to clarify it on remand here that we, go ahead.

Judge Schall (33:19)

Sorry to jump in on you the time is weak. So we could in your view say that this is printed matter. Number one but looking at the—in the Praxair DeStefano approach, it has patentable weight, but we can't say anything about whether, how that now stacks up against prior art that may be asserted. So we would have to go back on that.

Deanne Maynard (33:47):

I think if you would hold it eligible at step one or to Alice, and then you would say what, what the printed that the printed matter had a patentable weight and remand for further proceedings on that understanding.

Judge Reyna (34:02)

Like Judge Reyna was suggesting guidance possibly.

Deanne Maynard (34:05):

Yes, your honor, like the court does in an analogous situation like with claim construction, sometimes you correct things for remand. It would be helpful to clarify it here and here. Just two quick points one. This is this, this is structurally related, like in **[inaudible]**, the, the happy smiley face, un-frowny face. The, the ports when seeing on radiographic on an x-ray are seen when planted inside a body, that's, that's the beauty of it here. And then it's structurally related creates a foolproof way that a practitioner can see once the port's inside a body, even if the person has lost the record, even if the person doesn't know that the port is safe to be power injectable. And that was the that, that is part of the invention that furthers the invention in the same way that the initial on the measuring cup, even though the receptacle was a half cup, a half cup, a half cup, no matter what, when you put the initial on it of a cup, it made it easier to make fractional recipe. You could still make fractional recipes without being, initial just like, you know, potentially you could power inject a port that didn't have a radiographic marker identifying it as power injectability, but this creates new functionality in the same way that the initial on the Miller cup created new functionality and the court should hold that the content here gets patentable weight.

Deanne Maynard (35:26):

And at a minimum, it does for the method claims under Praxair. And we would ask this court to clarify that and reverse the judgment for further proceedings.

Judge Reyna (35:37):

**[inaudible]** before you sit down, let me ask you something. Now, you said that printed matter has—is irrelevant that—at step one. I'm not too sure of that. This court has never taken up that issue. And I

think that if it was true at this time, it would be one of first impression, but why would you say that it's irrelevant? [inaudible]

Deanne Maynard (36:00):

Well, I think, no, it isn't Your Honor. It's not definitive. So—and that because—of course, when you're at step one, you're looking at the claim as a whole in its entirety. And if you view printed matter, like the fact that there might be some printed matter in something like the fact that there might be a mental step or an abstract concept, very good, then a claim you still step out and look at the whole claim in its entirety. And when you do that here, this is clearly eligible subject matter. It's an improved machine, an improved power injectable port with specific structural markings, radiographic markings. And I disagree with my friend, the specification does describe details about it and persons who are skilled in the art with know how to do it. And so that's why I think that—and so I think Judge Reyna, if the claim were to printed matter in entirety and AngioDynamics hasn't claimed that, then didn't, you know, then the claim was being too you know, that would be a different question, but where it's just a piece of the claim.

Deanne Maynard (37:07):

That's not the inquiry. You don't focus on whether or not the printed matter limitation itself has patentable weight. Questions whether the claim as a whole is [inaudible]

Judge Schall (37:17):

Do any of my colleagues have any questions?

Judge Reyna (37:21):

Nope.

Judge Stoll (37:22):

Not for me.

Judge Schall (37:24):

Okay. Good. Well, we thank you for the arguments. This case is now submitted.