

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

AMERICAN BOARD OF INTERNAL MEDICINE	:	CIVIL ACTION
	:	
v.	:	No. 10-CV-2680-JCJ
	:	
SARAH VON MULLER, M.D.	:	
	:	
v.	:	
	:	
AMERICAN BOARD OF INTERNAL MEDICINE, CHRISTINE K. CASSEL, M.D., LYNN O. LANGDON, M.S., AND ERIC S. HOLMBOE, M.D.	:	

ORDER

AND NOW this ____ day of _____, 2012, upon consideration of Defendant/Counterclaim Plaintiff's Motion to Mold the Verdict rendered by the Jury on March 7, 2012 and any response in opposition by Plaintiff/Counterclaim Defendant, it is hereby ORDERED that said motion is GRANTED. Accordingly:

- 1) The verdict is molded to reflect that the Jury found Defendant/Counterclaim Plaintiff's affirmative defense of merger applied to ABIM's copyright claim; and
- 2) The Jury's finding of damages in the amount of \$82,446 is molded to \$0.

BY THE COURT:

Chief Judge J. Joyner

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**DEFENDANT/COUNTERCLAIM PLAINTIFF’S MOTION TO MOLD THE
JURY’S VERDICT**

Pursuant to Rule 56(e), Defendant/Counterclaim Plaintiff Sarah Von Muller, M.D. respectfully moves to mold the verdict.

I. Summary

Upon reviewing the Jury’s verdict and the Court’s charging instructions, it is clear that the verdict must be molded to reflect the Jury’s findings and the Court’s instructions on the applicable law. The Court instructed the Jury that if they found “that [Dr. Von Muller had] proved her affirmative defense by a preponderance of the evidence, then [they] must find for the defendant.” *See* Exhibit A, pg. 146 ln. 1-4. The verdict reflects that the Jury answered yes to Question 5 of the Special Interrogatories and found in favor of Dr. Von Muller’s affirmative defense of merger. Accordingly, the Jury’s finding is a verdict for the Defendant on the copyright claim and the verdict must be molded and reduced to zero to reflect that finding.

II. Pertinent Background

During the March 2, 2012 charging conference, Dr. Von Muller's counsel moved to amend the pleading to allow for the inclusion of the affirmative defense of merger. A copy of the trial transcript is attached as Exhibit B, pg. 202-203 ln. 20-7. The Court granted Dr. Von Muller's motion and included ABIM's suggested charge on the defense of merger. *See Exhibit B* pg. 203 ln. 8-11.

Pursuant to the Court's ruling the Jury was charged on the doctrine of merger as follows:

I mentioned to you earlier the affirmative defense. The defendant has raised the affirmative defense of the merger doctrine. I instruct you that an offer -- strike that.

I instruct you, members of the jury, that an author may copy the unprotected matter in any literary work, but may not copy the means of expression of that matter. However, there is an exception to that prohibition that defendant asserts is applicable here. This exception applies if there is only one way or only a few ways of expressing the ideals or other unprotected matters in a work.

In those cases an author is permitted to copy the expressions in the work to the extent necessary to express that unprotected matter if otherwise it would be difficult if not impossible to express it.

This doctrine is called the merger doctrine because when there is only one way of expressing unprotected matter, the expression is said to have merged with that matter. The merger doctrine may apply to any sort of

unprotected matter, such as ideal or in the case of factual works, facts or events. The doctrine may apply to literal text, such as when factual content can be effectively expressed only by using specific words or a limited range of words.

The merger doctrine may also apply to the non-literal elements of a literary work such as when it is necessary to recount factual events in the same order as another work, so as to present historical facts accurately and intelligently.

The merger doctrine also applies to pictorial, graphic and cultural works such as when there is a limited number of ways to represent certain sorts of objects.

For example, a sculpture that depicts a German shepherd dog will necessarily have certain similarities to other sculptures of dogs of that breed. It will have four legs, a tail, two prominent ears standing upward and a long nose.

These necessary similarities among sculptures of German shepherd dogs cannot under the merger doctrine be the basis for a finding of infringement, because otherwise copyright law would protect the ideal of a German shepherd dog. That's the instructions on merger, the affirmative defense of merger.

A copy of the charging instructions that were distributed to the Jury is attached as Exhibit A, pg. 147-149 ln. 18-19.

The Court had already instructed the Jury that "if you find that the defendant has proved her affirmative defense by a preponderance of the evidence, then **you must find for the**

defendant.” See Exhibit A pg. 146 ln. 1-4, (emphasis added). According to the Jury Foreperson, the Jury found by a preponderance of the evidence that Dr. Von Muller “copied elements of ABIM’s examination that [were] not copyrightable under the doctrines of merger.”

Unfortunately, the Jury did not heed the Court’s instruction that after finding the applicability of the doctrine of merger they had to find for the Defendants on ABIM’s copyright claim. It should be noted that Dr. Von Muller’s counsel’s proposed a verdict sheet that included an instruction for the Jury to stop and move on to the next claim (trade secrets) if they found that the doctrine of merger applied. A copy of Dr. Von Muller’s proposed verdict sheet is attached as Exhibit C.

Regardless, it is clear that the Jury found that the doctrine of merger applied to Dr. Von Muller’s alleged copyright infringement and as such they should have found in favor of Defendant, as instructed by the Court. Accordingly, the Court should mold the Jury’s verdict to reflect its findings of fact and the Court’s instructions on the law.

III. Argument

A. Pursuant to Rule 59(e), the Court should mold the verdict to reflect the Jury’s finding that the affirmative defense of merger applied to Dr. Von Muller’s infringement.

Rule 59(e) states that “a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.” This Rule makes clear that the District Court possesses the power to alter or amend a judgment after its entry. See *Mumma v. Reading Co.*, 247 F.Supp. 252 (E.D.Pa. 1965).

In *Mumma*, the jury had “found [the] plaintiff [was] damaged in the total amount of \$8,000 and reduced this amount in its verdict by 45%—a reduction that [the Court] concluded

was based on no evidence.” *Id.* at pg. 259. In granting the plaintiff’s motion to mold the verdict, the Court reasoned that it was not being “called upon to find different facts from the evidence, but merely to correct the judgment by striking out that portion which was erroneous because it lacked both legal and factual justification.” *Id.* According to the Court “Rule 59(e) is designed for precisely such situations.” *Id.*

Similar to *Mumma*, this motion is not seeking to find different facts than those found by the Jury but is made to conform the Jury’s findings to the Court’s legal instructions.¹ The Court instructed the Jury that if they found “that [Dr. Von Muller had] proved her affirmative defense by a preponderance of the evidence, then [they] must find for the defendant.” The verdict as read reflects that the Jury answered YES, that the affirmative defense of merger applied to Dr. Von Muller’s infringement. Accordingly, the Jury was required to find for the Defendant on the copyright claim.

Accordingly, the verdict on the copyright claim must be molded and reduced to zero to reflect the Jury’s finding that the affirmative defense of merger applied to Dr. Von Muller’s infringement.

¹Nothing in this motion should be construed as a waiver of any other issue that may be a part of Dr. Von Muller’s future filed appeal. Dr. Von Muller may raise further issues for consideration on appeal within the time permitted under the Rules.

IV. CONCLUSION

Since the Jury found that the affirmative defense of merger applied to Dr. Von Muller's infringement, the verdict on the copyright claim must be molded and reduced to zero to reflect the Jury's findings.

Respectfully submitted,

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