

EXHIBIT B TO DECLARATION OF  
WENDY L. DEVINE IN SUPPORT OF BENCH BRIEF  
RE NEXUS AND XLIF



1 success that aren't attributable directly to the instruments at  
2 issue in the case. I understand it's a system, but you can't  
3 use the whole system and praise for the whole system to defeat  
4 an argument that the various components that are at issue here  
5 are -- weren't obvious in the industry. They still have to  
6 prove all that. But that's my concern, and I'm not necessarily  
7 expecting an answer from counsel today. I'm just kind of  
8 putting it out there as a concern that I have.

9           ATTORNEY DEVINE: So, Your Honor, the claims do cover  
10 neuromonitoring and able dilators. The neuromonitoring  
11 itself -- and there's been a lot said about this, so I'll give  
12 you my perspective on it and what I think we're going to hear  
13 from Dr. Youssef. The neuromonitoring itself is not the  
14 entirety of the invention. The retractor itself is designed to  
15 move in a very specific way. It's very specific for the psoas  
16 muscle to minimize retraction time and minimize the amount of  
17 retraction which is integral to avoiding damage to the nerves  
18 even from pressure. So the retractor itself is innovative. I  
19 know counsel will disagree with me. My perspective is they  
20 have not identified that unique nature of that retractor in the  
21 prior art. That was the invention and the invention of putting  
22 that together with dilators that can neuromonitor is the  
23 inventive system.

24           Now as far as nexus and secondary considerations, we  
25 can brief this. This has not come up previously in the case,

1 so we would have briefed it on a motion. But the law states  
2 that there's a presumption if the embodiment reads on the  
3 claims. However, even if you can't meet that presumption, you  
4 can still show that the elements of the claims are leading to  
5 the secondary considerations. It doesn't have to be every  
6 single thing that is leading to the secondary considerations is  
7 in the claim. In fact, the Federal Circuit said if that was  
8 the standard, that would be near impossible because there's  
9 always something, right? Even your refrigerator, you have to  
10 plug it into the wall. It's not going to cool anything off  
11 without electricity. And this is sort of, although on a very  
12 high level, analogous to that, right? We have a dilator that a  
13 neuromonitor can work integrally with a retractor that is  
14 specially designed and functions in a very particular way that  
15 is claimed. All these limitations are claimed. And that  
16 dilator, yes, has to be plugged into a system that is going to  
17 allow that electrode to sense the nerves, but that doesn't mean  
18 that the system itself is not what is the subject of the  
19 praise.

20 THE COURT: Go ahead.

21 ATTORNEY WICKRAMASEKERA: Your Honor, that's not --  
22 first off, that's not a correct statement of the law. The law  
23 is not that there's not a nexus just because the claims cover  
24 the product. They have to be coextensive, and according to the  
25 Federal Circuit that means the claim is the product.

1           If Your Honor would like a bench brief on this issue,  
2 we're happy to provide one, but the Federal Circuit itself has  
3 stated that XLIF requires NeuroVision. That's in a Federal  
4 Circuit opinion. We would be happy to provide that.

5           THE COURT: Again, I don't want to hold us up today on  
6 this. I would like something in writing with some case  
7 support. I do think that there is an issue here that because  
8 of the problem that there's been testimony to the problem with  
9 the side entry, this lateral entry system of doing it. One of  
10 the big hurdles that had to be overcome was all of the nerves  
11 in this muscle. And just because you have a dilator that's got  
12 little neuromonitors on it, if it's not plugged into something,  
13 who cares? It's not going to detect anything. So the  
14 monitoring part, which is fully in your specification as part  
15 of this patent which all these claims flow from, I don't think  
16 you get to distinguish out that aspect of it in terms of the  
17 acceptance historically of the system that the system was more  
18 than just the tools, but rather also involved the tools plugged  
19 in. And that's not one of the claims here.

20           So, again, there may be other claims in this patent,  
21 where that's not a problem but for these for secondary  
22 considerations of non-obviousness for these claims, there may  
23 be not be enough there. I'm not ruling, just saying so. And I  
24 don't want to hear more argument on it today. I would like you  
25 to brief it. And if I can have those briefs for Friday, I can