

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3 WARSAW ORTHOPEDIC, INC.,  
4 Plaintiff,

5 vs.

Case No.  
3:08-CV-1512 MMA (AJB)

6 NUVASIVE, INC.,  
7 Defendant.

8 NUVASIVE, INC.,  
9 Counterclaimant,

10 vs.

11 MEDTRONIC SOFAMOR DANEK USA,  
12 INC.; WARSAW ORTHOPEDIC, INC.;  
13 MEDTRONIC PUERTO RICO OPERATIONS  
14 CO.; and MEDTRONIC SOFAMOR DANEK  
15 DEGGENDORF, GmbH,

16 Counterclaim Defendants.

17 AND RELATED COUNTERCLAIM.

18 CONFIDENTIAL, PATENT PROSECUTION SENSITIVE

19 Deposition of  
20 GARY MICHELSON, M.D.

21 November 19, 2010

22 Reported by LAURY WASOFF, CSR NO. 10995, RPR

23  
24 SHARI MOSS & ASSOCIATES  
25 Certified Shorthand Reporters  
1838 El Camino Real, Suite 108  
Burlingame, California 94010

1 you don't think you're the first person to have recognized  
2 that the bigger an implant is, the better it would be, do  
3 you?

4 A Well, the first person would require somehow that

5 I would know what every single person who ever lived who  
6 came before me believed, so I don't know that I would be  
7 in the position to answer that. And am I, as I sit here  
8 now, familiar with somebody advocating for putting in  
9 very, very large implants? I am not. There may be some.

10 But off the top of my head I don't remember any.

11 Q My question had to do with sort of the principle  
12 that the bigger the implant you could get in between the  
13 vertebrae, the better it would be.

14 A No.

15 MR. DAUCHOT: Hold on. Objection. Foundation.

16 THE WITNESS: I don't agree with your statement.

17 Q BY MR. SCHERKENBACH: What don't you agree with?

18 A I think that there are so many competing factors  
19 that I've spent much of my professional career trying to  
20 convince everyone to put in bigger implants. And for  
21 competing reasons people sometimes want to put in less  
22 than bigger implants.

23 Q Do you recall when you first conceived of the  
24 invention of the '973 patent? And I'm talking about a  
25 time, time frame.

1 A While I can't give you a specific date as I sit  
2 here, it was approximately two months before my meeting  
3 with Sofamor Danek.

4 Q And this is the January 1994 meeting you are  
5 referring to? 10:09

6 A No. I met with them in '93. It was either  
7 November or December of '93 I met with them. And I had  
8 already had my second iteration of my translateral  
9 instruments and implant by then.

10 Q At the time you conceived of what became the '973 10:10  
11 patent, had you heard of any other spine surgeon doing a  
12 lateral -- direct lateral fusion?

13 A Not one like the one I was describing, no.

14 Q My question is different. Regardless of whatever  
15 type of implant they used, at the time you conceived of 10:10  
16 what became the '973 patent had you heard of any other  
17 surgeon doing a direct lateral fusion?

18 A See, I don't know what you mean by direct lateral  
19 fusion. I myself had participated in cases, these  
20 tremendous deformity cases where the spine is not just 10:10  
21 curved, it's rotated and curved. So all you can look at  
22 in portions of a thoracolumbar junction, lumbar spine are  
23 the sides of the spine. There is nothing else showing  
24 because it's twisted around so hard.

25 And I can remember cases where the surgeon 10:11

1 December of 1993.

2 A Correct.

3 Q And what is it in your mind that allows you to  
4 place that as the time you conceived of the invention?

5 A Yes. I had a meeting with Sofamor Danek before I 10:14  
6 had any license agreements with them, and they brought out  
7 a number of people with them. And I did a demonstration  
8 on a sawbones model. I actually used the instruments,  
9 inserted one of these translateral implants. And I  
10 remember that I did it with the second iteration of the 10:15  
11 instruments.

12 At the time I had a gentleman doing the machine  
13 work for me named Dezider Imre. And he had I think a  
14 full-time job somewhere else at the time, so he could only  
15 do so much work for me at the time. He was actually 10:15  
16 working on a number of projects. And I remember that it  
17 took about a month or so to get the first iteration, and  
18 then I made changes, and it probably took three or four  
19 weeks to get the second iteration. And then I had those  
20 things in hand several weeks before the meeting with 10:15  
21 Sofamor Danek because I did these procedures on the  
22 sawbones and stuff.

23 So that would place it at least two months before  
24 that meeting date. And I don't know the specific date,  
25 but it was at the end of '93. 10:15

1 into the other room where the lawyers were. And then that  
2 went on through the entire night up to the next day. And  
3 then we ended up signing these agreements.

4 Q The August/September '93 meeting you just talked  
5 about, what did you show the Danek folks at that meeting? 10:28

6 A You're going to give me at least a month leeway  
7 on that. Right? I do think it's that, but if I'm off a  
8 couple weeks...

9 You know, all these things were shown under  
10 nondisclosure agreements, confidentiality agreements. And 10:28  
11 I do recall them executing that. And it listed on there  
12 specifically what was shown. So if you want me to try to  
13 simply remember what was shown, I'll be glad to do that.  
14 But if you actually wanted to know that, you could look at  
15 that document. It will tell you. 10:29

16 Q Did you show them or tell them about your '973  
17 concept in the August/September '93 meeting?

18 A No.

19 Q Had you conceived of the invention at that point?

20 A No. 10:29

21 Q So it was sometime -- in your view, sometime  
22 between August/September of '93 and maybe  
23 November/December of '93 that you conceived of the  
24 invention?

25 A Yes. 10:29

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