

April 8, 2014

Page 1

UNITED STATES COURT OF
APPEALS FOR THE FEDERAL
CIRCUIT

VASCULAR SOLUTIONS, INC.,

Plaintiff-Appellee,

vs.

BOSTON SCIENTIFIC
CORPORATION,

Defendant-Appellant.

Appeal No. 14-1185

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: APRIL 8, 2014

TIME: 10:00 A.M.

PLACE: UNITED STATES COURT OF APPEALS
717 MADISON PLACE, NORTHWEST
WASHINGTON, D.C. 20437

BEFORE: HONORABLE KIMBERLY A. MOORE
HONORABLE S. JAY PLAGER
HONORABLE RAYMOND T. CHEN

This cause was electronically recorded at the date and
time aforesaid. The following proceedings reflect the
transcription produced by:

Trina B. Wellslager
Registered Professional Reporter

1 APPEARANCES
 2 Counsel for Plaintiff-Appellee:
 3 J. THOMAS VITT, ESQUIRE
 4 Dorsey & Whitney, LLP
 5 50 South 6th Street, Suite 1500
 6 Minneapolis, Minnesota 55402
 7
 8 Counsel for Defendant-Appellant:
 9 MATTHEW M. WOLF, ESQUIRE
 10 Arnold & Porter, LLP
 11 555 Twelfth Street, NW
 12 Washington, D.C. 20004-1206
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 THEREUPON, the following proceedings were
 2 electronically recorded at 10:00 a.m.:
 3 JUDGE MOORE: 2014-1185, Vascular Solutions
 4 versus Boston Scientific.
 5 Mr. Wolf, so the panel is somewhat confused
 6 about how the invention works. And so not -- you
 7 don't have to worry about your time. We want to
 8 spend a bit here at the beginning getting from both
 9 counsel the equivalent of a technical tutorial, what
 10 you would normally give to a district court judge or
 11 a jury, because we're sort of struggling to
 12 understand how the technology works. The patent
 13 doesn't always correlate items in the figures with
 14 the numbers in the spec and then how the accused
 15 device actually works.
 16 So rather than try to jump into your claim
 17 construction arguments, would you mind stepping back
 18 and giving us the equivalent of a technical
 19 tutorial? Is that something that you're okay doing
 20 this morning?
 21 MR. WOLF: Absolutely, Your Honor.
 22 THE COURT: Okay.
 23 JUDGE PLAGER: Let me sharpen it from my
 24 personal viewpoint.
 25 MR. WOLF: Yes, Your Honor.

1 I N D E X
 2 WITNESS PAGE
 3 Argument by Mr. Wolf..... 4
 4 Argument by Mr. Vitt..... 42
 5 Rebuttal Argument by Mr. Wolf..... 73
 6
 7
 8 Certificate of Reporter Oath..... 79
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 JUDGE PLAGER: Which is, if I'm a cardiologist.
 2 MR. WOLF: Yes.
 3 JUDGE PLAGER: And I've got a patient in front
 4 of me who I'm about to use either one of these
 5 devices, what goes in first? What goes in second?
 6 MR. WOLF: Right.
 7 JUDGE PLAGER: What am I doing?
 8 JUDGE MOORE: What's the push rod push? We
 9 can't figure out all these things.
 10 MR. WOLF: Understood, Your Honor. So let's --
 11 let's start with -- may it please the Court.
 12 Matthew Wolf for Boston Scientific.
 13 Let's start with a guide catheter.
 14 JUDGE PLAGER: No, let's start with a
 15 guidewire. Does that come first?
 16 MR. WOLF: It --
 17 JUDGE PLAGER: There's lot of stuff in here
 18 about -- particularly in the patent -- about
 19 guidewires. What is a guidewire and, I mean, is it
 20 like a telephone cable? What is it?
 21 MR. WOLF: A guidewire is literally a wire -- a
 22 long wire with like a pigtail at the end that can be
 23 various shapes. And if you imagine it's -- it's
 24 relatively stiff, but also flexible, and it has a
 25 little twist knob at the end.

1 JUDGE PLAGER: Does it go in first?
 2 MR. WOLF: Usually. The guidewire and guide
 3 catheter end up together in there. Usually the
 4 guidewire goes in and the guide catheter goes over
 5 it. There can be exceptions.
 6 JUDGE PLAGER: Now, when you say the guide
 7 catheter goes over it, that was one of the
 8 questions.
 9 All the way through you gentlemen in your
 10 briefs talk about the guide catheter goes over the
 11 wire. Does that mean it's got little rollers that
 12 it rolls on over the wire or if the wire's above it
 13 and goes under it then it goes under the -- what is
 14 the relationship between the guidewire and the guide
 15 catheter?
 16 MR. WOLF: So just imagine the guide catheter's
 17 nothing more than a very small garden hose.
 18 JUDGE PLAGER: Yeah, okay.
 19 MR. WOLF: The guidewire is exactly what it
 20 sounds like. It's a relatively stiff wire.
 21 JUDGE PLAGER: All right.
 22 MR. WOLF: The cardiologist, usually through
 23 the femoral artery, runs the guidewire through the
 24 vasculature and this is --
 25 JUDGE MOORE: What's on the end of it,

1 anything? On the end of the guidewire. Is it
 2 literally just a wire or does it have some sort of
 3 sinker or something on the end of it?
 4 MR. WOLF: On the distal end, the part away
 5 from the doctor, that's where that pigtail goes.
 6 JUDGE MOORE: Okay.
 7 MR. WOLF: At the proximal end there's usually
 8 a little handle.
 9 JUDGE MOORE: You're not allowed to laugh when
 10 I ask stupid questions either.
 11 MR. WOLF: So the guidewire is run through the
 12 femoral artery, and this is very cool to watch on
 13 fluoroscopy, up through the vasculature and across
 14 the lesion you're trying to target.
 15 JUDGE MOORE: Wasn't there a movie or a
 16 technical tutorial presented below that possibly we
 17 could have you give to us? Only if it was part of
 18 the record below.
 19 MR. WOLF: There were -- there were definitely
 20 pictures.
 21 JUDGE MOORE: You said it's cool to watch in a
 22 movie, so I was thinking maybe --
 23 MR. WOLF: Counsel, do you recall a video?
 24 MR. VITT: Your Honor, there was no movie.
 25 Mr. Root's first declaration starting at A-200, and

1 particularly --
 2 JUDGE MOORE: Okay. Well, no, we'll hear from
 3 you later. Go ahead.
 4 MR. WOLF: There was no movie. So --
 5 JUDGE PLAGER: Is there a cardiologist in the
 6 audience?
 7 MR. WOLF: So the guidewire goes up and across
 8 the lesion, the area of stenosis, where the blockage
 9 of the artery occurs.
 10 JUDGE PLAGER: Okay.
 11 MR. WOLF: So it's now a track. It's like a
 12 railroad track you're going to run everything else
 13 along.
 14 JUDGE PLAGER: But it's just a single wire.
 15 MR. WOLF: It's a wire.
 16 JUDGE PLAGER: Okay.
 17 MR. WOLF: Think of a stiff human hair.
 18 JUDGE PLAGER: Then what happens?
 19 MR. WOLF: Then you take the guide catheter,
 20 which is really just a garden hose. There can be
 21 bells and whistles. But it runs -- and it's got a
 22 diameter enough that you can run catheters through
 23 it. It runs along the guidewire up to the point
 24 along --
 25 JUDGE PLAGER: Along, you mean --

1 MR. WOLF: Inside it. So imagine --
 2 JUDGE PLAGER: Hold it. It runs in -- what
 3 runs inside what?
 4 MR. WOLF: The guidewire -- so this is the
 5 guidewire, this is the guide catheter, pardon me.
 6 That's the relationship.
 7 JUDGE PLAGER: Oh, the guidewire is inserted
 8 into the guide catheter as --
 9 JUDGE MOORE: No, the guidewire's already in
 10 the body. The catheter's inserted over it.
 11 JUDGE PLAGER: Oh, the catheter is inserted --
 12 MR. WOLF: Exactly.
 13 JUDGE PLAGER: -- is inserted in a way so the
 14 guidewire ends up in the catheter.
 15 MR. WOLF: Right. So the guidewire is sticking
 16 outside the body, and it runs all the way through.
 17 They're very long.
 18 JUDGE PLAGER: I've got that much.
 19 MR. WOLF: And it's across the lesion.
 20 JUDGE PLAGER: Okay.
 21 MR. WOLF: So you now have this wire sticking
 22 out there --
 23 JUDGE PLAGER: It would be easier to --
 24 MR. WOLF: Here's the guidewire right here.
 25 JUDGE PLAGER: Okay.

Page 10

1 MR. WOLF: Out of the body. And you now take
 2 the tube and put it over the end of the guidewire
 3 and string it along. So you now have the guidewire
 4 inside the guide catheter.
 5 JUDGE MOORE: Back over here, because we record
 6 this.
 7 MR. WOLF: I apologize, Your Honor.
 8 JUDGE PLAGER: So you have the guidewire inside
 9 the guide catheter. This is the first time I've
 10 understood that part.
 11 MR. WOLF: Yes.
 12 JUDGE PLAGER: Go ahead.
 13 MR. WOLF: Okay. So then the problem is in
 14 some circumstances, the guide catheter -- the
 15 diameter of the guide catheter is too big to get to
 16 where you want to go. So imagine a small artery, a
 17 larger guide catheter, and they butt up against each
 18 other. You want that guide catheter to stay in
 19 place because subsequently you're going to be
 20 putting, for example, a stent delivery system
 21 through it.
 22 JUDGE MOORE: Is that the purpose of the
 23 tapered part then?
 24 MR. WOLF: Yes; but it still can be too big.
 25 And that's where the products at issue in this case

Page 11

1 come in.
 2 JUDGE PLAGER: The coaxial, what they call an
 3 coaxial catheter.
 4 MR. WOLF: That's right.
 5 JUDGE PLAGER: Why is it called a coaxial
 6 catheter?
 7 MR. WOLF: So think of a bullseye, one inside
 8 the other, a coaxial cable like your -- your cable
 9 television.
 10 JUDGE PLAGER: Yeah.
 11 MR. WOLF: It just means that they're
 12 concentric inside each other.
 13 JUDGE PLAGER: Okay.
 14 MR. WOLF: Like the --
 15 JUDGE PLAGER: So now you're going to run this
 16 coaxial catheter inside the guide catheter.
 17 MR. WOLF: Right.
 18 JUDGE PLAGER: Where is the guidewire at that
 19 point?
 20 JUDGE MOORE: It's like those little Russian
 21 dolls that nest inside each other, right?
 22 MR. WOLF: Exactly.
 23 JUDGE MOORE: And you're going to -- you're
 24 going to find the one that gets to the right sinus
 25 to get through the artery.

Page 12

1 MR. WOLF: That's exactly right, Your Honor.
 2 So you have this guide catheter that's largely a
 3 consistent diameter and usually does the job, gets
 4 to where you want to go. But sometimes you need to
 5 go farther.
 6 JUDGE PLAGER: To get into the artery.
 7 MR. WOLF: To get to the lesion you need to get
 8 to, to the blockage.
 9 JUDGE MOORE: Right.
 10 MR. WOLF: And so in 1996 Boston Scientific
 11 filed the patent, the Adams patent, for what's
 12 called the guide catheter extension. And really
 13 what it is is, so a guide catheter's really long.
 14 Imagine we chopped off the end of it, made the
 15 end small -- a little bit smaller but much more
 16 flexible tubing, and just stuck a long push rod on
 17 it.
 18 JUDGE PLAGER: Now, wait. Hold it. Stuck a
 19 long push rod on what?
 20 MR. WOLF: On this -- so this is the garden
 21 hose that is the guide catheter.
 22 JUDGE PLAGER: Yeah.
 23 MR. WOLF: We're going to take another piece of
 24 slightly smaller garden hose, maybe ten inches, and
 25 we're going to have a long, maybe hundred centimeter

Page 13

1 push rod. So we're now --
 2 JUDGE PLAGER: And this is to the bottom of
 3 this interior hose.
 4 MR. WOLF: Right. So we're going to now push
 5 it along so the --
 6 JUDGE MOORE: Is this picture in the reply
 7 brief at Page 4, is this the -- this is the Boston
 8 Scientific device. Is this what you're describing
 9 now?
 10 MR. WOLF: Yes, exactly, Your Honor.
 11 JUDGE MOORE: Do you have your picture? It
 12 might help you to visualize what he said anyway.
 13 JUDGE PLAGER: We love pictures.
 14 JUDGE CHEN: But that's not the picture of the
 15 Adams patent, right?
 16 MR. WOLF: Correct, Your Honor.
 17 JUDGE CHEN: This is the Guidezilla.
 18 MR. WOLF: That's correct, Your Honor.
 19 JUDGE MOORE: So here you have your push rod.
 20 Tell me about the push rod. What does it push?
 21 What's it doing?
 22 MR. WOLF: It's pushing that ten inches of
 23 guide catheter through the guide catheter extension,
 24 so the blue -- so the guide catheter, the long one,
 25 looks exactly like the blue to the left of this

Page 14

1 figure.
 2 JUDGE MOORE: Yeah.
 3 MR. WOLF: But it's much, much longer.
 4 JUDGE MOORE: I see.
 5 MR. WOLF: So we're now going to push this blue
 6 inside the guide catheter all the way to the end and
 7 past the end.
 8 JUDGE MOORE: So in theory this catheter is a
 9 narrower diameter so it's going to slide inside the
 10 other catheter. But I still don't get, what is
 11 pushing? Like, oh, is -- what are you -- what's the
 12 push rod pushing?
 13 MR. WOLF: It's pushing that last ten inches.
 14 So in order to get that -- so that ten inches, just
 15 imagine at the end of the day --
 16 JUDGE MOORE: Okay. So here's a really stupid
 17 question.
 18 MR. WOLF: Yeah.
 19 JUDGE MOORE: So is the flexible tip the part
 20 going in first and the push rod is what the doctor
 21 is using to push the whole catheter in or is the
 22 push rod going in first and the flexible tip is at
 23 the back end?
 24 MR. WOLF: The flexible tip is going first.
 25 JUDGE MOORE: I get it.

Page 15

1 MR. WOLF: So you're pushing that -- so imagine
 2 at the end of the day --
 3 JUDGE PLAGER: You're pushing it with the push
 4 rod.
 5 MR. WOLF: Yes.
 6 JUDGE PLAGER: And then do you extract the push
 7 rod?
 8 MR. WOLF: No, it stays. It's all one piece.
 9 It's all of a piece.
 10 JUDGE MOORE: Well, it will ultimately be
 11 extracting before the surgery is completed.
 12 MR. WOLF: Right, right. Right, right, right,
 13 right.
 14 JUDGE PLAGER: Not too many people walk around
 15 with push rods in them.
 16 MR. WOLF: Hopefully not.
 17 JUDGE PLAGER: The doctor pushes this ten-inch
 18 extension all the way in to where he or she wants
 19 it, and leaves it in place, that is, in the guide
 20 catheter. Actually now it's in the coaxial
 21 catheter, isn't it?
 22 MR. WOLF: So imagine that one -- a typical
 23 procedure might say five inches of the ten inches we
 24 see in blue remain in the guide catheter or at the
 25 far end of the guide catheter. The other five

Page 16

1 inches are now beyond. It's like you've added an
 2 extension to it.
 3 JUDGE PLAGER: Where is the coaxial catheter at
 4 this point?
 5 JUDGE MOORE: In the body.
 6 JUDGE PLAGER: It's inside as well.
 7 MR. WOLF: Yes.
 8 JUDGE MOORE: Butted up to the artery but not
 9 being able to get through.
 10 MR. WOLF: Right.
 11 JUDGE MOORE: So what goes inside this hole
 12 then in your device? Like this is -- so this is a
 13 catheter, right?
 14 MR. WOLF: Right. And it's big enough.
 15 JUDGE MOORE: What's going to go into it?
 16 MR. WOLF: Typically they're an angioplasty
 17 catheter or a stent delivery catheter or, frankly,
 18 both.
 19 JUDGE MOORE: Okay. The thing you're going to
 20 leave in the body ultimately is going to be fed
 21 through this interior catheter all the way through
 22 into the artery, and that's what's going to be left
 23 there ultimately.
 24 MR. WOLF: Exactly, the stent, or the balloon,
 25 whatever the case may be.

Page 17

1 JUDGE PLAGER: So basically we end up with
 2 three more or less tubes running up in there, the
 3 last one having the stent or whatever it is on the
 4 end of it.
 5 MR. WOLF: Right.
 6 JUDGE PLAGER: And all that's done through a
 7 little piece of the body.
 8 MR. WOLF: Yes. It's all done typically
 9 through the groin.
 10 JUDGE PLAGER: These are very small hoses.
 11 MR. WOLF: Exactly, Your Honor. Stents are --
 12 a grain of rice gives you a rough idea of the size
 13 we're talking about.
 14 JUDGE MOORE: I think we ought to get going
 15 though on the argument now, if you don't mind.
 16 And, don't worry, we'll give you extra time at
 17 the front end, if you want to devote it exclusively
 18 to technology, especially if you disagree with
 19 Mr. Wolf on anything he says.
 20 JUDGE CHEN: May I ask a follow-up question?
 21 JUDGE MOORE: Yes, of course.
 22 JUDGE CHEN: Thank you. A tapered inner
 23 catheter, do you have a tapered inner catheter that
 24 works with your Guidezilla? The patent talks about
 25 a tapered inner catheter that goes inside of the

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.