

## Judge Junks Applied's Appeal Of Covidien Verdict

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*Wednesday, Apr 30, 2008* --- In another setback for Applied Medical Corp., a federal court Tuesday quashed the company's bid for a new trial, upholding a jury verdict that a Tyco International Ltd. subsidiary did not infringe Applied's patent for trocar seal technology.

Judge Cormac J. Carney of the U.S. District Court for the Central District of California strongly denied Applied's request for a disqualification of the verdict or a new trial and emphasized the soundness of the February noninfringement ruling for U.S. Surgical, a subsidiary of Covidien AG, formerly Tyco Healthcare.

Applied filed the motion for judgment as a matter of law in March, claiming the jury's verdict was flawed because the U.S. Surgical improperly predicated its defense on aspects of the disputed trocar device that were irrelevant to the infringement claims.

Trocars are devices used to provide channels for other instruments during laparoscopic surgery and often include a "floating septum seal" that permits an instrument inserted into a trocar to move off-axis, or float.

"In essence, Applied is arguing that the outer portions of the septum valve are legally irrelevant to the infringement analysis and that the court committed reversible error merely by allowing U.S. Surgical to mention the outer portions," Judge Carney wrote.

The court, however, reiterated the relevance of the outer portions of the septum valve, which U.S. Surgical used to differentiate its technology from the invention protected by Applied's U.S. Patent Number 5,385,553.

The five-week trial presented substantial evidence that the outer portions were critical to the "ring-levers-teeth" embodiment function disclosed in the '553 patent, the ruling said.

"After carefully reviewing the parties' briefs and the complete trial record, the court is even more convinced that its decision in this regard was correct," Judge Carney wrote.

"Some facts are indisputable. The indisputable fact in this case is that the outer portions of the septum valve in the RLT embodiment do exist and they are relevant to the way in which that embodiment performs the floating function," he concluded.

Glen Summers, a lead attorney for U.S. Surgical, applauded Judge Carney's ruling and said he looked forward to meeting Applied in the U.S. Court of Appeals for the Federal Circuit when the company pursues its promised appeal.

"We feel vindicated by the jury's decision and Judge Carney's decision to uphold the verdict. We had a very intelligent, fair and conscientious jury, who absolutely got it right. Judge Carney in turn was correct to deny the motion for JMOL or new trial," Summers said.

The court's decision ends the proceedings in the district court, where Applied sought roughly \$300 million dollars and an injunction against U.S. Surgical for willful infringement of the '533 patent, Summers noted.

Joseph Re of Knobbe Martens Olson & Bear LLP, an attorney for Applied Medical, said he was pleased the '533 patent was deemed valid, adding there was no surprise to yesterday's ruling, as Judge Carney had already indicated his judgment in the infringement suit.

Re anticipates a Federal Circuit appeal that would remand the suit for a district court trial consistent with that court's 2006 ruling, which held U.S. Surgical's claim construction to be flawed.

The prolonged infringement suit has taken many twists and turns in the five years since Applied filed its complaint, claiming U.S. Surgical's second redesign of its Versaseal Plus trocar product continued to violate Applied's patent.

In February 2005, the district court granted summary judgment of noninfringement to U.S. Surgical.

In May 2006, the Federal Circuit reversed the lower court's decision, ruling that the claim construction adopted by the district court had factual gaps. The appellate court remanded the motion for summary judgment, and the district court denied it.

Then, after the Federal Circuit's ruling in *In re Seagate Technology LLC*, U.S. Surgical asked the district court to reconsider its ruling in light of *Seagate*. However, in December, Judge Carney ruled that Applied had met the *Seagate* standard and could continue to bring its allegations of willful infringement against U.S. Surgical.

The ruling marked the first time a court allowed a willfulness claim to go to trial since the *Seagate* ruling, which changed the standard for determining when infringement is willful, according to Re.

Before *Seagate*, companies had an affirmative duty to exercise due care not to infringe on existing patents, including obtaining legal advice from a patent counsel before creating a product that could be infringing.

Now, a patent holder needs to offer proof that a company was “objectively reckless” in willfully infringing on its patents before bringing the charge.

Judge Carney's decision acknowledged that Seagate had changed the playing field but left the original ruling intact, clearing the way for the jury trial that ended in U.S. Surgical's favor.

The patent in this case is U.S. Patent Number 5,385,553.

Applied Medical Resources Corp. is represented by Knobbe Martens Olson and Bear LLP.

U.S. Surgical Corp. is represented by Bartlit Beck Herman Palenchar & Scott LLP; Dewey & LeBoeuf LLP; and Paul, Hastings, Janofsky & Walker LLP.

The case is Applied Medical Resource Corp. v. U.S. Surgical Corp., case number 8:03-cv-01267 in the U.S. District Court for the Central District of California.

--Additional reporting by Amanda Ernst, Erin Coe and Brendan Pierson