

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ENDOTACH LLC,)
)
 Plaintiff,)
)
 v.) Cause No. 1:13-cv-01135-LJM-DKL
)
 COOK MEDICAL INCORPORATED,)
)
 Defendant.)

**ENDOTACH LLC’S MOTION TO RECONSIDER A PORTION
OF THE COURT’S SEPTEMBER 5, 2017 ORDER ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT¹**

The parties in this case filed their respective motions for summary judgment over three years ago in April of 2014. Throughout that briefing, which consisted of over 250 pages of argument and roughly 200 exhibits, the Court was asked to decide a multitude of issues including: (1) non-infringement of two patents (based on three claim terms); (2) invalidity (based on six different alleged prior art references); (3) willful infringement; and (4) laches (cross motions). On January 27, 2015, the Court denied Plaintiff Endotach LLC (“Endotach”)’s motion for summary judgment, and granted Defendant Cook Medical Incorporated (“Cook”)’s motion in part, finding Cook’s laches defense applied and one of the two asserted patents was invalid.

After a trip through the Federal Circuit and the United States Supreme Court that ultimately determined laches was no longer a viable defense in patent infringement cases, the parties conferred with the Court on May 8, 2017 to discuss the remaining summary judgment

¹ Pursuant to Federal Rule of Civil Procedure 59, and in accordance with relevant precedent, Endotach files this motion for reconsideration of the Court’s final judgment entered on September 5, 2017. *See e.g. Allen v. Engelson*, 2016 U.S. Dist. LEXIS 106071, at *12-13 (N.D. Ill. 2016); *Martinez v. City of Chi.*, 499 F.3d 721, 725 (7th Cir. 2007).

issues upon remand. After reviewing the parties' remaining arguments (and again, the large number of exhibits), on September 5, 2017, the Court entered its second summary judgment order, finding infringement was a question for the jury, but holding the remaining patent was invalid per an allegedly pre-dating patent application.

The crux of that holding was based on the presumption that "there is *no evidence* that Dr. Rhodes conceived of the '154 patented invention earlier than Dr. Lee's patent application." Dkt. No. 285 at 31 (emphasis added). However, that holding unfortunately overlooked significant record evidence, which demonstrated that *all* of the elements of Dr. Rhodes' invention were conceived before the alleged prior art inventor's.

Given the vast volume of issues, exhibits, and arguments, and the more than three years that these issues stretched on, it is entirely understandable that small but important details relevant to this latest conclusion could be overlooked. Therefore, Endotach respectfully requests limited reconsideration of the invalidity issue, particularly regarding the record evidence related to Dr. Rhodes' conception of his invention.

I. Relevant Law for the Prior Art Issue

The Court found the '154 Patent² to be invalid pursuant to 35 U.S.C. §102, subsections (e) and (g). Dkt. No. 285 at 25-31.³ The Court rejected any argument regarding 35 U.S.C. §102(a). *Id.* at 28.

² United States Patent Number 5,122,154 (the "'154 Patent").

³ (e) the invention was described in . . . a patent granted on an application filed by another filed in the United States before the invention by the applicant for the patent . . . or . . .

* * *

(g) . . . (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of the invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

When determining whether or not a patent or publication qualifies as prior art, such a review is a legal question based on underlying fact issues. *Manville Sales Corp. v. Paramount Sys. Inc.*, 917 F.2d 544 (Fed. Cir. 1990). A plaintiff whose patent is allegedly barred by 35 U.S.C. § 102(a) or (e) “can overcome a reference by showing that [it was] in possession of [its] invention prior to the effective date of the reference.” *In re Costello*, 717 F.2d 1346, 1349 (Fed. Cir. 1983). Section 102(g) contains the basic rule for determining priority, which provides that a person shall be entitled to a patent unless “the invention was made in this country by another inventor who had not abandoned, suppressed or concealed it.” *Aventis Pharma Deutschland GmbH v. Lupin Ltd.*, 499 F.3d 1293 (Fed. Cir. 2007); 35 U.S.C. §102(g). To show priority for the purpose of determining whether a reference qualifies as prior art, a patentee has the burden of production to proffer evidence that: (1) it reduced its invention to practice first...***or (2) it was the first party to conceive of the invention and then exercised reasonable diligence in reducing that invention to practice.*** See *Stamps.com Inc. v. Endicia, Inc.*, 437 Fed. Appx. 897, 907 (Fed. Cir. 2011) (emphasis added).

II. ARGUMENT AND AUTHORITIES

Through pure happenstance, both Dr. Rhodes (the inventor of the Patent-in-suit) and Dr. Lee (the author of Cook’s alleged prior art) both notarized key patent documents on April 24, 1990. On that day, Dr. Rhodes had a substantially complete draft of his patent application notarized. Dkt. No. 173-18.⁴ That same day, Dr. Lee endorsed his own patent application. Dkt. No. 148-10. The Court found, in such an instance, that the tie goes to the prior art inventor, stating that “Dr. Lee’s invention takes priority because he conceived of the invention in the ‘154 patent at least on the same date as Dr. Rhodes, but reduced it to practice first...” Dkt. No. 285 at

⁴ References to exhibits in this motion will be to exhibits contained within parties’ motion for summary judgment briefing and related appendices.

30. In the Court's view, that left Endotach with only one remaining argument – to prove Dr. Rhodes conceived of his invention prior to that April 24, 1990 date. *Id.* The Court found Endotach could not do so, noting that “Dr. Silver fails to pull all the evidence together in a way that a reasonable jury could conclude that Dr. Rhodes had conceived of the inventions in the asserted claims by at least December 5, 1989.” Dkt. No. 285 at 31.

However, on summary judgment, with all inferences being drawn in Endotach's favor, Endotach was not required to prove as a matter of law (or even by clear and convincing evidence) that December 5, 1989 date was Dr. Rhodes' conception date. Nor was Endotach solely relying on Dr. Silver to “pull the evidence together” to support prior conception. Instead, all Endotach was required to do to defeat Cook's motion for summary judgment on invalidity was to create a fact issue on whether Dr. Rhodes had conceived of his invention before Dr. Lee conceived of his. If the evidence presented by Endotach demonstrated that Dr. Rhodes conceived of his invention on any date prior to April 24, 1990, then that issue could not be decided as a matter of law and should be decided by the jury.

Endotach respectfully asserts that it presented such evidence during the parties' briefing and now respectfully requests reconsideration of the Court's invalidity finding.

A. Dr. Rhodes Conceived of All Elements of His Invention Prior to April 24, 1990

The Court held that Dr. Lee's patent application, which was endorsed on April 24, 1990, and filed with the United States Patent and Trademark Office three days later, was invalidating prior art under §102(e) and (g) because “there is no evidence that Dr. Rhodes conceived of the '154 patented invention earlier than Dr. Lee's patent application.” Dkt. No. 285 at 31. In other words, the Court held there was no proof that Dr. Rhodes had conceived of his invention prior to his own notarized draft patent application, which was also complete as of April 24, 1990. *Id.*

To show priority for the purpose of determining whether a reference qualifies as prior art, a patentee has the burden of production to proffer evidence that: (1) it reduced its invention to practice first...or (2) it was the first party to conceive of the invention and then exercised reasonable diligence in reducing that invention to practice. *See Stamps.com Inc. v. Endicia, Inc.*, 437 Fed. Appx. 897, 907 (Fed. Cir. 2011). Here, the evidence demonstrated that Dr. Rhodes in fact conceived of his invention before Dr. Lee and then exercised reasonable diligence in reducing it to practice.

1. Endotach's Evidence of Dr. Rhodes' Conception

Dr. Rhodes began developing what would become the invention in the '154 Patent in the fall of 1989. Dkt. Nos. 173-65 at 62:12-64:6; 173-67 at 15:18-23, 21:16-22:7.⁵ By early December 1989, Dr. Rhodes had sketched out "preliminary drawings" for his stent graft design and described the elements of the invention that would become the '154 Patent to his family and close friends. *See* Dkt. Nos. 148, Exh. Z.Exh. 45; Dkt. Nos 173-65 at 62-12-63:7, 257:17-261:10; 173-66 at 160:1-161:5. Upon reviewing this information, testimony, as well as other related evidence, Dr. Silver, Endotach's stent graph expert, opined that "Dr. Rhodes conceived ***each and every limitation of the invention of the '154 Patent*** at least as early as December 5, 1989." Dkt. No. 174-19, ¶ 42 (emphasis added).

In its opinion, the Court took issue with Dr. Silver's view as related to the December 5, 1989 drawings by themselves, as the only source of evidence. Dkt. No. 285 at 31 ("Nowhere in Dr. Silver's report or supporting materials, however, does he describe which 'several...elements' are contained ***in the drawings*** and which are not.") (emphasis added). However, the drawings

⁵ Given that Dr. Rhodes died several years before this litigation, the non-documentary evidence provided in support of conception and reduction to practice came from those who witnessed Dr. Rhodes' inventive process at the time it took place, including his wife, a close family friend, and Dr. Rhodes' long-time secretary, who personally notarized and typed up Dr. Rhodes' draft patent applications. *See e.g.* Dkt. Nos. 173-65 at 62:12-64:6; 173-67 at 100:8-101:8; 158:1-161:6.

were not the only pieces of the puzzle Dr. Silver used to form his opinion that Dr. Rhodes' entire invention was conceived as of that December date. Instead, further in Dr. Silver's declaration, he discussed the testimony of several individuals who witnessed and discussed the entire invention with Dr. Rhodes contemporaneously with those drawings – including the key features of the '154 Patent, the “spaced apart stents to allow the device to be cut so that it would be one-size-fits-all.” See Dkt. No. 174-19, ¶ 38. Based on the notarized drawings, as well as the corroborating evidence of multiple non-inventor witnesses, Dr. Silver opined that all of the elements of the '154 Patent had been invented prior to 1990. See Dkt. No. 174-19, ¶ 42 (emphasis added).

Based on this collection of evidence alone, including Dr. Silver's opinion as one skilled in the art of stent graft design, Endotach presented competent summary judgment evidence that Dr. Rhodes conceived of his invention as of the December 5, 1989 date. This collection of proof, under precedent set by courts within the Seventh Circuit, dictates that fact issues are present regarding this dispute and should be resolved by a jury. See *e.g. Douglas Dynamics, LLC v. Buyers Prods. Co.*, 745 F. Supp. 2d 876, 884 (W.D. Wis. 2010) (noting documentary evidence, including preliminary figures and draft patent language that ended up in the final patent application and issued patent “raise a genuine issue of material fact about whether the conception of the subject matter” relative to a priority dispute); *Suncast Corp. v. Avon Plastics*, 1999 U.S. Dist. LEXIS 15222, at *66 (N.D. Ill. 1999) (disputes over whether drawings and testimony support a particular conception date “creates an issue of fact regarding when conception occurred.”); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, 2012 U.S. Dist. LEXIS 167942, at *22-23 (E.D. Wis. 2012) (same).⁶ Although Cook argued that all of the '154

⁶ In its order, the Court faulted Dr. Silver for failing to explain “which ‘several...elements’ are contained in the drawings and which are not.” Dkt. No. 285 at 31. However, the plain language of Dr. Silver's declaration state that “each and every limitation” was found in the December 5, 1989 drawings, removing any question as to which elements were present and which were not. See Dkt. No. 174-19, ¶ 42.

Patent's claim limitations were not present in the December 5, 1989 drawings and thus conceived by that date, these disputes are precisely the purview of the jury. *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum, LLC*, 779 F. Supp. 2d 858, 863 (N.D. Ind. 2011) (“A court’s role on summary judgment is not to weigh the evidence, make credibility determinations, or decide which inferences to draw from the facts, but instead to determine whether there is a genuine issue of triable fact.”); *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 852 (N.D. Ill. 2010) (“The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

Even if the December 5, 1989 drawings (combined with the testimony of Mrs. Rhodes, Ms. Dungan, Mr. Cuffari, and Dr. Silver), did not show all of the claimed elements of the ‘154 Patent, Endotach presented substantial evidence that Dr. Rhodes still conceived of his invention in the weeks prior to Dr. Lee’s endorsed application.

It was undisputed at the summary judgment stage that by April 24, 1990, Dr. Rhodes had finished a final draft of his patent application and had it notarized by his secretary Ms. Dungan. *See* Dkt. Nos. 173-18, 173-19. However, this was not the first date that Dr. Rhodes had conceived of his invention. To the contrary, Dr. Rhodes had completed written draft patent applications with all of the elements of his invention identified, along with advanced drawings, in the weeks and months prior to the late April date. For example, the draft patent application for the ‘154 Patent that was notarized on April 24th had gone through three different written iterations, all of which were included in the summary judgment record. *See* Dkt. Nos. 173-71 at 6-11; 173-47 at 4; 173-48; 173-18. On top of these drafts, Endotach also provided the original cassette tape (Dkt. No. 173-47) used by Dr. Rhodes to dictate the first complete draft of his invention (which would become the first draft, Dkt. No. 173-71).

Relative to the dictation tape and subsequent drafts, Ms. Dungan testified that she transcribed and made Dr. Rhodes' requested changes herself as part of her work with Dr. Rhodes. Dkt. No. 173-67 at 75:16-19; 167:14-168:25. After hearing portions of the dictation tape, and reviewing the drafts of the patent application, Ms. Dungan testified that there was not "any chance in [her] mind that these three drafts [of the patent application] were done" on April 24, 1990. Dkt. No. 173-67 at 176:20-177:25. Instead she testified unequivocally that these previous drafts had been completed prior to that date. Dkt. No. 173-67 at 176:20-177:25. More specifically, Ms. Dungan testified she was sure she had made the changes to the original (non-notarized) draft applications "two to three weeks before" the final draft was completed and notarized. Dkt. No. 173-67 at 176:20-177:13. Importantly, for the purposes of predating the Lee patent application, the substance of Dr. Rhodes draft patent applications relative to the final April 24 version did not change. *See* Dkt. Nos. 173-47, 173-48, 173-49, 173-71. The only differences in the drafts were minor grammatical changes and redrawing and labeling of certain figures with specific notations made between the drafts over that "two to three week[]" period. *Id.* In fact, the sections where the boundaries of the invention are described – the "Field of the Invention" and the "Summary of the Invention" – are the same. The key inventive elements of the claims of the '154 Patent were present in each of those drafts as summarized in the chart below, and correspond to the disclosures made in the specification of the '154 Patent:

| Claimed Feature⁷ | Original Draft Application (Exh. A69) [Dkt. 173-91] | Notarized Draft Application (Exh. A17) [Dkt. 173-18] | Specification of U.S. 5,122,154 [Dkt. 148-1] |
|--|---|---|---|
| Graft for use in blood vessel, duct, or lumen | A69-5 (RHOD000017); A69-7 (RHOD000019) | A17-1 (CRBCP002347); A17-3 (CRBCP002349) | 1:5-12 |
| Graft comprises a sleeve with at least two stents | A69-1 (RHOD000013); A69-4 (RHOD000016); A69-7 to A69-8 (RHOD000019-20) | A17-3 to A17-5 (CRBCP002349-51) | Abstract; Fig. 1; 4:15-16; |
| Sleeve is tubular shape and made of flexible material that is impervious to ingrowth of tissue therein | A69-7 to A69-9 (RHOD000019-21) | A17-3 to A17-5 (CRBCP002349-51) | Abstract; 4:16-19; 5:66- 6:4; 8:54-61 |
| At least two ring-like stents mounted on periphery of sleeve at spaced apart locations | A69-1 (RHOD000013); A69-7 (RHOD000019) | A17-3 (CRBCP002349) | Abstract; Fig. 1; 4:19-22; 5:61- 66 |
| Stents are expandable | A69-1 (RHOD000013); A69-8 (RHOD000020) | A17-4 (CRBCP002350) | Abstract; 4:24-26; 5:63- 66 |
| Stents are resistant to contraction back after being expanded | A69-8 to A69-9 (RHOD000020-21) | A17-4 to A17-5 (CRBCP002350-51) | Abstract; 4:26-28; 6:28- 32; 6:65-66 |
| Graft can bend within curved vessel | A69-7 (RHOD000019) | A17-3 (CRBCP002349) | Abstract; 4:29-32; 7:37- 50 |

Dkt. Nos. 173-71, 173-18.

While Ms. Dungan did not have the technical expertise to be able to compare the content of the draft patent applications to the issued patent, Dr. Silver reviewed all of the draft applications, the notarized patent application, as well as the final issued patent, and in crediting

⁷ All of these claimed features are present in claim 1 of the '154 Patent. For purposes of brevity, the entire claim language is not included and is instead summarized. However, the chart demonstrates where all the claimed elements of the final, issued patent are present, as identified by Dr. Silver. Dkt. No. 174-19, ¶ 43.

Ms. Dungan’s testimony, he opined that these earlier non-notarized drafts “confirm that Dr. Rhodes had conceived of *each and every limitation* of the invention of the ‘154 Patent *as of late March or early April 1990.*” Dkt. No. 174-19, ¶ 43 (emphasis added). This was not the result of an “unsupported and conclusory” opinion as Cook alleged. *See* Dkt. No. 196 at 5-6. Instead, Dr. Silver, as one skilled in the art of stent graft design, reviewed each of the draft patent applications, compared them to the final draft, and then compared those drafts to the issued ‘154 Patent. Dkt. No. 174-19, ¶ 36-40; 43. This combination of testimony and supporting documentation is precisely the type of evidence that creates a genuine issue of fact for conception. *Douglas Dynamics*, 745 F. Supp. 2d at 884; *Suncast Corp.*, 1999 U.S. Dist. LEXIS 15222, at *66; *Kimberly-Clark*, 2012 U.S. Dist. LEXIS 167942, at *22-23.

Given the fact there were roughly 200 exhibits combined in the parties’ briefing, it is understandable that some of the finer details of Dr. Rhodes’ conception story were missed. However, there was substantial documentary evidence (not to mention testimony) that demonstrated a fact issue regarding whether Dr. Rhodes or Dr. Lee invented the subject matter of the ‘154 Patent first. As such, that issue should be decided by the jury and Endotach respectfully requests reconsideration on this point. *Douglas Dynamics*, 745 F. Supp. 2d at 884; *Suncast Corp.*, 1999 U.S. Dist. LEXIS 15222, at *66; *Kimberly-Clark*, 2012 U.S. Dist. LEXIS 167942, at *22-23.⁸

⁸ While Cook argued that Dr. Lee actually conceived of his invention in May of 1989, the Court found that Dr. Lee’s conception date was not until April 24, 1990. Dkt. No. 285 at 28-31. As noted in Endotach’s summary judgment briefing, there is no evidence that could support that Dr. Lee conceived of a central element of the ‘154 Patent’s invention – a single membrane sleeve embodiment – prior to that date, as Dr. Lee admitted in his deposition. *See* Dkt. No. 173-67 at 71:16-72:11 (identifying Figure 8, the single membrane embodiment, was not present in the patent disclosure or until the endorsed patent application on April 24, 1990). Therefore, Dr. Lee’s original “paper” is irrelevant to the Court’s analysis here. As such, Dr. Rhodes’ conception came before Dr. Lee’s.

B. Endotach Provided Unchallenged Evidence of Reduction to Practice and Diligence

Based on the above evidence, Dr. Rhodes was the first to invent the subject matter of the ‘154 Patent. In doing so, as long as Dr. Rhodes demonstrated diligence in his reduction to practice, even if his reduction to practice came after Dr. Lee’s, then Dr. Rhodes would be awarded priority. *See Stamps.com Inc. v. Endicia, Inc.*, 437 Fed. Appx. 897, 907 (Fed. Cir. 2011).

Endotach presented unchallenged evidence that Dr. Rhodes “exercised reasonable diligence in reducing [his] invention to practice.” *Id.* Specifically, Endotach provided a detailed history of all the steps Dr. Rhodes took between December 5, 1989 and August 15, 1990 (when the patent application was filed) to reduce his invention to practice. *See* Dkt. No. 174-19, ¶¶ 38-41. Among the steps that Dr. Rhodes took (as substantiated by documentary evidence) during that time period include: (1) meeting with experts in the stent graft field to discuss his potential new design⁹; (2) finding and retaining patent prosecution counsel¹⁰; (3) conducting a prior art search¹¹; (4) getting his sketches put into a form that could be used in the patent application; and (5) working with his prosecution counsel to finalize the application and drawings that would eventually become the ‘154 Patent.^{12, 13}

Cook did not dispute this evidence in its motion or reply brief. *See* Dkt Nos. 153, 196. Therefore, as long as Dr. Rhodes conceived of the invention first (as shown above), then Dr.

⁹ Dkt. No. 173-30, Dkt. No. 148, Z.Exh. 49, Dkt. No. 173-65 at 260:25-261:10; Dkt. No. 173-66 at 102:11-24.

¹⁰ *See* Dkt. No. 173-65 at 102:16-22; *See* Dkt. No. 148, Z.Exh. 40 at Entry No. 155; A27.

¹¹ *See* Dkt. No. 148, Z.Exh. 40 at Entry No. 155; Dkt. No. 173-28; Dkt. 161 at 1; Dkt. No. 148, Z.Exh. 40 at Entry No. 113; Dkt. No. 173-3 at 7-8; Dkt. No. 148, Z.Exh. 40 at Entry No. 55; Dkt. No. 173-21; Dkt. 136 at 6; Dkt. No. 148, Z.Exh. 40 at Entry No. 110; Dkt. No. 173-26.

¹² *See* Dkt. No. 148, Z.Exh. 40 at Entry No. 54; Dkt. No. 173-20; Dkt. 136 at 5-6.

¹³ A full listing of all of the documentary evidence supporting Dr. Rhodes diligence for reduction to practice can be found in Dkt. No. 174-19, ¶¶ 41.

Rhodes was entitled to priority, and at worst, presented a fact issue for the jury. *Stamps.com*, 437 Fed. Appx. at 907; *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1577 (Fed. Cir. 1996).

III. CONCLUSION

The record summary judgment evidence demonstrated Dr. Rhodes conceived his invention prior to Dr. Lee. This evidence was not limited to Dr. Silver's opinion, or only proof for "several...elements" of the invention. Instead, for the combined issues of conception and reduction to practice, Endotach provided the testimony of four non-inventor witnesses, along with 20 separate, corroborating documentary exhibits that demonstrated Dr. Rhodes' conception and reduction to practice of his invention.¹⁴

This is not a case where an inventor testified in his own interest and without support in order to establish an earlier conception date just to swear behind a piece of prior art. Instead, the 20 exhibits lay out a detailed history of when Dr. Rhodes came up with his invention (prior to the allegedly invalidating Lee patent application) and how he worked on it consistently through the filing of his patent. Dr. Silver analyzed all of this evidence as one skilled in the art, compared the prior draft patent applications to the issued patent and opined, unequivocally, that all of the elements were present in late 1989 and early 1990.

Such evidence cannot be weighed at the summary judgment stage. As one court within the Seventh Circuit held: "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Here, Endotach's evidence must be believed as the non-movant. Thus, Endotach respectfully requests reconsideration of the invalidity portion of the Court's September 5, 2017 summary judgment order, find that issues of fact remain regarding

¹⁴ The 20 exhibits are identified in Dr. Silver's declaration, in paragraphs 36-43, and throughout Endotach's responsive briefing.

the alleged invalidity of the '154 Patent and to submit the issues infringement and invalidity to the jury for resolution.

Dated: October 2, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2017, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Indiana, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Glenn S. Orman