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Deanne Maynard (00:00):

May it please the court. My name is Deanne Maynard, and I represent defendant, appellant NuVasive. And I'd like to reserve five minutes of time for rebuttal. The district court, fundamentally misapplied basic trademark law resulting in a litany of highly prejudicial errors that culminated in a $60 million verdict and the cancellation of NuVasive's federal trademark registrations. Among the many errors, the district court made three legal errors related to use. First, the district court wrongly believed that prior use alone was enough to establish trademark rights, but NNP had to prove that they continued to use the same mark on the same goods until the time of trial. Second, the district court wrongly believed that prior use was enough to establish nationwide rights. And so therefore he didn't require the jury defined where, if anywhere, NNP had adequately penetrated the marketplace to establish trademark rights. And finally, the district court wrongly believed that use had to be disclosed to the trademark office and failure to do so was fraud.

Deanne Maynard (01:15):

And so therefore, it did not require the jury to find that the declarance had a subjective belief that NNP had clearly established rights superior to NuVasive's. And all of these errors among others culminated in the $60 million verdict, which is contrary to law because under the statute, trademark verdicts are to be compensatory and not punitive. And under this court's law, can't be windfall, which here it certainly is where in NNP, in its most profitable year ever, only made $220,000. And now they've been awarded $60 million. I mean, this isn't a case where every product NuVasive sold would have been sold by an NNP. It isn't a knockoff case. It's just a name. So if I could start with the first legal error, because the first legal error about use requires judgment as a matter of law for NuVasive on the trademark infringement claim. And then that also sets aside the damages number. NNP discontinued use of the Neurovision SE mark in 2007, Dr. Ray, so conceited at trial. Since that time they've labeled their product with a different mark; they changed the mark to Nerveana. Their only basis here in this court to claim continued use is their use of Neurovision, the word Neurovision, in a totally different mark, the company name, Neurovision Medical Products. That, as a legal matter under this court's precedent, is not continued use of the different mark Neurovision SE–

Judge (02:59):

Counsel, I've looked at the—I looked at the cases that were cited there. They're very interesting. The one the movie buff cases I think it was a particularly interesting example, but Neurovision is not exactly like putting together the words, movie buff, both of which are good English words, commonly used, put together to, to describe a concept. Neurovision is much more like Xerox. It's a unique name, it's a made up word. And so it's more identifiable if somebody said I'm a Xerox buff and then somebody else copied that you would say, well, wait a minute. Why are you taking Xerox's name? It's not like you've been using, you know, Harvard or Cambridge in your name things that evoke a warm, fuzzy feelings in our intellectual centers but are commonly used. Neurovision's, a made up word. So if they're still using Neurovision, doesn't that show, even if they're using with a different word behind it?

Deanne Maynard (04:03):

No, your honor, for, for two reason. One, just to talk about your point about the Brookfield case, the Brookfield case and other part of the decision says, movie buff is a made up word and it doesn't appear in the dictionary. So to the extent one's going to draw an analogy. I think the analogy is still apt here, but, more importantly, as a legal matter, the standard for tacking is extremely strict. As the court says in the barks have to be virtually identical. And in one industry's this court noted, the only case that could find were tacking had been allowed is where someone had added an apostrophe to the word Hess. And so in other circuits that the standard is the same. So, for example, in *Van Dyne-Crotty,* the federal circuit, which has a lot of experience what trademark law says that the both marks have to be considered in their entirety.

Deanne Maynard (04:51):

And it expressively rejects the notion that you look only at the strong words, which I think is the question that you're asking. That's not the task that, for tacking, what you look at is the mark in its entirety and *Elko*, which is a case from a predecessor to the federal circuit. So it was also binding law and the federal circuit says that the same point, you don't just look at the distinguishing feature. And so it is true if we're tacking purposes, they can't claim continued use of Neurovision. Even if one thinks that Neurovision standing alone was the mark that they previously used. That's not sufficient. They can't tack their current use of a different mark, Neurovision Medical Products, which is added words to it. It's not the same mark when you look at it as a whole, in order to clean continued use.

Deanne Maynard (05:42):

And that lack of continued use disposes of their trademark infringement claim. They have no trademark infringement claim. It also disposes of the damages claim here, which was based solely on the trademark infringement claim, because the only claim they made was one for lost profits, which one has, under the statute, you have to make as a trademark infringement matter. So, if the court were to find that they're discontinuance, as I think the court should, is clear on this record, no reasonable juror could have concluded they continued to use the mark that entitles NuVasive to judgment as a matter of law and outright—

Judge (06:18):

Is it required that they continue to use the mark on the very product that said issue this final device? Or can they use mark on another button device?

Deanne Maynard (06:33):

In order to continue use, your honor, as a legal matter, they have to continue the exact same mark on the ex—on the same product. Now the spinal monitor, just so the record's clear, the spinal monitor, the monitor used by spine surgeons is my client's product—

Judge (06:48):

Oh, okay.

Deanne Maynard (06:48):

NuVasive.

Judge (06:50):

So their—

Deanne Maynard (06:51):

And their—

Judge (06:51):

Is for what pa—

Deanne Maynard (06:53):

Ear nose and—

Judge (06:53):

And throat.

Speaker 1 (06:55):

Ear, nose, and throat doctor.

Judge (06:56):

Okay, alright.

Deanne Maynard (06:56):

Yes, your honor. And so that is an important point too, in the district court it's continually cut off our attempts to prove the difference between our products, which would have been highly relevant, both for the Sleekcraft factors.

Judge (07:08):

Well right, and it seems like he didn't consider this the whole likelihood of confusion issue properly, given that they were different products and different markets. And I'm not sure you haven't got all that evidence in.

Deanne Maynard (07:21):

We didn't, your honor. In fact, that's another separate claim of ours, which he completely, and [inaudible] repeatedly cut off our efforts saying this is not a patent case. This is not a patent case. This is trademark. This is just about a name. But that misses the fundamental point about trademark. Trademark is not just about a name, it's about a name and association with a particular product. And so it could very well be that one can use the same name on one product, and someone else can use the same name on a different product. And both people can have their marks exist simultaneously. So, but you need not get to the Sleekcraft problem. If you find, as I think you should, that there's not continuous use here because—

Judge (08:01):

I don't know if we can really find that. Because It seems like there's a—it's a question for the jury. I mean, or is it undisputed that they stopped using the mark in connection with the ear, nose, and throat nerve spotter.

Deanne Maynard (08:17):

They testify--Dr. Ray, who who's the inventor of their machine, conceded that since 2007, it marked six product with a different name, Nerveana. And this is in the excerpts that record 125 and 129 to 130. So the fact that they mark their products with a different name is conceited. They have changed their product name and their briefing here relies on the use, their current use, of their company name, Neurovision Medical Products. So turning to the fraud on the PTO claim that the judge made a similar legal error with

respect to use. It's quite clear in this court that every known use need not be disclosed to the trademark office. That's also the law in most other circuits. So yet nevertheless, the district judge here instructed the jury and allowed them to find fraud based on the wrong [**inaudible**]. That the judge told the jury that the trademark law requires disclosure of use.

Deanne Maynard (09:31):

And we know that caused prejudice here because the jury in its deliberations sent out a note to the judge, "Your honor, we're trying to find where on the trademark application, it requires disclosure of prior use." And over our objection, the judge responded quote, "the law of trademark requires disclosure of prior use at ER 56." And then went on to say to us, to counsel, "we'll see if that is the law or not the law." Well, that has not, that is not the law. It wasn't the law when he said it has now been the law. We cited to him recent authority from this court Hannah Financial that held that wasn't the law right before he told the jury that was the law. And so that infects the entire, I mean, I recognize you usually give some deference that juries fines, but here where they're given the completely wrong legal framework in which to decide the questions, you really can't give them any deference here. They were told that the wrong falsity was fraud. They were not told that the declarance had to have a specific intent to mislead the patent office. And so those two things together require setting aside the fraud verdict, and at least a new trial on the fraud claim. Although there's really inadequate evidence on the record here that anyone at NuVasive had knowledge of their clearly established rights, which—

Judge (11:04):

Well, I'm a little concerned about the evidence that where the vice president of NuVasive submitted the, section 510 K form to the FDA to expedite the product, it's product approval and describe the product is substantially equivalent to the Neurovision SE. So it shows some knowledge about the product and the use of the name in connection with, you know, an application to the FDA. And then moves forward and files with the in contestability, before the patent office later. So somewhat at odds.

Deanne Maynard (11:45):

Different people made those filings.

Judge (11:48):

I know but aren't, they all attributable to the corporation because the corporation's the one who is claiming the right to the mark?

Deanne Maynard (11:56):

The declaration requires the trademark oath requires to the best of the verifiers knowledge and belief. No other person has the right and courts that look at that, look at the declarance belief, but the court need not decide that question in order to reverse here, because the judge still told the jury, even if you—

Judge (12:22):

I understand that, and that's what I'm saying, why I think that, that this is a question in fact, it's not something we can say.

Deanne Maynard (12:28):

At a minimum new trial would be required. So they do point to evidence that there were some people within the company who knew of the name Neurovision on a different product, but that—

Judge (12:42):

It seemed like many people were using the name Neurovision.

Deanne Maynard (12:47):

In the United States.

Judge (12:49):

Yes.

Deanne Maynard (12:49):

Yes, your honor. And that's common in trademark. And it's important to understand that it's not a falsity or fraud on the patent office to check that the box that you don't believe anyone else has clearly established rights. If what you mean is in this space. So we were applying for a trademark in the spine space, and it isn't true that every time you turn out to be wrong and you subsequently might lose a case on likely to confusion later, that that means you lied. But beforehand, I mean, it means so the standard for setting aside for fraud on the patent office is a much tougher than the standard for ultimate likelihood of confusion of the two marks. So, but at a minimum, your honor, even if one thinks that some people in the company did know of the name at a minimum new trial will be required because the jury was improperly instructed.

Deanne Maynard (13:41):

If the court doesn't set aside a liability ruling, there are a number of problems with the monetary award as well. The judge excluded our expert evidence on the very point on which the law gives us the burden of proof, which is to prove the cost and the amount of our profits that's not attributable to the name. So he excluded not only as we were discussing earlier, your honor, not only did he exclude our expert who was going to testify that with this medical product and in his expert report is in the record in and around ER 499, he was going to testify that with this kind of medical product and the kind of support that you give within, and the kind of advice that you give with it, and the kind of instructions that you give with it then in, and it's the way that it works is the reason spine surgeons would buy it, not because of what you call it.

Deanne Maynard (14:42):

And the only thing that they're entitled to would be any profits that NuVasive has that are attributable to what we've called it, but their product does something entirely different. And what we've called this medical device has very little to do with anybody's decision to purchase it. And our expert would have testified that in his opinion, only 2% of any profits would have been attributable to the name yet the judge wouldn't let us put that in. And he did, and it wasn't an abuse of discretion standard that should apply to that decision could because he aired as a matter of law and concluding that this report was not a proper rebuttal report.

Judge (15:18):

So can you address your request for re-assignment? What is that based on to another judge?

Deanne Maynard (15:24):

Your honor, there are two reasons I think for reassignment here. Under this court's case law, you will reassign if a judge has continually expressed an erroneous view, an adamantly held view that suggests that they will not be able to set that side up on remand. And I think that is clearly met here repeatedly throughout the trial, despite our citation of this court's decisions that are clearly on point and clearly hold otherwise, he continued to rule contrary to this court's decisions. And secondly, then he continually shut down our clients attempt to defend itself with derogatory remarks of my client's trial counsel.

Judge (16:08):

Were you trial counsel, who is trial counsel?

Deanne Maynard (16:11):

My partner, Arturo Gonzalez, is trial counsel. And he repeatedly by name said, Mr. Gonzalez this, and Mr. Gonzales that, and shut him down in a derogatory way. This is not a patent case. The jury can read Mr. Gonzalez, are we going to really go on for pages and pages? This is not a patent case in ways that were both legally mistaken and then very personal to the lawyer representing my client before. And so, yes, your honor, we would ask that if you do find the need to remand that you would send it back to someone else. I'd like to reserve the balance of my time.

Peter Ross (16:51):

Good morning, Peter Ross for Neurovision Medical Products. I'd like to start out talking about the trial court's decision to cancel NuVasive trademark registrations. Because if that decision is upheld, a whole number of interesting consequences, follow. The decision whether or not to cancel the trademark is by statute solely one for the court, the jury instructions are not relevant. It's the judge's determination. And this court reviews the trial court's decision solely for abuse of discretion. And here there was no abusive discretion. To understand the fraud, I think it's necessary to understand two facts that give this case context.

Judge (17:41):

Well Counsel, if in fact the judges got a misapprehension as to the law. I think their cases that whole, that there is an abuse of discretion.

Peter Ross (18:00):

That can be, but there's no evidence here before this court that the judge had a misapprehension of the law at the time—

Judge (18:09):

On any points?

Peter Ross (18:09):

Not on the fraud, certainly at the time he made the decision. The other side submitted a brief explaining a lot. We submitted a brief explaining the law. The judge looked at those briefs and concluded that he found the fraud standard was met. And in fact, here, the evidence of the fraud was overwhelming. And I think if I could take just two minutes, I could make that clear to this court that the two contextual facts are that Dr. Ray was the leading figure in the medical industry on nerve location technology. He'd come up with a very clever device that worked like the backup beepers on an automobile. When the knife gets close to a nerve, the machine starts beeping faster and faster warning the surgeon. And Dr. Ray crisscrosses the country, he's lecturing at hospitals, conventions, trade shows, conducting clinical studies, publishing articles in learning journals, calling on doctors and hospitals and acquainting everyone with his Neurovision device. He's not some crackpot toiling away in obscurity. He's the leading figure. Second contextual facts fact is that NuVasive's entire business plan—

Judge (19:35):

Counsel, before you get on that, he does appear to have had a very innovative idea and but it doesn't appear that it really caught on. If you look at the number of sales of these machines and he loaned them out, he went to a lot of places, and it looked like there may have been some glitches in the way that it actually operated and the people didn't like it. How many of these machines did they actually sell?

Peter Ross (19:57):

He sold, I believe one or two, but to put that in context, that wasn't the business model. The way these

machines work is you lend the machine and you sell people the electrodes. The electrodes aren't that expensive, but he's selling millions of dollars' worth of electrodes year by year. And to show exactly how that worked, NuVasive—

Judge (20:22):
What was the price of the sales on the electrodes?

Peter Ross (20:28):
I don't have the exact figure.

Judge (20:30):
Okay so that's not in the record?

Peter Ross (20:31):
It must be in the record. I just don't have—

Judge (20:34):
Okay. Do you have any idea of what the profitability was?

Peter Ross (20:36):
Of the electrodes?

Judge (20:36):
Year by year for the company.

Peter Ross (20:39):
Uh—

Judge (20:41):
I—we got that. We got the figure $200,000 from the other side was your best year, or do you dispute that?

Peter Ross (20:46):
No, I don't dispute that.

Judge (20:47):
Okay. Your best year was $200,000 and that would be the electrodes, the machines, everything.

Peter Ross (20:53):
Yes. And so to put that in—

Judge (20:56):
To put that in context, counsel, I'd say that doesn't sound like very much.

Peter Ross (20:59):
Okay. I—

Judge (21:01):

Especially when you have a $60 million verdict.

Peter Ross (21:03):

I understand what the court is saying, but to put it in context, NuVasive had $203 million worth of sales and they sold 20 machines. They were doing the exact same thing we're doing. They're lending them out and they're selling a whole lot of electrodes and that's how they made their profit. And to understand exactly why that figure, the damage figures appropriate, I'd like to talk about this second contextual fact, which is that NuVasive's, entire business model depended on this new nerve location technology. They smartly realized that the wave of the future for surgeries, minimally invasive surgery, we can operate on one's heart or one's uterus or knee through a tiny hole. But we couldn't do that with back surgery because of the danger of cutting nerves. So what NuVasive did is they recognize that this new nerve location technology could be used to punch a tiny little hole through the muscle and convert back surgery into minimally invasive surgery. So this was a very, very important part that their whole business model depended on it. So here's the evidence of the fraud. NuVasive is startup company. They have zero products in $0 in sales.

Judge (22:36):

Wait, before you go there. The question of fraud though, is if question fact for the jury, right?

Peter Ross (22:40):

Well, this was a question for the judge.

Judge (22:43):

No, it's not. Under all the case law leading treatise of, I mean, it's a question of fact that the jury, right? Did he instruct the jury on this?

Peter Ross (22:55):

He did. And there was an advisory opinion from the jury, but no one sought fraud damages. It's a question for the jury if we were getting fraud damages—

Judge (23:06):

The Court orders cancellation based on a finding of fraud by the jury.

Peter Ross (23:10):

The court orders cancellation based on its own finding of fraud.

Judge (23:17):

I don't think that's right.

Peter Ross (23:17):

Well, that's it. That's exactly what the statute provides that the court has to determine whether or not to cancel these marks.

Judge (23:28)

I'm sorry what is the language of the statute?–

Peter Ross (23:33)

The language I'm focusing on is just that it's the courts,

Judge (23:35):

Which statute?

Peter Ross (23:36):

The 1065.

Judge (23:49):

Okay. You [inaudible].

Peter Ross (23:52):

So the court has plenty of evidence and the court does say expressly that the jury found fraud, and I agree with that determination. The court was making its own determination as it was required to do.

Judge (24:08):

Was the jury properly instructed on the prior use question.

Peter Ross (24:15):

I think as in an overall basis that the jury instructions were proper and that justice was served here on an overall basis. But if—

Judge (24:30):

What does that statement mean? Was the jury properly instructed on the question of the prior right as opposed to simply prior use?

Peter Ross (24:40):

On prior right. Versus—

Judge (24:42):

Right, right. The statute--it requires disclosure of knowledge of someone's prior rights to use the mark.

Peter Ross (24:56):

Oh.

Judge (24:56):

Not prior use.

Peter Ross (24:57):

I understand what the court is saying now. It is asking, and in my view, within the context of the facts of this case, the instructions were proper on an overall basis.

Judge (25:10):

Beyond the instructions, I'm looking at question four on the jury ballot. Did defendant fraudulently conceal that it knew of plaintiff's prior use. And that doesn't seem to be what the statute says. That's not what 1051, A3D says. It asks whether the person has the right to use, that's different from prior use. So it doesn't even look like the question that's put to the jury much less the instructions, but the question they were asking yes or no, doesn't look like it's been properly formulated.

Peter Ross (25:45):

Well, I don't believe there was an objection to that question going into the—

Judge (25:50):

It may be plain error, counsel, if there was not an objection, but I think there probably was an objection.

Peter Ross (25:57):

In any event, the decision in my view was one for the court, not the jury.

Judge (26:05):

Okay but if the court has formulated the question wrongly for the jury, wouldn't that be the best evidence that the court didn't understand what the law required?

Peter Ross (26:13):

Well the jury, the verdict form was submitted by the parties and argued. And I don't recollect that there was an objection to the form of that question. So in that case, it would be an invited error if it were an error.

Peter Ross (26:36):

And then what we have here is a situation where there are a handful of executives in NuVasive's company, one NuVasive executive Corbett Stone contacts Dr. Ray and attends a sales pitch meeting with Dr. Ray son, the NuVasive of engineering staff, including a Brian Keller, acting under Corbett Stone's direction, borrows Dr. Ray's Neurovision machine and conducts animal testing. Another NuVasive executive, Steve Ritzler is in charge of seeking approval from the FDA. And he says, "please approve us because our machine is just like Dr. Ray's Neurovision machine." Their in-house counselor Spangler does a trademark search and finds Neurovision.com, a website affiliated with an address and a phone number for Dr. Ray. Board member Lacob gets a business plan from Dr. Ray for his Neurovision machine and Simmons, another NuVasive executive, says he ran the Neurovision name by everyone on the management team, Stone-Keller and Ritzler don't say, well, we didn't bring up Dr. Ray and his Neurovision machine. They say, we don't remember what we said. And the guy who signed the first declaration with the PTO, the patent and trademark office, was at the meetings. He's there by name listed among the attendees. Clearly an inference can be made that the declaration was fraudulent, the trial judge's decision to cancel the marks–

Judge (28:24):

What was the evidence of intent to deceive the patent office and was the jury instructed that they had to find that?

Peter Ross (28:30):

The evidence of intent was the fact that Dr. Ray is the leading figure in this new field of nerve location. It's the heart of their business plan. Everyone's looking at Dr. Ray, they're borrowing the machine from him to do animal testing. They're looking at demonstrations with him, they're comparing their machine to his neural vision machine to get registration. Everyone's at the same small meetings. And it's impossible to believe that they didn't understand that this guy who is leading figure in the industry—

Judge (29:07):

Right but what was the evidence that they intended to deceive the patent office as to someone's prior right?

Peter Ross (29:14):

Because they well know about Dr. Ray's machine—

Judge (29:17):

Right to the mark or his, I mean, the machine is something different than his right to the mark.

Peter Ross (29:22):

I guess the machine has the mark right on it. And they say they use the name Neurovision in their applications to the FDA.

Judge (29:32):

I don't even know if you've established prior right to use the mark if you've only sold one or two.

Peter Ross (29:37):

Well what we did is we established that we marketed this all over the country, and it was used all over the country. They uh—

Judge (29:51):

So how many of these machines were out, had been loaned out?

Peter Ross (29:54):

They were lent out at, I think at about 20 at a time, at any single time.

Judge (30:02):

Did the electrodes have the word Neurovision on the many place, or if they have anything in their literature that said only to be used with the Neurovision SE?

Peter Ross (30:09):

They didn't have the word Neurovision on the electrodes. And the testimony trial was you couldn't print it on the electrodes—

Judge (30:17):

Was it in the literature?

Peter Ross (30:17):

It was in the literature that accompanied every electrode sale.

Judge (30:21):

Where were the 20 machines? What parts of the country?

Peter Ross (30:25):

Well there was a pin chart that was created that showed prior use in 25 states. And that was the summary of the documentary evidence, invoices letters, programs for lectures.

Judge (30:39):

If there are only 20 machines on loan, how could they be in 25 states?

Peter Ross (30:42):

Well, because we're doing this for 10 years before they ever started in business.

Judge (30:49):

So the machines were migrating from state to state?

Peter Ross (30:53):

From state to state. And that pin charts is the summary of the documentary evidence. Dr. Ray testified that he spoke to over 1000 doctors in hospitals about his Neurovision device. He gave 200 to 250 trial demonstrations at various hospitals and clinics. And he performed over 600 surgeries with his partners, showing people the use of his Neurovision machine. It was all over the country. And it was before this device was ever used by NuVasive, or the name was ever used by NuVasive. On the other hand, NuVasive with all its sales of electrodes and its lending out of far greater number of machines for the more popular back surgeries proved prior use nowhere in the country. There's no evidence that they ever used the name in any state before we did.

Judge (31:53):

Now, how can you show continuous use if you changed the name in 2007 to Nervera? Is that what you changed it to?

Peter Ross (32:04):

Let me start out by saying that the Neurovision SE machines were not taken out of circulation. The evidence at trial was we continue to use those machines through the date of trial, with new machines that we made. We stamped Nerveana—Nirvana, I guess—on the front and Neurovision Medical Products on the back of the machine. The machine, and the electrodes were all continually sent and were sold with literature that described the Neurovision system as including the machine, the electrodes, the cutting implements, and everything that was needed to use this Neurovision system and their Neurovision was always used by itself. What happened here is analogous in my view to the following, we manufacture one car, we call it the Ford model A. Then we name the whole company, the Ford motor company, and every car has Ford motor company stamped on it.

Peter Ross (33:14):

It's not discontinuing use of the mark. It's expanding use of the mark. And here's an interesting thought on that subject that if the model number SE is considered to be part of the mark, which the Brookfield case seems to indicate it would not be, the NuVasive actually never used its registered mark. They registered the mark Neurovision, but they use Neurovision JJB. So if their argument were accepted, then NuVasive's registration would be subject to cancellation for non-use since they never used the mark. Judge Bybee to get to what I understand your honor's issue to be concerning their $60 million in profits versus our smaller profits in game plan. I would liken it to this example; some crazy guy uses a waffle iron to make soles for running shoes. And they become very popular and he puts a little swoosh on those running shoes. But it's only among a very small group of the populace that happens to do long distance cross-country running.

Peter Ross (34:40):

And it turns out that the greatest use of that little swish mark is on a whole line of athletic equipment that Nike successfully sells, and it turns into a multi-billion dollar company. Here, Dr. Ray was using his mark Neurovision in exactly the way NuVasive was using it for the nerve location technology, but for a very small specialty in the medical profession. It was the head neck surgery and their object was to avoid the facial nerve and the ODA and the recurrent laryngeal nerve. Using that device for back surgery turned out to be the equivalent of putting the Nike swoosh on clothing and other athletic apparel. That was the market where a huge profit could be made. But because at Dr. Ray is a little guy and has a little business—

Judge (35:39):

Did he have, was he? But he was a nose and throat specialist, right?

Peter Ross (35:47):

Yes.

Judge (35:47):

And he wasn't going to go into and do back surgery?

Peter Ross (35:49):

Well, actually his device, and there was evidence of this in the record had been used in back surgery.

Judge (35:55):

Did he have, did he have a patent on the device?

Peter Ross (35:56):

He had a patent on the electrodes. They came up with different electrodes.

Judge (36:01):

He hasn't alleged here that they're in violation of the patent on his—

Peter Ross (36:04):

No.

Judge (36:04):

On his process.

Peter Ross (36:05):

No.

Judge (36:05):

So this is really quite different. This is your waffle sole example, somebody, the guy for the waffle soles claiming not that Nike's making waffle souls, but that he is entitled for getting profits for all of the shirts that they're making and for the batting helmets that they're making and bats.

Peter Ross (36:27):

Yeah. And under the trademark law, all we have to do is prove the profits they earned from use of the mark, if there's likelihood of confusion. We prove likelihood of confusion because their own records show that their right email saying we're getting calls for all kinds of people who want head and neck surgery. We don't even do that.

Judge (36:49):

That's not sufficient for, I mean, he didn't include evidence. He didn't take the exclude evidence on the sleep craft factors would you, they have to be considered. That's one aspect is the evidence of actual confusion. That's not the end of the inquiry.

Peter Ross (37:07):

May I answer that question? I know that I have—

Judge (37:12):

Yes, of course you may.

Peter Ross (37:12):

Okay. On the sleek craft factors and that evidence that's reviewed for abuse of discretion. I think I know that all that evidence was cumulative in the record. It was indisputably in the record that Neurovision Medical marketed mainly to head and neck surgeons. It was indisputably in the record that NuVasive marketed primarily to back surgeons. It was indisputably in the record that doctors are sophisticated. Everyone understood these points and they were argued to the jury by the defense. The only thing that happened is that the judge said we've heard this let's move on. And was that an abuse of discretion? I think not. I think that was a common instruction based on the evidence in the case. And with regard to the technology of the products, it would be to return to my Ford example. It'd be like me putting out a Ford automobile and then defending on the trademark saying, well, my cars are fuel injected as opposed to yours, which have a carburetor. The judge was, I think, making a reasonable decision, not abusive discretion saying that's not the inquiry—

Judge (38:35):

But in your Ford example, that Ford is a recognizable mark and people have come to associate, you know, high quality cars over a long period of time. So if you put, if I went out and built a car and then stuck a Ford emblem on it, somebody's going to come along and buy it because it's a Ford. Now, is there any evidence here that somebody would have purchased Neurovision's? I'm sorry. NuVasive product, because it said Neurovision. Not because it was a machine that really helped in back surgeries. I mean, it just didn't seem like your client's product had gotten sufficiently out there that anybody was going to mistake somebody else's product for that.

Peter Ross (39:19):

Well, that was actually the jury's determination based on the totality of the circumstances. And there was plenty of evidence in the record of actual confusion, much greater than likelihood of confusion, but there's plenty of evidence including their own memos saying, well, this is going to get confusing with two products that do the same thing with the same name and they are getting calls for our products. So there's proof that customers that thought they were going to get us were actually calling their company, looking for this head and neck product—

Judge (39:58):

This is one of those areas that go on the internet domain confusion, where soon as they figure out that, oh, that company makes the spine and I'm looking for the ear, nose, and throat it's over. It's like maybe a notion of initial confusion, but it does it really prove that there's a likelihood of confusions that should one would purchase NuVasive's product instead of yours.

Peter Ross (40:23):

Well, the initial interest confusion is actionable and—

Judge (40:28):

Only in the context of the internet and domain names.

Peter Ross (40:32):

I think that what happened here actually is they conducted their trademark search, which we know they did. They have $0 in sales, they're a startup. They know that Dr. Ray hasn't registered his trademark. So they just put the most recognizable trademark in the field on their product to get their company jump started. They need to convince surgeons that we have a nerve locating and avoidance device that will work, and they take the most recognized name in the industry and put it on their product with everyone's knowledge at those initial management meetings.

Judge (41:17):

All right. Thank you, counsel.

Peter Ross (41:18):

Thank you.

Deanne Maynard (41:25):

If I may just respond briefly, Judge Bybee. We did object to question number four on the verdict form at ER 258, starting out with respect to question number four, we have several objections to that one. It goes on for several pages. Some of it is, you know—hits the very point that it needs to be. The jury needs to be asked whether the two individuals who signed the trademark application knew that the plaintiff had superior or clearly established rights in the new revision SE mark, not merely prior use. Yet of course they weren't asked that, and they weren't told that was even relevant. We had made similar objections to the jury instruction starting at ER 265 on the same point. With respect to NNP sales, your honor, the number that I quoted, the $220,000, for their best year is available at ER 402 and the surrounding pages 386 to 405 will support the proposition that that was their best year. The records shows that they made only 35 of their machines total ever. There is no evidence as to where the machines were precisely loaned or to whom or for how long other than vague testimony saying we loaned them—

Judge (42:51):

By comparison, how many machines did your client make?

Deanne Maynard (42:55):

Your honor, I think there may not, this evidence may not be in the trial record, but it is in—I believe it is in the briefing with respect to the preliminary injunction. I think there's a number saying we've made 900 machines. And he's right that our business model is to loan the machine, but we sell many, many, many more products than just electrodes and not even that many electrodes. So—and he—and Dr. Ray testified on the 35 machines, your honor, that's a fact it can be found at ER 87 to 88 and ER 128 to 129. As far as the map to which he refers, Dr. Ray conceded that nearly all the thumbtacks represent electrode-only customers. And even then the map was show that there are no customers at all in 25 states and that in 15 additional states, there are fewer than three customers.

Deanne Maynard (43:50):

So it's just—I think on this record to pick up on a point you made your honor, that one could find no reasonable jury could find that they had clearly established rights for anyone to lie about. And that that would be a basis for judgment as a matter of law, but at a minimum, the errors in instructions would require a new trial. The one point counsel made is all they're trying to do is expand their mark from your revision to Neurovision medical products. Brookfield says, that's the one thing that we definitely know you can't do through tacking? You know, I would also like to note that we have a claim for latches here that I think is a very serious claim that the judge rejected on a legally erroneous basis. They knew for six years before they sued, if they had sued six years before they did, we would have been the unprofitable company that he has described us to be. And there's no way they would've gotten $60 million in damages

that actually should bar their ability to get any damages here. If your honors don't have any further questions.

Judge (45:02):

No, thank you.

Deanne Maynard (45:04):

Thank you.

Judge (45:05):

Neurovision Medical Products versus NuVasive is submitted, and we'll take up—