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JUDGE IN VIOXX CASES APPROVES ALL EXPERTS FOR BOTH SIDES TO TESTIFY

***In re Vioxx Products Liability Litigation*, MDL No. 1657, 2005 WL 3105326 (E.D.La. 11/18/05)**

The Vioxx cases have received nationwide media attention since their inception, with over 7,000 state and federal lawsuits already filed to date. All federal Vioxx suits have been consolidated for pretrial purposes only before Judge Fallon in the Eastern District Court of Louisiana. (See VIOXX CASES CENTRALIZED BEFORE JUDGE FALLON IN LOUISIANA'S EASTERN DISTRICT, March 2005 issue.) Of those, the first federal trial concerning Richard Irvin, Jr., and the role, if any, that Vioxx played in his death, began earlier this week in Houston, Texas.

Vioxx is a non-steroidal anti-inflammatory drug, developed by defendant Merck & Co., Inc. and approved by the Food and Drug Administration in the 1990s. Since its approval, Vioxx gained widespread acceptance among physicians treating patients with arthritis and other conditions causing chronic or acute pain. In 2001, Irvin, a 53-year-old man with severe lower back and hip pain, had been taking Vioxx for approximately one month when he suffered a heart attack and died. An autopsy revealed a blood clot in his coronary artery. Over three years later, Merck withdrew Vioxx from the market when clinical trial data indicated that the use of Vioxx increased the risk of heart attack and stroke. Plaintiffs, Irvin's surviving spouse, minor children, and estate, then brought this action alleging that Vioxx was a defective product, that Merck knew Vioxx was defective, and that Merck failed to warn Irvin of Vioxx's defective nature. Prior to the start of this week's trial, Judge Fallon ruled on a number of *Daubert* and *Daubert-like* motions concerning both parties' use of scientific testimony in Irvin's litigation.

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Both parties offered, and Judge Fallon approved, a myriad of experts for trial. The gist and subject matter of these expert's opinions are summarized below:

For defendant Merck:

- Dr. Thomas Wheeler: the cause and manner of Mr. Irvin's death; the role of Mr. Irvin's pre-existing atherosclerosis in his death; the role of hypertrophy of Mr. Irvin's heart in his death; the lack of evidence to link short-term use of Vioxx 25 mg with serious adverse cardiovascular events.
- Dr. Janet Arrowsmith-Lowe: Merck's interactions with the FDA and the company's communications with the medical community.
- Dr. Frank Lanza: Vioxx serves as an important treatment option for patients with a history of gastrointestinal complications.
- Dr. Merlin Wilson: Vioxx is a safe and effective treatment for pain and inflammation associated with rheumatoid arthritis, osteoarthritis, and other musculoskeletal disorders; Vioxx is an important medicine for physicians like him, in his patient practice, patients experienced fewer gastrointestinal side effects than on traditional medicines; the results of the VIGOR test were disseminated widely in the medical community starting in March 2000.
- Dr. David Silver: threshold for duration of 36 months; the naproxen hypothesis; alleged gastrointestinal safety relating to Vioxx; adequacy of labeling for Vioxx; specific causation as to the death of Richard Irvin.

For plaintiff Irvin:

- Dr. Winston Gandy, Jr.: Vioxx 25 mg increases the risk of blood clots in short-term use; Vioxx contributed to Mr. Irvin's sudden cardiac death.
- Dr. Wayne A. Ray: Vioxx increases the risk of heart attacks and heart disease; the magnitude of that risk; whether an increased risk could come from a use of Vioxx for less than 30 days.
- Dr. Benedict R. Lucchesi: a host of topics ranging from medical causation to an array of non-scientific issues such as advertising and drug pricing.
- Dr. Colin M. Bloor and Dr. Joseph L. Burton: the alleged role of Vioxx in Irvin's death
- Dr. Thomas Baldwin: Irvin's use of Vioxx for less than 60 days created an increased risk of sudden cardiac death; Vioxx led to the development of a blood clot, which ultimately caused a heart attack and the sudden death of Irvin.
- Dr. Richard M. Kapit: Merck's dealings with the FDA; its moral and ethical obligations to ensure the safety of Vioxx; Merck's motivation for competition in withholding information regarding the danger of Vioxx.
- Dr. John W. Farquhar: Vioxx causes cardiovascular disease, hypertension, and increased risk of heart attack throughout usage.

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Holding that the methodology used by each expert was proper regardless of the soundness of their conclusions, Judge Fallon permitted both parties' experts to testify without limitation, repeatedly emphasizing that the proper place to attack expert opinions is on cross-examination. Judge Fallon did caution a number of times, however, that the parties might wish to rethink their use of particular experts because of the overlapping and redundancy of testimony. Judge Fallon also reserved ruling on the testimony of certain experts regarding actions Merck should have taken or what Merck knew in developing and marketing Vioxx. Additionally, Judge Fallon generally ruled to allow testimony regarding whether 1) adverse thrombotic cardiac events occur only if Vioxx is ingested 18 months or longer; 2) Vioxx is the same as all NSAIDs regarding cardiotoxic effects; 3) Naproxen is sufficiently cardioprotective to explain excess cardiac risk in VIGOR tests; 4) Merck could provide risk information through labeling or marketing without prior approval of the FDA; and 5) Vioxx could cause an increased risk of thrombotic cardiovascular events.

Judge Fallon's rulings are extremely important to future Vioxx cases. First, because all federal Vioxx suits have been consolidated before Judge Fallon for pretrial purposes, we can expect his future *Daubert* rulings on expert testimony to be substantially identical to those in Irvin's case. Because the majority of issues will be the same across the federal cases, both sides may well utilize the same experts repeatedly, presuming they come across well in the courtroom. Of course, both plaintiff and defense counsel will likely whittle down their experts over the course of the litigation, and exchange some experts for others as they discover who is more effective and whose demeanor is superior before a jury.

—*Sarah B. Belter*

BOTH MANUFACTURER AND INSTALLER MAY BE LIABLE FOR CAMPER STOVE PROPANE LEAK

***Credeur v. Jayco, Inc.*, 2005-0294 (La.App. 3d Cir. 11/02/05), ___ So. 2d ___**

Emery Thibodeaux was tragically killed when he tried to light a cigarette in his camper and propane gas leaking from the camper's stove exploded. The family sued Atwood Mobile Home Products, Inc. ("Atwood"), the manufacturer of the stove, and Jayco, Inc. ("Jayco") the manufacturer of the camper. Both defendants filed motions for summary judgment. The trial court denied Atwood's request for summary judgment, citing issues of material fact re-

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garding possibly defective conditions present in the stove. However, the trial court granted summary judgment in favor of Jayco, the manufacturer of the camper.

Louisiana's Products Liability Act defines a manufacturer as, among other things, "[a] manufacturer of a product who incorporates into the product a component or part manufactured by another manufacturer." La. R.S. 9:2800.53. In light of this provision, Louisiana's Third Circuit Court of Appeal reversed the ruling of the trial court granting summary judgment in favor of Jayco. Writing for the court, Judge Saunders cited La. R.S. 9:2800.53 and held that Jayco, who installed the stove into its camper, should also be considered a manufacturer. Judge Saunders further held that the same questions about defective conditions in the stove that precluded summary judgment in favor of Atwood also precluded summary judgment in favor of Jayco.

—*Don A. Rouzan*

HARDWARE STORE LABELING BUNGEE CORD AS ITS OWN MIGHT BE LIABLE AS A MANUFACTURER

***Louviere v. Ace Hardware Corp.*, 2005-0259 (La.App. 3 Cir. 11/2/05) ___ So.2d ___**

In late 2001, Greg Louviere purchased a bungee cord from Handyman Ace Hardware that bore a price tag stating "ACE PRICE $2.95". Louviere used the cord to bind down a set of drawers on a piece of furniture in his pickup truck. When he stretched the cord, the secured metal end failed and caused the cord and hook to bounce back and strike him in the right eye.

He suffered injuries and sued Handyman Ace Hardware and its insurer, Transcontinental Insurance Company. The trial court granted a partial summary judgment in favor of Handyman Ace Hardware dismissing all claims except redhibition (liability of a seller of a product).

The Louvieres appealed claiming that the trial court erred in failing to find that a genuine issue of material fact existed as to whether Handyman Ace Hardware could be considered a manufacturer of the product within the meaning of the Louisiana Products Liability Act. Under the LPLA, a manufacturer is defined as a person or entity who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product.

Aside from the Ace price tag, there were no other labels on the bungee cord to indicate who manufactured the product. Based on that fact, the appellate court held that there was a triable dispute regarding whether the tag estab-

lished that Handyman Ace Hardware labeled the bungee cord as its own pursuant to the LPLA.

Accordingly, the Third Circuit reversed the partial summary judgment of the trial court and remanded the case for further proceedings.

—*Michelle D. Craig*

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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