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## Ladies and Gentlemen of the Jury

Molly Schwing

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## CASE BRIEF

### “LADIES AND GENTLEMEN OF THE JURY:

*Molly Schwing*

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard at this trial... Do not let bias, prejudice or sympathy play any part in your deliberations.”<sup>1</sup>

These are the words read to the jury members in the District Court of Brazoria County, Texas 23rd Judicial District read before they began deliberating the evidence set forth during a three week trial.<sup>2</sup> The jury panel of seven men and five women heard the story of a grieving widow named Carol Ernst.<sup>3</sup> Carol and her husband, Robert Ernst, lived in a smaller town of Angleton, located just south of Houston, Texas.<sup>4</sup>

Robert, fondly referred to as Bob, was Carol’s second husband.<sup>5</sup> Carol had divorced her first husband in the early 1980s and raised four children as a single mother.<sup>6</sup> Bob worked as a produce manager for Wal-Mart.<sup>7</sup> He led what most people would consider a healthy lifestyle; he was an active triathlete and marathon runner.<sup>8</sup> When Bob began having trouble with arthritis, Carol suggested that he see his physician and inquire about taking the prescription drug Vioxx for pain relief.<sup>9</sup> Bob acted on his wife’s suggestion and went to his physician seeking treatment for his arthritis. Bob’s physician gave him a prescription for Vioxx.<sup>10</sup>

After only eight months of taking the arthritis painkiller, Bob died suddenly of a heart attack at the age of fifty-nine.<sup>11</sup> Carol brought suit against Merck & Co, Inc. (hereinafter “Merck”), blaming Vioxx for

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<sup>1</sup> Charge of the Court, *Ernst v. Merck & Co., Inc.* (on file with author).

<sup>2</sup> Aaron Smith, *Jury: Merck negligent*, CNN Money, August 22, 2005, [www.money.cnn.com/2005/08/19news/fortune500/vioxx/](http://www.money.cnn.com/2005/08/19news/fortune500/vioxx/).

<sup>3</sup> Marc Kaufman, *Merck Found Liable in Vioxx Case*, WASH. POST, Aug. 20, 2005.

<sup>4</sup> Smith, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Smith, *supra* note 2.

<sup>10</sup> *Id.*

<sup>11</sup> Kaufman, *supra* note 3.

the 2001 death of her husband.<sup>12</sup> In court, Carol delivered an emotional testimony about coping with the tragic death of her husband.<sup>13</sup>

On September 30, 2004, Merck voluntarily withdrew Vioxx, its prescription medication for arthritis and acute pain, from the worldwide pharmaceutical market.<sup>14</sup> At the time the drug was removed from the market, over twenty million people had used Vioxx.<sup>15</sup> The withdrawal occurred upon the emergence of the results of a three-year clinical trial which evaluated the efficacy of Vioxx in preventing the recurrence of colorectal polyps in patients with a history of colorectal adenomas.<sup>16</sup> Evidence from the clinical trial showed patients had an increased risk of heart attack and stroke after eighteen months of taking prescription Vioxx.<sup>17</sup>

When Vioxx entered the pharmaceutical market in 1999, the drug became an overnight blockbuster. Vioxx pulled in \$2.5 billion in annual sales through over 100 million prescriptions and twenty million users.<sup>18</sup> This figure represented about one tenth of Merck's total revenue.<sup>19</sup> The withdrawal of Vioxx from the pharmaceutical market stunned Merck's economic position as it triggered a decrease in the Company's stock value by approximately one-third.<sup>20</sup>

At the conclusion of the trial of *Ernst v. Merck & Co., Inc.*, twelve jurors were asked to answer six questions.<sup>21</sup> These questions were complicated with explanations of various legal definitions and a requirement that all affirmative answers be based on a preponderance of the evidence standard. After only eleven hours of deliberation, the

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<sup>12</sup> Smith, *supra* note 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> A colorectal polyp is a growth that projects from the lining of the colon or rectum. Polyps of the colon and rectum are typically benign, but they may cause painless rectal bleeding. Over time and when left untreated, certain types of polyps, called adenomatous polyps, may develop into cancer. Richardf Epstein, *Pharmaceutical Innovation and Cost: An American Dilemma: Regulatory Paternalism in the Market for Drugs: Lessons from Vioxx and Celebrex*, 5 YALE J. HEALTH POL'Y & ETHICS 741, 742 (Summer, 2005).

<sup>17</sup> The study was multi-centered, placebo-controlled, double-blind study which began in 2000. The study monitored 2600 patients to compare results of the use of Vioxx verses a placebo. *Merck Pulls Vioxx on Cardiovascular Risk*, Mealey's Product Liability & Risk, Sept. 30, 2004.

<sup>18</sup> Smith, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Charge of the Court, *supra* note 1.

jurors returned a 10-2 verdict holding Merck responsible for Bob Ernst's death.<sup>22</sup>

The jurors were asked the following questions and gave the following answers:

"Was there a defect in the marketing of VIOXX at the time it left the possession of Merck & Co., Inc. that was a producing cause of the death of Bob Ernst?" The jurors answered yes.<sup>23</sup>

"Was there a design defect in VIOXX at the time it left the possession of Merck & Co., Inc. that was a producing cause of the death of Bob Ernst?" The jurors answered yes.<sup>24</sup>

"Did the negligence, if any, of Merck & Co., Inc. proximately cause the death of Bob Ernst?" Again, the jurors answered yes.<sup>25</sup>

After the verdict was read, Jonathan Skidmore, attorney for Merck, commented on this element of the verdict. He said, "We believe that the plaintiff did not meet the standard set by Texas law to prove Vioxx caused Mr. Ernst's death."<sup>26</sup> Merck claimed that Vioxx did not cause Bob's death. Specifically, defense counsel argued "there is no reliable scientific evidence that shows Vioxx causes cardiac arrhythmias, which an autopsy showed was the cause of Mr. Ernst's death, along with coronary atherosclerosis."<sup>27</sup> The company argued that arrhythmia, in particular, had never been linked to Vioxx in studies of the drug.<sup>28</sup> Thus, the result of Bob's Vioxx use was too attenuated to be a proximate cause of his death beyond a preponderance of the evidence.

The coroner who performed the autopsy on Bob's body testified during the trial. The coroner admitted that Bob may have died from a blood clot as opposed to the arrhythmia originally identified.<sup>29</sup> Furthermore, the coroner indicated that she was not aware that Vioxx could cause blood clots when the autopsy was performed.<sup>30</sup> Thus, she did not consider the blood clots to be a possible source of Bob Ernst's death.<sup>31</sup>

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<sup>22</sup> Kaufman, *supra* note 3.

<sup>23</sup> Charge of the Court, *supra* note 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Kaufman, *supra* note 3.

<sup>27</sup> *Id.*

<sup>28</sup> A NewsHour with Jim Lehrer Transcript, "The Vioxx Verdict," Aug. 22, 2005.

<sup>29</sup> Kaufman, *supra* note 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

After a finding of fault on behalf of Merck, the jurors continued to answer the questions in order to reach a finding on damages. Texas law provides that in an action where a plaintiff seeks damages, “the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.”<sup>32</sup> Thus, the jury instructions were carefully devised and formatted into relevant, yet separate categories. The jurors were asked, “What sum of money, if paid now in cash, would fairly and reasonably compensate Carol Ernst for her damages, if any, resulting from the death of Bob Ernst?”

a. For “pecuniary loss sustained in the past,” the jurors awarded \$100,000.<sup>33</sup>

b. For “pecuniary loss that, in reasonable probability, will be sustained in the future,” the jurors awarded \$350,000.<sup>34</sup>

c. For “loss of companionship and society sustained in the past,” the jurors awarded \$2 million.<sup>35</sup>

d. For “loss of companionship and society that, in reasonable probability, will be sustained in the future,” the jurors answered \$10 million.<sup>36</sup>

e. For “mental anguish sustained in the past,” the jurors answered \$2 million.<sup>37</sup>

Carol Ernst’s testimony provided direct evidence of her mental anguish. She testified about her personal use of antidepressants. This evidence was admitted to show her difficulty in coping with the loss of her husband.

f. For “mental anguish that, in reasonable probability, will be sustained in the future,” the jurors answered \$10 million.<sup>38</sup>

When asked “do you find by clear and convincing evidence that the harm to Bob Ernst resulted from malice attributable to Merck & Co., Inc?” the jurors answered yes.<sup>39</sup>

Under Texas law, in order for a plaintiff to be awarded exemplary or punitive damages, the jurors must find that the defendant’s wrongful actions were done with malice.<sup>40</sup> This finding must be supported by clear and convincing evidence. The clear and

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<sup>32</sup> *Tex. Civ. Prac. & Rem. Code* § 41.008 (2005).

<sup>33</sup> Charge of the Court, *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Charge of the Court, *supra* note 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Tex. Civ. Prac. & Rem. Code* § 41.008 (2005).

convincing evidence standard for exemplary damages is a more difficult threshold than the beyond a preponderance of the evidence standard used to find basic civil liability.

“What sum of money, if any, should be assessed against Merck & Co., Inc. and awarded to Carol Ernst as exemplary damages for the death of Bob Ernst?” The jurors answered \$229 million.<sup>41</sup>

When determining the amount of exemplary damages, the jurors were instructed to consider evidence relating to: the nature of the wrong, the character of the conduct involved, the degree of culpability of Merck, the situation and sensibilities of the parties concerned, the extent to which such conduct offends a public sense of justice and propriety, and the net worth of Merck.<sup>42</sup>

After the verdict was announced, Mark Lanier, the attorney for Carol Ernst, told reporters the punitive damages figure was based on “the money Merck made and saved by putting off their product label changes.”<sup>43</sup> Specifically, Lanier argued that Merck had illegally concealed information concerning the health risks associated with Vioxx use in order to boast sales of the drug. Lanier commented on the speculation prior to trial that Vioxx would sweep the case in reliance on its vast array of fiscal resources. In reference to the jurors involved in the trial, he stated that “anyone who said they are too ‘small-town’ or won’t understand – they are crazy.”<sup>44</sup>

Skidmore, on the other hand, argued Ernst’s case did not warrant an award of punitive damages because the injury was not a result of malice. The attorney for Merck claimed the company “acted responsibly: from researching Vioxx prior to approval in clinical trials involving almost 10,000 patients, to monitoring the medicine while it was on the market, to voluntarily withdrawing the medicine when it did.”<sup>45</sup>

Texas law limits the amount of recovery of exemplary damages.<sup>46</sup> The exemplary damages awarded may not exceed an amount equal to the greater of two numbers. The first number computed is two times the amount of economic damages plus an amount equal to any non-economic damages that do not exceed

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<sup>41</sup> Charge of the Court, *supra* note 1.

<sup>42</sup> *Id.*

<sup>43</sup> Smith, *supra* note 2.

<sup>44</sup> *Id.*

<sup>45</sup> Kaufman, *supra* note 3.

<sup>46</sup> NewsHours, *supra* note 28; *Tex. Civ. Prac. & Rem. Code* § 41.008 (2005).

\$750,000.<sup>47</sup> The second number is set at \$200,000.<sup>48</sup> Because Texas caps punitive damage awards, under the first method of computing the limit, the verdict against Merck will be reduced to \$26.1 million even before an appeal is heard.<sup>49</sup>

The finding of this Texas jury will have a profound effect on the thousands of other cases filed against Merck. Many financial experts have predicted that Merck will have to settle its Vioxx cases in order to remain a profitable company. Analysts from J.P. Morgan Chase have estimated that Merck's liability for Vioxx could range from \$8 billion to \$25 billion.<sup>50</sup> However, Merck has vowed that it will not settle these cases.<sup>51</sup>

Commentators on the trial have stated that the jury in this case returned a "message verdict."<sup>52</sup> From the outset of the case, the legal principles seemed to weigh in favor of Merck. As previously discussed, Carol Ernst's causation argument was much more attenuated than thousands of other Vioxx related suit already filed. If this jury was willing to find fault in Merck's actions in this case, it should be even easier for plaintiffs in other cases to link injury to use of the drug.

Since the recall of Vioxx in September of 2004, about 4,200 product liability lawsuits have been filed against Merck.<sup>53</sup> These lawsuits constitute approximately 7,500 plaintiff groups. Estimates on the number of patients possibly injured or killed by Vioxx use had reached over 10,000.<sup>54</sup>

Mr. Andrew Birchfield is a plaintiffs' attorney in a Vioxx case scheduled to be heard in a New Orleans federal court in November 2005.<sup>55</sup> Mr. Birchfield is also counsel for a committee overseeing 4500 federal Vioxx lawsuits.<sup>56</sup> Mr. Birchfield commented on the outcome of Ernst's case indicating that the jurors' decision will support many others who may have been harmed by Vioxx. Specifically, Mr. Birchfield stated that the jury heard all of the facts of the case including information about "Merck's bad conduct, and they came to the conclusion that Vioxx caused the death and the company needed to be

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<sup>47</sup> *Tex. Civ. Prac. & Rem. Code* § 41.008 (2005).

<sup>48</sup> *Id.*

<sup>49</sup> NewsHour, *supra* note 28.

<sup>50</sup> Smith, *supra* note 2.

<sup>51</sup> *Id.*

<sup>52</sup> NewsHour, *supra* note 28.

<sup>53</sup> Smith, *supra* note 2.

<sup>54</sup> *Id.*

<sup>55</sup> Kaufman, *supra* note 3.

<sup>56</sup> *Id.*

punished.”<sup>57</sup> Regardless of whether the jury in Brazoria County “let bias, prejudice or sympathy play any part” in its deliberations, the exemplary damages it awarded against Merck set a solemn tone for future Vioxx litigation.<sup>58</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Charge of the Court, *supra* note 1.

