

1 FOLLOWS: THAT AS PART OF HIS JOB IN PHARMACOEPIDEMIOLOGY, HE
2 CAN AND DOES CALCULATE ATTRIBUTABLE RISK, AND AS PART OF HIS
3 JOB AS A PHARMACOEPIDEMIOLOGIST, HE'S ABLE TO CALCULATE AN
4 ATTRIBUTABLE RISK FOR A MEMBER OF A CERTAIN POPULATION. AND HE
5 WOULD TESTIFY THAT, FOR A PERSON THAT IS 53 YEARS OLD THAT HAS
6 TAKEN VIOXX FROM 1 TO 30 DAYS, BASED ON HIS DETERMINATION THAT
7 THE RELATIVE RISK OF VIOXX IS 2.16, THAT THE LIKELIHOOD THAT,
8 IF THAT INDIVIDUAL ALSO SUFFERED A HEART ATTACK, THAT THE
9 LIKELIHOOD THAT HIS HEART ATTACK WAS CAUSED BY VIOXX IS
10 54 PERCENT.

11 HE WOULD ALSO TESTIFY THAT -- I PROVIDE HIM WITH
12 ASSUMPTIONS. IF HE ASSUMES THAT DICKY IRVIN WAS A 53-YEAR-OLD
13 MALE WHO TOOK VIOXX FROM 1 TO 30 DAYS AND HAD A HEART ATTACK,
14 THAT THE LIKELIHOOD THAT HIS HEART ATTACK WAS CAUSED BY VIOXX
15 IS 54 PERCENT.

16 THE COURT: AND I UNDERSTAND THAT COUNSEL FOR THE
17 DEFENDANT, WHILE DISAGREES WITH THE SUBSTANCE OF THAT, DOES
18 AGREE THAT IF THE DOCTOR -- IF THE PROFESSOR WERE CALLED, HE
19 WOULD TESTIFY TO THAT FACT.

20 MR. BECK: THAT'S CORRECT, YOUR HONOR.

21 THE COURT: THE COURT WILL ACCEPT IF HE WERE CALLED,
22 HE WOULD TESTIFY TO THAT.

23 THE NEXT ITEM OF BUSINESS IS THE QUESTION OF
24 DR. GRAHAM, IS DR. MICHAEL GRAHAM, MICHAEL A. GRAHAM, REGARDING
25 THE GENERAL AND SPECIFIC CAUSATION. I PREVIOUSLY RULED IN THIS

1 MATTER THAT DR. GRAHAM, WHO IS A PATHOLOGIST, CAN TESTIFY TO
2 SOME GENERAL ISSUES: THE FACT THAT MR. IRVIN DIED FROM A HEART
3 ATTACK; THE FACT THAT HE FEELS THAT THE MECHANISM WAS A
4 RUPTURED EMBOLUS, AND THAT THAT WAS THE CAUSE OF HIS DEATH.
5 THE PROBLEM THAT I HAD IS HIS GIVING AN OPINION AS TO THE
6 SPECIFIC CAUSE OF THE DEATH OF MR. IRVIN WITH REGARD TO ITS
7 RELATIONSHIP TO VIOXX. THE PLAINTIFF IS INTERESTED IN ASKING
8 SPECIFICALLY WHETHER VIOXX CAUSED OR CONTRIBUTED TO MR. IRVIN'S
9 DEATH, AND I HAVE PREVIOUSLY RULED THAT THAT WAS OUTSIDE OF HIS
10 EXPERTISE OR HIS -- HIS QUALIFICATIONS. COUNSEL HAS MADE AN
11 OFFER TO CLARIFY AND/OR TO RECONSIDER. I'LL HEAR FROM THE
12 PARTIES. ALSO DR. BALDWIN, INCLUDING DR. BALDWIN.

13 MR. MEUNIER: IF IT PLEASE THE COURT, JERRY MEUNIER
14 FOR PLAINTIFFS. JUDGE, THERE ARE PLAINTIFF'S COUNSEL IN THIS
15 MDL WHO BELIEVE THAT THE COURTS' RULINGS CONCERNING DR. BALDWIN
16 AND GRAHAM CONSTITUTE A GRAMMATICALLY ADVERSE PRECEDENT FOR
17 PLAINTIFFS IN LATER MDL CASES TO BE TRIED, AND IN FACT MAY
18 IMPOSE A RULE 702 QUALIFICATION STANDARD FOR SPECIFIC CAUSATION
19 EXPERTS WHICH, AS A PRACTICAL MATTER, WILL BE VIRTUALLY
20 IMPOSSIBLE TO SATISFY. THESE ARE POTENT CONCERNS, MDLY
21 CONCERNS, WHICH PLAINTIFFS' LIAISON COUNSEL, RUSS HERMAN IS
22 HERE WITH THE INSTANT MOTION.

23 BUT BEFORE RUSS SPEAKS AND EVEN PRETERMITTING
24 THOSE DOWNSTREAM MDL WIDE CONCERNS, THE IRVIN PLAINTIFFS
25 REQUEST THAT THE COURT'S -- OR SUBMIT THAT THE COURT'S RULINGS

1 LIMITING THE TESTIMONY OF THESE TWO EXPERTS ARE RULINGS THAT DO
2 REQUIRE CLARIFICATION AND WHICH DO WARRANT SERIOUS
3 RECONSIDERATION ON SOUND PRINCIPLES OF EVIDENTIARY LAW. AS WE
4 APPRECIATE THE ANALYSIS, YOUR HONOR HAS CONCLUDED THAT NEITHER
5 DR. TOM BALDWIN, PLAINTIFF'S CARDIOLOGIST, NOR DR. MICHAEL
6 GRAHAM, PLAINTIFF'S PATHOLOGIST, HAS BROUGHT TO THIS CASE
7 SUFFICIENT BACKGROUND AND FAMILIARITY WITH VIOXX TO QUALIFY
8 THEM TO OPINE THAT VIOXX CAUSED OR SUBSTANTIALLY CONTRIBUTED TO
9 DICKY IRVIN'S HEART ATTACK AND DEATH. IN OTHER WORDS, THE
10 COURT IS NOT EXCLUDING THIS TESTIMONY ON THE BASIS OF INVALID
11 METHODOLOGY IN THE DAUBERT SENSE, BUT RATHER, ON THE BASIS OF
12 THE QUALIFICATIONS LANGUAGE IN RULE 702, WHICH REQUIRES THAT
13 EXPERTS HAVE SUFFICIENT, QUOTE, KNOWLEDGE, SKILL, EXPERIENCE,
14 TRAINING, OR EDUCATION. AND WE DO EMPHASIZE THE DISJUNCTIVE OR
15 BECAUSE IT IS PURPOSEFULLY USED. WHAT QUALIFIES AN EXPERT TO
16 ADDRESS A SPECIFIC CAUSATION QUESTION ABOUT VIOXX IS VIOXX
17 KNOWLEDGE OR SKILL OR EXPERIENCE OR TRAINING OR EDUCATION OR
18 ANY COMBINATION.

19 THE COURT'S DECISION THAT DRs. BALDWIN AND
20 GRAHAM LACK ANY SUCH QUALIFICATION REGARDING SPECIFIC CAUSATION
21 GIVES RISE TO AT LEAST TWO VERY BASIC CONCERNS: NUMBER ONE,
22 THE CONCERN IS THAT THE DEFENDANT IS NOW ALLOWED TO CONTROL THE
23 OUTCOME OF THE 702 DEBATES BECAUSE OF ITS OWN HISTORIC HANDLING
24 OF THE INFORMATION CONCERNING VIOXX; AND CONCERN NUMBER 2 IS
25 THAT RULE 702 IS BEING INTERPRETED IN A WAY THAT IS

1 INCONSISTENT WITH RULE 703, ADDRESSING THE PROPER BASES AND
2 ALLOW BASES FOR EXPERT TESTIMONY.

3 AS TO CONCERN NUMBER ONE, JUDGE, THE QUESTION,
4 SIMPLY PUT, IS THIS: SHOULD A DEFENDANT MANUFACTURER ALLEGEDLY
5 DELIBERATELY CONCEALING THE CV RISKS OF VIOXX BENEFIT BY VIRTUE
6 OF AN HISTORICAL CLIMATE IN WHICH THE MEDICAL COMMUNITY OF
7 PRACTICING PHYSICIANS DOES NOT KNOW ABOUT THE DANGERS OF VIOXX
8 UNTIL THOSE DANGERS ARE DISCLOSED THROUGH LITIGATION. THAT IS
9 TO SAY, IT IS UNAVOIDABLY TRUE THAT DOCTORS DO NOT BRING TO THE
10 TABLE, DO NOT BRING TO THE CASE EXTENSIVE, PAST KNOWLEDGE ABOUT
11 VIOXX. IT WAS NOT UNTIL SEPTEMBER 30, 2004, UPON THE REMOVAL
12 OF THE DRUG FROM THE MARKET, THAT THE MEDICAL COMMUNITY WAS
13 PROVIDED WITH INFORMATION FROM MERCK UPON WHICH TO DETERMINE
14 THAT VIOXX CAUSES MI'S OR OTHER CARDIOVASCULAR INJURIES. THE
15 ABSENCE OF SUCH CARDIOVASCULAR ILLNESSES TO VIOXX EXPOSURE --
16 THE ABSENCE OF SUCH INFORMATION, RATHER, PRIOR TO SEPTEMBER '04
17 MADE IT UNLIKELY THAT ANY PHYSICIAN WOULD HAVE ATTRIBUTED A
18 CARDIOVASCULAR EVENT TO VIOXX EXPOSURE AT THAT TIME. THIS
19 COURT NECESSARILY HAS RECOGNIZED THAT THE ILLNESSES AT ISSUE IN
20 THIS LITIGATION NECESSARILY OCCURRED BEFORE THE DRUG WAS
21 WITHDRAWN. THEREFORE, WHETHER A PROPOSED EXPERT DID OR DID NOT
22 DIAGNOSIS A CARDIOVASCULAR ILLNESS OUTSIDE OF THE CONTEXT OF
23 THIS LITIGATION MUST NECESSARILY IN THIS CASE, WE SUBMIT, BE A
24 MINOR, NOT A MAJOR, FACTOR IN THE COURT'S DECISION.

25 IN THIS CIRCUMSTANCE, JUDGE, WE BELIEVE IT IS

1 CRITICAL TO ALLOW 702 QUALIFICATIONS TO BE BUILT NOT JUST ON
2 LONG YEARS OF EXPERIENCE WITH VIOXX PREDATING ITS 2004
3 WITHDRAWAL, BUT IN THE LANGUAGE OF THE RULE BASED ON KNOWLEDGE,
4 SKILL, EXPERIENCE, TRAINING, OR EDUCATION, WHICH CAN, AND IN
5 MANY CASES WILL HAVE TO BE BUILT ON A REVIEW OF PUBLISHED
6 STUDIES, RESEARCH, AND LEARNING DEVELOPED SINCE THE WITHDRAWAL
7 OF THE DRUG. THIS IS ESPECIALLY IMPORTANT, OF COURSE, IN THE
8 CONTEXT OF MDL TRIALS AS THESE TRIALS ARE OCCURRING
9 SIMULTANEOUS WITH DISCOVERY IN THE EMERGING SCIENCE AND TRUTH
10 ABOUT VIOXX.

11 WE ARE NOT SUGGESTING TO THIS COURT THAT YOU
12 LOWER THE 702 BAR. WE ARE SIMPLY SUGGESTING THAT YOU NOT SET
13 IT SO HIGH AS TO REQUIRE WHAT IS NOT, AS A PRACTICAL MATTER,
14 AVAILABLE IN THE WAY OF HISTORIC VIOXX EXPERTISE WITHIN THE
15 COMMUNITY OF PRESCRIBING PHYSICIANS.

16 YOUR HONOR HAS ALSO CITED AS A FACTOR THE LACK
17 OF THESE PHYSICIANS' EXPERIENCE WITH PRESCRIBING VIOXX. AND
18 YET, VIOXX AS A PAIN MEDICATION WOULD NOT TYPICALLY BE
19 PRESCRIBED BY CARDIOLOGISTS, MUCH LESS PATHOLOGISTS, AND AT THE
20 SAME TIME, CARDIOLOGISTS AND DEATH CASES PATHOLOGISTS HAVE THE
21 RELEVANT EXPERTISE IN DIAGNOSING THE CAUSE OF CARDIOVASCULAR
22 INJURY OR A FAILED MI. AND THEREFORE, WHETHER A PROPOSED
23 EXPERT ON CAUSATION DID OR DID NOT PRESCRIBE VIOXX, AGAIN, IS A
24 FACTOR WHICH WE SUBMIT MUST BE OF MINOR, NOT MAJOR,
25 CONSIDERATION.

1 THE COURT HAS ALSO CITED THE FACT THAT THESE
2 EXPERTS ARE NOT -- DO IN THE COME TO THE TABLE -- COME TO THE
3 CASE WITH EXPERIENCE IN RESEARCH CONCERNING VIOXX. YOUR HONOR,
4 THE CLINICAL RESEARCH ON VIOXX LARGELY WAS CONDUCTED BY MERCK
5 ITSELF, AND IT WOULD THEREFORE BE UNLIKELY THAT RESEARCHERS
6 AFFILIATED WITH MERCK WOULD NOW STEP FORWARD AND BE ABLE
7 AVAILABLE TO SERVE AS EXPERT WITNESSES FOR PLAINTIFF. AGAIN,
8 THAT IS A FACTOR WHICH, IN THE CONTEXT OF THIS CASE, WE SUBMIT
9 MUST BE A MINOR OR AND NOT A CONTROLLING OR MAJOR
10 CONSIDERATION.

11 THE SECOND CONCERN WE HAVE IS NO LESS IMPORTANT,
12 AND THAT IS THAT 702 NEEDS TO BE READ WITH 703 TO BE THE BASIS
13 FOR WHICH ARE ALLOWED EXPERT OPINIONS. 703 PROVIDES THAT AN
14 EXPERT'S OPINION THAT THE FACTS OR DATA WHICH SUPPORT AN EXPERT
15 OPINION OR THE INFERENCES FROM FACTS AND DATA MAY BE THOSE
16 PERCEIVED BY OR MADE KNOWN TO THE EXPERT AT OR BEFORE THE
17 HEARING. AT OR BEFORE THE HEARING. AND IF OF A TYPE
18 REASONABLY RELIED UPON, MAY NOT EVEN BE PER SE ADMISSIBLE INTO
19 EVIDENCE. OF COURSE, IN THIS CASE, WE DO HAVE ADMITTED INTO
20 EVIDENCE PUBLISHED STUDIES, LITERATURE, CLINICAL STUDIES,
21 EPIDEMIOLOGICAL DATA.

22 WE ALSO NOW HAVE, FOR THE PURPOSES OF THESE NEXT
23 TWO EXPERTS, DRS. GRAHAM AND BALDWIN, THE SWORN TESTIMONY OF AN
24 EXPERT THAT YOUR HONOR HAS ADMITTED, AND THAT IS DR. RAY, WHO
25 HAS SUBMITTED OPINIONS WHICH, IN A HYPOTHETICAL QUESTION,

1 SHOULD BE ALLOWED TO FORM A BASIS UNDER RULE 703 FOR THE
2 CAUSATION OPINION OF BOTH BALDWIN AND GRAHAM.

3 SO, AGAIN, WE BELIEVE THAT, WHEN YOU READ 702 IN
4 CONNECTION WITH 703, NEITHER BALDWIN NOR GRAHAM SHOULD BE
5 DISQUALIFIED SIMPLY BECAUSE THEY ARE GOING TO BE ASKED A
6 SPECIFIC CAUSATION QUESTION, WHICH IS PREDICATED ON THEIR
7 KNOWLEDGE OF WHAT IS PUBLISHED, WHAT IS IN LEARNED TREATISES,
8 AND WHAT HAS ALREADY BEEN STATED IN THIS CASE BY ANOTHER
9 EXPERT.

10 YOUR HONOR, WE ALSO POINT OUT WHAT APPEARS TO BE
11 SOME INCONSISTENCY IN THE COURT'S RULINGS INSOFAR AS YOU DID
12 ALLOW THE TESTIMONY IN THE FIRST TRIAL OF A PATHOLOGIST,
13 DR. BLOOM. DR. BLOOM TESTIFIED AS TO SPECIFIC CAUSATION,
14 TESTIFIED THAT VIOXX CAUSED OR SUBSTANTIALLY CONTRIBUTED TO THE
15 DEATH OF DICKY IRVIN. DR. BLOOM DID NOT BRING TO THE TABLE ANY
16 EXPERTISE BEYOND WHAT THE COURT NOW SEEMS TO BE REQUIRING WITH
17 RESPECT TO BALDWIN AND GRAHAM. WE DON'T THINK IT WAS ERROR TO
18 ALLOW DR. BLOOM TO TESTIFY. FOR THE SAME REASON, IT WOULD NOT
19 BE AN ERROR TO ALLOW TESTIMONY BY BALDWIN AND GRAHAM.

20 JUDGE, THE FINAL POINT, I SUPPOSE, TO BE MADE
21 BEFORE MR. HERMAN ADDRESSES YOU IS THIS: BUT EVEN THOUGH THIS
22 IS NOT A DAUBERT ISSUE PER SE, THE FIFTH CIRCUIT IN THE RUSHING
23 CASE, 1999, SAID SOMETHING WHICH WE THINK IS VERY IMPORTANT TO
24 REMIND US OF THE IMPORTANCE OF THE JURY'S ASSESSMENT IN THESE
25 CASES INVOLVING EXPERTS; AND IT WAS THIS FROM RUSHING: AS LONG

1 AS SOME REASONABLE INDICATION OF QUALIFICATION IS ADDUCED, THE
2 COURT MAY ADMIT THE EVIDENCE WITHOUT ABDICATING ITS GATEKEEPING
3 FUNCTION. AFTER THAT, QUALIFICATION BECOMES A ISSUE FOR THE
4 TRIER OF FACT RATHER THAN FOR THE COURT IN ITS GATEKEEPING
5 CAPACITY.

6 WE BELIEVE THAT THIS JURY IS WELL EQUIPPED TO
7 WEIGH AND ASSESS THE QUALIFICATIONS OF THESE EXPERTS ON
8 SPECIFIC CAUSATION. THE COURT SHOULD ADDRESS THIS, OBVIOUSLY,
9 AT A THRESHOLD LEVEL, A MINIMAL LEVEL, FOR THE REASONS I'VE
10 MENTIONED, NOT EMPHASIZING THINGS LIKE PRESCRIPTION AND
11 RESEARCH EXPERIENCE.

12 THESE MEN ARE EMINENTLY QUALIFIED, JUDGE, TO
13 BUILD UPON WHAT IS KNOWN SINCE WITHDRAWAL OF THE DRUG, TO BUILD
14 UPON WHAT HAS BEEN INTRODUCED INTO EVIDENCE IN THIS CASE, TO
15 EXPRESS THOSE OPINIONS, AND THEN LET THE JURY DECIDE. IF WE
16 WANT INSTRUCTIVE VERDICTS IN THIS LITIGATION, WE THINK IT'S
17 IMPORTANT FOR THIS CASE AND FOR LATER CASES THAT A QUALIFIED
18 EXPERT BE ABLE TO HAVE THEIR OPINIONS WEIGHED BY THE JURY.

19 THE COURT: THANK YOU, COUNSEL. DO YOU WANT TO
20 RESPOND AT THIS TIME OR DO YOU WANT TO HAVE MR. HERMAN SPEAK
21 FIRST?

22 MR. BECK: I'LL WAIT UNTIL MR. HERMAN IS DONE.

23 MR. HERMAN: MAY IT PLEASE THE COURT. JUDGE FALLON,
24 GOOD AFTERNOON. I APPRECIATE, ON BEHALF OF THE MDL, THE
25 OPPORTUNITY TO ADVOCATE BEFORE YOU. I APPRECIATE THAT YOU HAVE

1 BEEN, AS ALL COUNSEL IN TRIAL, THAT YOUR DAY STARTS PROBABLY
2 AROUND 6:00 A.M., AND ENDS AROUND 8:00 P.M., AND TO THIS
3 EVENING ALLOW US TO ARGUE THIS ISSUE. WE APPRECIATE IT.
4 PARTICULARLY AFTER YOUR HONOR HAS MADE SOME RULINGS, HEARD
5 OTHER ARGUMENT ON THE SAME ISSUES, AND RECEIVED OTHER BRIEFING.

6 IN ACT 3, SCENE 2, OF JULIUS CEASAR, MARC
7 ANTHONY SAYS, "IN FACING THE JUDGMENT OF A ROMAN CITIZENRY, I
8 HAVE NOT WIT NOR WISDOM TO PERSUADE YOU." BUT, YOUR HONOR, I
9 AM MINDFUL OF ANOTHER SHAKESPEARE QUOTE WHICH GIVES ME SOME
10 SOLACE. IT WAS A CRITICISM BY SHAKESPEARE OF HIS OBSERVATION
11 OF JUDICIAL STARE DECISIS. AND WHAT HE SAID MEASURE FOR
12 MEASURE IS, "DO NOT MAKE A SCARECROW OF THE LAW AND SET IT OUT
13 TO CAUSE FEAR IN BIRDS OF PREY UNTIL THEY MAKE IT THEIR PERCH,
14 AND LET IT KEEP ONE SHAPE FOR TIME AND CUSTOM." AND WHAT HE
15 SAID WAS THAT DECISIONS, PARTICULARLY WHEN THEY INVOLVE
16 JUSTICE, NEED REPETITIVE EXAMINATION.

17 ADVOCATES COME TO THIS COURT, AND YOU CERTAINLY
18 HAVE IN THIS COURTROOM SOME OF THE MOST SKILLED ADVOCATES TO
19 PRESENT CASES. AND, YOUR HONOR, IT IS DAUNTING, DIFFICULT, AND
20 BEGUILING FOR ME TO ADVOCATE PROFESSIONALLY ABOUT SOMETHING
21 WHICH PLAINTIFF LAWYERS FEEL SO STRONGLY. THERE WAS ALWAYS A
22 GREAT FEAR THAT DAUBERT WOULD NOT ONLY BE A SLIPPERY SLOPE BUT
23 WOULD EVENTUALLY BECOME A RAZOR'S EDGE THAT NOT ONLY SHAVED THE
24 ABILITY OF SMALL PEOPLE AND CONSUMERS TO PRESENT THEIR CASES
25 BUT A BLADE THAT WOULD CUT THE JUGULAR; A RAZOR'S EDGE.

1 YOUR HONOR, IN ONE SENSE, THE MDL LAWYERS ON OUR
2 SIDE SEE THESE RULINGS, MOST RESPECTFULLY, TO COME OUT OF A
3 ILLUSION CREATED BY THE DEFENDANTS. I HAVE HAD OCCASION TO
4 ADDRESS YOUR HONOR INDICATING THAT ONLY A THIRD OF DISCOVERY
5 HAS BEEN DONE IN THE CASE; THAT DOCUMENTS HAVE BEEN SECRETED;
6 THAT SCIENCE HAS BEEN SUBVERTED; THAT DOCTORS HAVE BEEN
7 ALIENATED. AND AS DISCOVERY GOES FORWARD, A CLEAR PICTURE OF
8 DECEPTION MOTIVATED BY AVARICE COMES FORWARD.

9 NOW, WHAT DOES THAT HAVE TO DO WITH DAUBERT AND
10 THESE RULINGS? THE MDL WAS DESIGNED AS A DISCOVERY MECHANISM
11 TO SAVE THE TIME AND MONEY OF THE LITIGANTS AND THE JUDICIARY.
12 IT WAS NOT DESIGNED AS A TRIAL MECHANISM. AND WHILE I
13 CERTAINLY RECOGNIZE THE POWER OF THIS COURT AND OTHER MDL
14 COURTS TO CONDUCT TRIALS, AND I REPEAT, BECAUSE OF THE DELAY OF
15 MERCK PHASED WITH A MULTIPLICITY OF STATE ACTIONS IN ASKING FOR
16 AN MDL, WE ARE NOW IN A SITUATION OF ACCELERATION, EXPEDITION,
17 WITHOUT FULL KNOWLEDGE OF FACTS.

18 THE REALITY IS THAT AN EXPERT, WHETHER HE
19 STUDIES FOR 8 HOURS OR 80 HOURS, WILL NEVER REACH THE DEGREE OF
20 SOPHISTICATION OR KNOWLEDGE OF AN ADVOCATE OR A JUDGE, WHO,
21 WITH TENACITY, DEVOTES TIME, ENERGY, AND INTELLECT WITH
22 GRAPPLING WITH A SCIENTIFIC PROBLEM OR A MEDICAL PROBLEM THAT
23 COMES INTO A COURTROOM. THE PERPETUATION OF EXPERT WITNESSES
24 WITH FULL KNOWLEDGE IS A DIFFICULT TASK AS IT IS, BUT WHEN
25 TRIALS ARE ACCELERATED AND EXPEDITED AND DISCOVERY IS

1 INCOMPLETE, THEN THE EXPERTS THAT COME IN THE COURTROOM MUST,
2 OF NECESSITY, OF NECESSITY, BASE THEIR OPINIONS ONLY UPON WHAT
3 IS KNOWN OR KNOWABLE.

4 IT IS TRUE, AS YOUR HONOR OBSERVED, THAT THE
5 LAWYERS IN THIS COURTROOM KNOW MORE THAN EXPERTS, BUT, YOU
6 KNOW, YOUR HONOR, A LEARNED LAWYER ONCE TAUGHT ME THAT, IN ANY
7 GIVEN CASE, THE LAWYER'S JOB IS TO KNOW, FIRST OF ALL, TO BE
8 TAUGHT BY EXPERTS; AND SECOND, TO KNOW MORE. AND THE
9 PROTECTION IS THAT AN ADVOCATE WHO IS WELL PREPARED CAN
10 CROSS-EXAMINE UPON THE VULNERABILITIES OF THE EXPERT, AND THE
11 VULNERABILITIES OR ALLEGED VULNERABILITIES OF THE EXPERTS WE
12 ARE TO PRESENT IN THIS CASE AND EVERY OTHER CASE IN THE MDL ARE
13 VULNERABILITIES THAT ARE EXPOSED OR CAN BE EXPOSED BY
14 CROSS-EXAMINATION. THEY ARE NOT SOME EPHEMERAL TYPES OF
15 ISSUES.

16 NOW, LET'S LOOK AT WHAT WAS KNOWN TO PLAINTIFF
17 POTENTIAL EXPERTS. WHAT WAS KNOWN IS THAT MERCK'S POSITION WAS
18 IN WHAT THEY CLAIMED TO BE AUTHORITATIVE TEXTS, LITERATURE
19 STUDIES, WHAT ANY CARDIOLOGIST WOULD HAVE LOOKED AT HAD THEY
20 BEEN ASKED TO LOOK AT IT, AND INDEED THE MERCK MANUAL, WHICH IS
21 USED ALL OVER THE COUNTRY IN ORDER FOR ANY PHYSICIAN TO MAKE A
22 DIFFERENTIAL DIAGNOSIS, YOU DON'T HAVE TO WORRY ABOUT VIOXX.
23 IF IT'S 50 MILLIGRAMS AND IT TAKEN FOR -- IF IT'S NOT
24 50 MILLIGRAMS TAKEN FOR 18 MONTHS, YOU DON'T HAVE TO WORRY
25 ABOUT IT. AND THEY PUBLISHED IT, YOU KNOW. THEY GAVE THAT

1 INFORMATION IN JOURNALS IN THE FDA. THE FDA DOES NOT CONDUCT
2 EPIDEMIOLOGICAL STUDIES OF ITS OWN. IT'S GARBAGE IN/GARBAGE
3 OUT, OR TRUTH IN/TRUTH OUT.

4 SO WHAT IS A PHYSICIAN TO DO? WHAT IS MISSING
5 HERE, MOST RESPECTFULLY, IS THE FACT THAT WE LAWYERS WILL NEVER
6 APPROACH A CARDIOLOGIST WHO IS BOARD-CERTIFIED OR A PATHOLOGIST
7 IN THE ABILITY TO TREAT AND DO A DIAGNOSIS. WE DID NOT HAVE
8 FOUR YEARS OF MEDICAL SCHOOL, WE DID NOT HAVE TWO OR THREE
9 YEARS OF INTERNSHIP AND RESIDENCY. WE HAVE NOT GONE TO
10 SPECIALIZED COURSES. WE DON'T SEE THOUSANDS OF PATIENTS IN OUR
11 LAW OFFICES.

12 AND WHAT IS A RESIDENT OR A INTERNIST? WHAT DO
13 THEY DO? THEY DON'T KNOW WHAT VIOXX IS. THEY DON'T KNOW WHAT
14 PROPULSID IS. THEY DON'T KNOW WHAT SHELLEY'S HEART VALVE IS.
15 THEY'VE GOT TO GO TO A PDR. THEY'VE GOT TO TALK TO OTHER
16 PHYSICIANS. THEY'VE GOT TO READ THE LITERATURE THAT'S
17 AVAILABLE, AND THEN THEY MAKE A DIAGNOSIS, AND THEN THEY TREAT
18 THE PATIENT. AND WE BELIEVE THAT THAT'S WHAT THIS IS ALL
19 ABOUT. THIS CARDIOLOGIST IS BOARD-CERTIFIED. HE HAD TO TAKE
20 TESTS. IT'S HIS DISCIPLINE. THERE IS NO SHOWING, NUMBER ONE,
21 THAT HE'S INTELLECTUALLY DEPRAVED.

22 NOW, LET'S TALK ABOUT THE REALITY OF CONDUCTING
23 STUDIES. \$3 MILLION. ARE PLAINTIFFS ACROSS THIS COUNTRY, WE
24 HAVE TO GO OUT ON OUR CASES AND WE CONDUCT THE STUDIES THAT
25 MERCK SHOULD HAVE DONE IN ORDER TO GET EXPERTS TO TESTIFY? I

1 WILL TELL YOU THAT I THINK THAT LEARNED COUNSEL OPPOSITES ONE
2 OF THE MOST GIFTED COURTROOM LAWYERS THAT I'VE EVER SEEN. AND
3 IN HIS OPENING STATEMENT, SAYS, WELL, DR. RAY WAS PAID 250,000
4 BY PLAINTIFF'S LAWYERS WAS A APPROPRIATE THING FOR HIM TO SAY.
5 IT WAS GOOD ADVOCACY, BUT ARE PLAINTIFF LAWYERS IN THE MDL
6 EXPECTED TO SPEND 300,000 OR \$500,000 A CASE? MOST OF IT ON
7 EXPERT TESTIMONY AND DEPOSITIONS? WE HAVE TO GO OUT NOW, EVERY
8 TIME A DOCUMENT COMES FORWARD, AND TAKE SOMEBODY'S DEPOSITION
9 THAT EITHER WORKED FOR MERCK OR IS WORKING FOR MERCK, JUST IN
10 ORDER TO GET THE DOCUMENT TO AN EXPERT TO LOOK AT. AND THESE
11 EXPERTS ARE PUTTING THEIR REPUTATIONS ON THE LINE.

12 I THINK THAT YOUR HONOR HAS HAD ENOUGH
13 EXPERIENCE WITH EXPERTS, JUDICIALLY AND AS AN ATTORNEY, THAT IF
14 AN EXPERT SITS ON THAT STAND AND YOUR HONOR BELIEVES HE'S
15 DISHONEST, YOU CALL THE LAWYERS UP, THEY'RE SUBJECT TO
16 CROSS-EXAMINATION BY A SKILLED ADVOCATE. AND WE HAVE LAWYERS
17 ALL OVER THE COUNTRY NOW SAYING, WHAT ARE WE GOING TO DO FOR
18 SPECIFIC CAUSATION? WE'RE NOT A DRUG COMPANY. WE WEREN'T THE
19 ONES THAT WERE SUPPOSED TO RUN A CV TEST. MERCK HAS GOT,
20 WHATEVER THEY SAID, A HALF A BILLION DOLLARS, A BILLION
21 DOLLARS, TO SPEND ON LAWYERS AND EXPERTS? WHAT ARE WE TO DO IN
22 THE MDL? WE'VE GOT A SINGLE PRACTITIONER ON CANAL STREET WHO'S
23 GOT A CLIENT TO PROTECT. HOW MUCH MONEY IS SHE EXPOSED TO
24 SPEND USING AN MDL PRODUCT IF SHE CAN'T HAVE A LOCAL
25 CARDIOLOGIST EXPERT COME IN TO COURT AND OPINE ON CAUSATION?

1 OR OTHER PEOPLE IN THE MDL?

2 YOUR HONOR, I DO NOT WANT TO OVERSTEP THE BOUNDS
3 OR MY WELCOME HERE THIS COURT CERTAINLY HAS THE POWER TO HAVE
4 TRIALS. YOUR HONOR IS A GATEKEEPER. YOU CERTAINLY HAVE THAT
5 POWER, AND, YOUR HONOR, AS ONE CONCRETE EXAMPLE OF THE
6 IMBALANCE THAT WE SEE IS LEARNED COUNSEL FOR THE DEFENDANTS
7 CALLED A DR. SILVER TO TESTIFY. HIS QUALIFICATION WAS HE WAS
8 AN INVESTIGATION ON ARCOXIA. WE HAVE BEEN TRYING TO GET
9 ARCOXIA DOCUMENTS FOR THREE OR FOUR MONTHS. HOW DO WE GET A
10 CARDIOLOGIST OR A PATHOLOGIST AND HOW DO WE CROSS-EXAMINE WHEN
11 WE DON'T HAVE THE DISCOVERY?

12 AND SO THE ISSUE HERE IS: IS THERE A TOOL THAT
13 SAFEGUARDS THE SANCTITY OF THIS COURT WITHOUT -- AND AT THE
14 SAME TIME DOESN'T AUTOMATICALLY EXCLUDE -- I SHOULDN'T USE THE
15 WORD "AUTOMATICALLY" BECAUSE A LOT OF CONSIDERATION HAS BEEN
16 GIVEN TO YOUR HONOR -- THAT DOESN'T EXCLUDE A CARDIOLOGIST OR A
17 PATHOLOGIST FROM TESTIFYING BASED ON THE FACT THAT THEY
18 DON'T -- THAT THEY HAVEN'T READ ALL THE ARTICLES, ET CETERA,
19 THAT THE FOUNDATION IS NOT WHAT -- IT'S NOT THE GREATEST
20 FOUNDATION IN THE WORLD. BUT I CERTAINLY BELIEVE THAT.

21
22 AND I ASK YOUR HONOR, BECAUSE I KNOW THAT YOUR HONOR GIVES THIS
23 TRIAL AND EVERY TRIAL DEEP CONSIDERATION. YOU'VE NEVER BEEN --
24 YOU DON'T SHOOT FROM THE HIP. YOU STUDY. YOU KNOW MORE THAN
25 THE LAWYERS IN THE CASE. I'M NOT SAYING THAT AS A IT JUST

1 HAPPENS TO BE TRUE. AND SO WHAT I ASK AND WHAT I SAY TO YOUR
2 HONOR, I THINK THAT THIS MATTER IS SO SERIOUS IN TERMS OF THE
3 MDL, THAT IT'S PIVOTAL. AND I EXPECT MR. BECK TO DO HIS USUAL
4 GOOD JOB, BUT WHAT I WOULD ASK IS THAT YOUR HONOR SPEND SOME
5 QUIET -- SOME QUIET MOMENTS AWAY FROM THE FRAY, BEFORE YOUR
6 HONOR RULES ON THESE ISSUES, TO TAKE ONE MORE LOOK AT IT.

7 THE COURT: THANK YOU, MR. HERMAN.

8 THE WITNESS: BE REASONABLY BRIEF, MR. BECK. I THINK
9 I UNDERSTAND THE ISSUE.

10 MR. BECK: YES, I'M GOING TO BE VERY BRIEF. I'M
11 GOING TO VERY BRIEFLY ADDRESS THE IMPACT ON MERCK -- CHANGED
12 AND THE CLAIMS OF PREJUDICE BY PLAINTIFF. AND MR. ISMAIL WILL
13 ALSO BE BRIEF AND HE CAN ADDRESS THE MERITS AS WELL AS ANY
14 SHAKESPEARE QUOTES THAT PERTAIN TO OUR SIDE OF THIS DISPUTE
15 SINCE I AM NOT WELL VERSED.

16 THE COURT: YOU SAY YOU'RE AN ENGLISH MAJOR.

17 MR. BECK: YEAH, BUT IT WAS AMERICAN ENGLISH. JUDGE,
18 I WANT TO JUST TALK ABOUT THE PRACTICALITIES OF THIS TRIAL
19 SINCE THAT'S WHAT I'M TRYING. WE HAD DAUBERT RULINGS BEFORE
20 THE TRIAL AS TO DR. BALDWIN. WE HAD A DAUBERT RULING BEFORE
21 THE DECEMBER TRIAL. WE HAD A RULING DURING THE TRIAL. SO IT
22 WOULD HAVE COME AS NO SURPRISE TO THE PLAINTIFFS THAT
23 DR. BALDWIN WAS NOT GOING TO BE PERMITTED TO TESTIFY ON THIS.

24 THE MDL PEOPLE WEIGHED IN. THERE WAS A MOTION
25 TO RECONSIDER. AND THERE IS NOTHING REALLY NEW THERE. WITH

1 DR. GRAHAM, IT WAS -- HE WAS KIND OF JUST A MIRROR IMAGE OF
2 DR. BALDWIN, AND AGAIN, THE DAUBERT RULING WAS MADE BEFORE
3 TRIAL.

4 MR. MEUNIER ASKED, "WELL, HOW ABOUT IF YOU
5 RESERVE IT?" I SAID, "I NEED TO KNOW BEFORE WE START THE
6 TRIAL. YOUR HONOR SAID, "NO, THIS IS MY RULING." AND HERE IS
7 MY CONCERN FROM MY POINT OF VIEW, YOUR HONOR: I STOOD UP,
8 BASED ON THE COURT'S RULING, AND SAID THEY ARE NOT GOING TO
9 HAVE A MEDICAL DR. COME IN HERE AND SAY THAT VIOXX CAUSED
10 MR. IRVIN'S DEATH. AND NOW THEY ARE TRYING TO CHANGE THE
11 RULINGS, WHICH, OBVIOUSLY, WOULD BE PREJUDICIAL TO US.

12 ON THE OTHER HAND, THIS WAS NOT SOMETHING, THEY
13 MAKE IT SOUND LIKE IT WOULD HAVE BEEN IMPOSSIBLE TO HAVE
14 EXPERTS TO OPINE ON SPECIFIC CAUSE. THEY HAD TWO EXPERTS AT
15 THE LAST TRIAL WHO GAVE OPINIONS ON SPECIFIC CAUSE. THEY HAD A
16 PATHOLOGIST THAT YOUR HONOR FOUND WAS QUALIFIED, DR. BLOOR, AND
17 HE GAVE TESTIMONY ON SPECIFIC CAUSE, AND THEY DECIDED THEY
18 DIDN'T WANT TO CALL HIM THIS TIME BECAUSE THEY'VE CHANGED
19 THEORIES.

20 THEY DECIDED THAT THEY COULDN'T SELL THE THEORY
21 OF NO PLAQUE RUPTURE, AND SO THEY CHANGED PATHOLOGISTS, BUT
22 THEY HAD ONE IN THE LAST CASE WHO WAS QUALIFIED TO TALK ABOUT
23 SPECIFIC CAUSE. SIMILARLY, THEY HAD DR. LUCCHESI, AND HE GAVE
24 AN OPINION ON SPECIFIC CAUSE LAST TIME, AND THEY DECIDED NOT TO
25 CALL HIM EITHER. AND I DON'T KNOW WHY, BUT IT MAY HAVE BEEN

1 BECAUSE OF THEIR PERCEPTION OF HOW HE DID IN TERMS OF TRYING TO
2 SELL THIS IDEA OF THE IMBALANCE THEORY. SO THEY HAD TWO
3 EXPERTS WHO GAVE SPECIFIC CAUSE OPINIONS, BOTH OF WHOM THEY
4 DECIDED, FOR WHATEVER TACTICAL REASONS, THEY DID NOT WANT TO
5 USE THIS TIME, AND INSTEAD, THEY WANTED TO USE SOMEONE WHO HAD
6 BEEN EXCLUDED LAST TIME AND ANOTHER PERSON WHO THEY SHOULD HAVE
7 KNOWN HADN'T DONE ANY KIND OF REASONABLE AMOUNT OF WORK.

8 SO, YOUR HONOR, THAT'S ALL I HAVE TO SAY ABOUT
9 THAT. IN TERMS OF THE MDL, WE'RE TRYING THIS CASE NOW, AND I
10 THINK WE'RE ENTITLED TO RULINGS UNDER THE RULES OF EVIDENCE IN
11 THIS CASE RATHER THAN BECAUSE OF WHAT LAWYERS WOULD LIKE IN
12 OTHER CASES.

13 THE COURT: THANK YOU.

14 MR. ISMAIL: YOUR HONOR, AS WE SEE THE ISSUE AND READ
15 YOUR PRIOR RULINGS, THIS COURT HAS NOT IMPOSED A LITMUS TEST ON
16 THE LITIGANTS AS PLAINTIFF'S COUNSEL HAS SUGGESTED IN THE
17 CONSIDERATION OF DAUBERT IN 702. THIS COURT HAS NEVER RULED
18 THAT THE ABSENCE OF A VIOXX PRESCRIPTION OR THE ABSENCE OF
19 RESEARCH EXPERIENCE ON NSAIDS PRECLUDES AN EXPERT, BUT WHAT WE
20 HAVE WITH DRS. BALDWIN AND GRAHAM IS THAT THEY DID, IN FACT,
21 COME TO THIS LITIGATION WITH NO RELEVANT EXPERIENCE, EITHER AS
22 A PRESCRIBER, PARTICULARLY AS TO SPECIFIC CAUSE AS A DIAGNOSER
23 OF THROMBOTIC INJURY, NEITHER HAVE BEEN FAMILIAR WITH THE
24 LITERATURE, NEITHER HAD BEEN A RESEARCHER ON THESE ISSUES.

25 SO THE QUESTION THEN BECOMES: HAVE THEY,

1 THROUGH THEIR WORK IN THIS CASE, ELEVATED THEMSELVES TO ONE WHO
2 SHOULD BE ALLOWED TO GIVE AN OPINION TO THIS JURY? AND AS TO
3 BOTH EXPERTS, YOUR HONOR HAS CORRECTLY RULED THREE TIMES NOW
4 FOR DR. BALDWIN AND TWICE NOW FOR DR. GRAHAM THAT THEY HAVE NOT
5 DONE SO.

6 DR. BALDWIN, AS YOUR HONOR HAS OBSERVED, HAS
7 SPENT VERY LITTLE TIME REVIEWING THE CARDIOVASCULAR LITERATURE
8 RELATED TO VIOXX FOR COX-2S, AND THAT IS COMPOUNDING HIS LACK
9 OF RELEVANT EXPERIENCE THAT HE BROUGHT TO THIS CASE. YOUR
10 HONOR HAS OBVIOUSLY READ BOTH DEPOSITIONS WHERE DR. BALDWIN WAS
11 UNABLE TO FIELD RATHER BASIC QUESTIONS ABOUT THE LITERATURE
12 THAT HE PURPORTS TO RELY UPON. AND IT'S NOT A QUESTION OF DID
13 MERCK HAVE INFORMATION THAT DR. BALDWIN HAS BEEN UNFAIRLY
14 SHIELDED FROM.

15 HE PURPORTS TO BASE HIS OPINION, IN FACT, ON THE
16 PEER-REVIEWED LITERATURE. THE PROBLEM WITH DR. BALDWIN IS HE
17 HAD NO EXPERTISE IN THAT LITERATURE PRIOR TO THIS LITIGATION,
18 HAS SPENT VERY LITTLE TIME LEARNING THAT LITERATURE, AND IS
19 UNABLE AT THIS POINT TO OFFER ANYTHING TO THE JURY ON SPECIFIC
20 CAUSATION.

21 AND AS TO DR. GRAHAM, YOUR HONOR HAS SEEN HIS
22 DEPOSITION AS WELL. CHARITABLY, DR. GRAHAM HAS SPENT MAYBE TWO
23 OR THREE HOURS FAMILIARIZING HIMSELF WITH THE SCIENCE RELEVANT
24 TO THIS CASE. HE HAS TESTIFIED THAT PRIOR TO BEING RETAINED BY
25 PLAINTIFFS, HE HAD ABSOLUTELY NO EXPERTISE WITH COX-2 INHIBITOR

1 DRUGS. 7,000 AUTOPSIES, NOT A SINGLE DIAGNOSIS THAT WOULD BE
2 RELEVANT.

3 SO, YOUR HONOR, AS IT RELATES TO THESE EXPERTS
4 AND THE CONCERNS OF PLAINTIFF'S COUNSEL, WE DO IN THE SEE YOUR
5 RULINGS AS ONE THAT RAISES A IMPOSSIBLE BAR, BUT RATHER, WE'VE
6 HAD SEVERAL EXPERTS CLEAR THAT BAR. WE'VE JUST HAD TWO EXPERTS
7 IN THIS CASE WHO, THROUGH THEIR OWN LACK OF EXPERIENCE AND LACK
8 OF REVIEW OF THE RELEVANT MATERIALS, COULD NOT DO SO.

9 AND WITH RESPECT TO THE -- I THINK EVERYONE IN
10 THIS COURTROOM TODAY RECOGNIZES THAT MOTION IS NOT ONE FOR
11 CLARIFICATION BUT RATHER FOR A REVERSAL OF PRIOR RULINGS. YOUR
12 HONOR HAS PREVIOUSLY RULED NEITHER EXPERT CAN ATTRIBUTE VIOXX
13 TO MR. IRVIN'S DEATH, AND THE PROPOSED HYPOTHETICALS, IN FACT,
14 SEEK TO GET THAT OPINION TO THE JURY. AND THAT WOULD BE
15 CONTRARY TO THE THREE RULINGS ON DR. BALDWIN, NOW TWO RULINGS
16 ON DR. GRAHAM.

17 AND THE PROBLEM WITH BOTH EXPERTS, YOUR HONOR,
18 IS THE HYPOTHETICAL DOESN'T -- NEITHER EXPERT IS QUALIFIED TO
19 GIVE THE OPINION EVEN AS PHRASED IN THE HYPOTHETICAL.
20 DR. GRAHAM'S ENTIRE OPINION IS THE ATTRIBUTABLE RISK IS GREATER
21 THAN 2. WELL, WE HEARD FROM AN EXPERT FROM PLAINTIFFS ON THAT
22 ISSUE WHO IS A EPIDEMIOLOGIST. DR. GRAHAM IS A PATHOLOGIST,
23 BRINGS NOTHING TO THAT ISSUE -- EXPERTISE, TRAINING, OR
24 OTHERWISE.

25 AND DR. BALDWIN, THE HYPOTHETICAL PROPOSED A

1 DIAGNOSIS THAT HE DOES NOT DO IN HIS PRACTICE. HE DOES NOT IN
2 HIS PRACTICE ASSUME A RISK THAT HE'S NOT QUALIFIED TO SEE THAT
3 IS THERE, AND WITHOUT ANY INDIVIDUAL OPINIONS ABOUT THE
4 PLAINTIFF, NEITHER DR. GRAHAM, NOR DR. BALDWIN, SAY "I'VE
5 LOOKED AT MR. IRVIN'S MEDICAL RECORDS AND PATHOLOGY AND I CAN
6 DISCERN THAT VIOXX CAUSED HIS DEATH." INSTEAD THEY RETREAT TO
7 SAYING, "WELL, IF IT'S AN INCREASED RISK, THEN IT MUST HAVE
8 CAUSED HIS DEATH." THAT IS AN OPINION THAT IS DIRECTLY
9 CONTRARY TO THE RULES IN 703 AND OPINIONS UNDER DAUBERT. THANK
10 YOU.

11 THE COURT: THANK YOU VERY MUCH. LET ME SHARE WITH
12 YOU MY VIEWS IN THIS MATTER, AND I APPRECIATE THE REMARKS OF
13 COUNSEL. I ALWAYS LEARN FROM LEARNED COUNSEL AND ALWAYS TAKE
14 THE OPPORTUNITY TO GIVE THEM AN OPPORTUNITY TO SPEAK. AS I SEE
15 THE DAUBERT SITUATION, THE 702, OF COURSE, AS YOU KNOW, IS
16 REALLY THE REDACTOR'S (SPELLED PHONETICALLY) ATTEMPT TO CODIFY
17 THE DAUBERT, COMEAUX, AND THE JOINER CASES AND PUT IT INTO A
18 RULE, BLACK LETTER RULE, AS OPPOSED TO HAVING IT EXPANDED INTO
19 THOSE THREE CASES AS WELL AS A NUMBER OF OTHER CASES THROUGHOUT
20 THE COUNTRY IN THE APPELLATE COURTS.

21 BASICALLY, AS I SEE THE COURT'S RULE IS THAT,
22 FOR 702 PURPOSES, THE TESTIMONY MUST BE HELPFUL TO THE FACT
23 FINDER AND, OF COURSE, RELEVANT TO THE ISSUES IN DISPUTE. THE
24 EXPERT MUST BE QUALIFIED AS AN EXPERT BY KNOWLEDGE OR SKILL AND
25 I DON'T PUT A AND. I THINK IT'S OR. YOU KNOW, ALL OF THEM,

1 ALTHOUGH THEY ARE JUST COMMAS IN THREE OF THEM AND A OR IN THE
2 LAST, I READ IT AS A OR IN ALL OF THEM. IN TERMS OF KNOWLEDGE
3 OR SKILL OR EXPERIENCE OR TRAINING OR EDUCATION TO EXPRESS AN
4 OPINION ON THE FACT AT ISSUE.

5 AND THE COURT IS, THESE DAYS -- I THINK YOU'RE
6 BEGINNING TO SEE IT MORE IN DISTRICT COURTS, BUT EVEN -- EVEN
7 FROM THE STANDPOINT OF THE TESTIMONY, IT'S THE COURT MAKES A
8 ATTEMPT ALWAYS TO, RATHER THAN EXCLUDE THE ENTIRE TESTIMONY, TO
9 SEE WHETHER OR NOT AN EXPERT WHO IS QUALIFIED, HE CAN GIVE
10 TESTIMONY EVEN ON A ISSUE OR TWO AS OPPOSED TO THREE OR FOUR
11 ISSUES. AND I'VE BEEN MINDFUL OF THAT ON BOTH SIDES AND TRY TO
12 RECOGNIZE THAT, IF THAT'S A POSSIBILITY. AND, OF COURSE, THE
13 EXPERT MUST BASE IT ON SUFFICIENT FACTS OR DATA; THAT IS TO
14 SAY, IT MUST BE RELEVANT.

15 AND, OF COURSE, THE LAST POINT IS THE
16 METHODOLOGY. THE METHODOLOGY MUST BE APPROPRIATE. IT'S NOT
17 THE JOB OF THE COURT, AT LEAST IN A GATEKEEPER ROLE, TO TEST
18 THE CONCLUSION. IN FACT, THE SUPREME COURT HAS ALWAYS TAKEN
19 THE POSITION THAT CONCLUSION IS FOR THE JURY OR FACT FINDER;
20 METHODOLOGY IS FOR THE COURT.

21 I READ THE ULTIMATE PURPOSE OF 702, AS WELL AS
22 THE DAUBERT AND COMEAUX AND JOINER CASES, TO MAKE CERTAIN THAT
23 AN EXPERT, WHETHER BASING AN OPINION ON PROFESSIONAL STUDIES OR
24 PERSONAL EXPERIENCE, EMPLOYS IN THE COURTROOM THE SAME LEVEL OF
25 INTELLECTUAL RIGOR CHARACTERIZED IN HIS PRACTICE OR HER

1 PRACTICE OUTSIDE OF THE COURTROOM. THAT IS TO SAY, THEY HAVE
2 SOME EXPERIENCE OUTSIDE OF THE COURTROOM WHICH IS RELEVANT AND
3 HELPFUL, AND THEY USE THE SAME RIGORS, THE SAME APPROACH,
4 DEMAND OF THEMSELVES AS WELL AS OTHERS THE SAME REQUIREMENTS
5 OUTSIDE OF THE COURT -- INSIDE OF THE COURTROOM AS THEY DO
6 OUTSIDE OF THE COURTROOM.

7 WITH DR. MICHAEL GRAHAM, HE IS A PATHOLOGIST,
8 PROFESSOR AND ALSO A WORKING PATHOLOGIST, BRINGS BOTH THEORY
9 AND PRACTICE, I THINK, TO THE COURT -- OR TO HIS PATIENTS.
10 HE'S GOT SIGNIFICANCE EXPERIENCE IN PATHOLOGY. HE'S PERFORMED
11 OVER 7,000 AUTOPSIES; MOST OF THOSE, AT LEAST IN THE EARLY DAYS
12 OF HIS CAREER, DONE BY HIMSELF. HE'S GOT SOME ASSISTANTS NOW,
13 BUT HE HAS PARTICIPATED IN A SUBSTANTIAL NUMBER OF AUTOPSIES.

14 AND BECAUSE HEART DISEASE IS A MAJOR PROBLEM, AT
15 LEAST IN THIS COUNTRY, A PATHOLOGIST, BY JUST THAT FACT ALONE,
16 COMES INTO A LOT OF EXPERIENCE WITH CARDIOVASCULAR PATHOLOGY.
17 SO IT DOESN'T SURPRISE ME THAT HE KNOWS SOMETHING ABOUT
18 CARDIOVASCULAR PATHOLOGY AND MAY NOT EVEN HAVE BEEN TRAINED IN
19 THAT PARTICULAR SUBSPECIALTY, BUT WITH HIS EXPERIENCE DAY TO
20 DAY OUT THERE, HE HAS GOTTEN SOME EXPERIENCE IN THAT. HE'S
21 CERTAINLY QUALIFIED, IN MY OPINION, TO TESTIFY TO THE CAUSE OF
22 DEATH, THE HEART ATTACK, THE CAUSE OF THE HEART ATTACK, THE
23 PLAQUE RUPTURE. HE MAKES SENSE OUT OF HIS RULING AND I
24 UNDERSTOOD IT. I THOUGHT IT WOULD BE HELPFUL TO THE JURY.

25 THE ISSUES THAT I SEE IN DR. GRAHAM ARE REALLY

1 TWOFOLD: ONE IS WHETHER HE'S QUALIFIED TO TESTIFY REGARDING
2 VIOXX, AND ALSO, HIS METHODOLOGY CONCERNED ME A BIT. I DIDN'T
3 DISCUSS IT IN THE OPINION BECAUSE I DIDN'T GET THAT FAR, BUT
4 THE METHODOLOGY ALSO I SHARE WITH YOU GIVES ME SOME CONCERN.
5 THE ISSUE WITH REGARD TO QUALIFICATIONS, TO MY MIND, IS WHETHER
6 HE HAS EDUCATION OR EXPERIENCE OR KNOWLEDGE TO TESTIFY THAT
7 VIOXX CAUSED, IN WHOLE OR IN PART, MR. IRVIN'S DEMISE. THIS IS
8 A ISSUE THAT I THINK IS A LOT DIFFERENT THAN OTHER FACTS, OTHER
9 SCENARIOS, IF YOU WILL.

10 I THINK IF THERE ARE TWO PATHOLOGISTS, ONE THAT
11 WORKED AT CHARITY HOSPITAL WHEN IT WAS ONGOING IN THE EMERGENCY
12 ROOM AND SAW A LOT, A LOT OF KNIFE WOUNDS AND TREATED OR AT
13 LEAST EXAMINED PEOPLE, DID PATHOLOGICAL WORK THAT CONCLUDED
14 THAT THE DEATH WAS DUE TO A KNIFE WOUND. ANOTHER PATHOLOGIST,
15 EQUALLY TALENTED, MAY NOT WORK THERE, MAY NOT SEE OR HAVE SEEN
16 ANY KNIFINGS IN THE HEART OR WHATEVER, BUT HAS SEEN OVER THE
17 YEARS SOME DAMAGE TO THE HEART. SOMEONE'S BROUGHT IN WITH A
18 SIGNIFICANT KNIFE WOUND AND KNIFE ACCOMPANIES HIM, AND THE
19 PARTY, THE PATHOLOGIST LOOKS OVER, MEASURES WHAT THEY NEED TO
20 MEASURE, SEE WHAT THEY NEED TO SEE, AND CONCLUDES THAT THE
21 HEART WAS STOPPED, DAMAGED BY A KNIFE. MAY NOT HAVE WRITTEN
22 ANY ARTICLES ON IT, MAY NOT HAVE HAD ANY EXPERIENCE ON IT.

23 TO ME, BOTH OF THOSE PATHOLOGISTS WOULD BE
24 APPROPRIATE TO TESTIFY IN THE CASE AS AN EXPERT AS TO WHAT
25 CAUSED THE WOUND IN THE HEART. THE LATTER MIGHT BE TAKEN UNDER

1 CROSS-EXAMINATION MORE THAN THE FORMER BECAUSE HE DIDN'T SEE
2 ANY KNIFE WOUNDS IN THE PAST, BUT HE CAN DEDUCE OR CONCLUDE
3 FROM WHAT HE SAW AND WHAT HIS EXPERIENCE IS THAT IT WAS A KNIFE
4 WOUND. HE WOULD TESTIFY. HIS CREDIBILITY AND EXPERIENCE I
5 WOULD LET THE JURY WEIGH AND TAKE THAT INTO CONSIDERATION.

6 BUT WITH THE QUESTION OF WHETHER OR NOT VIOXX
7 PARTICIPATED OR CAUSED HEART DAMAGE IS A LOT MORE SUBTLE THAN
8 MY FIRST EXAMPLE. IT REQUIRES SOME KNOWLEDGE, IT SEEMS TO ME,
9 SOME EDUCATION, SOME EXPERIENCE IN VIOXX OR COX-2 INHIBITORS OR
10 NSAIDS OR SOMETHING THAT IS HELPFUL TO THE JURY TO ALLOW THE
11 WITNESS TO TESTIFY ALONG THAT LINE.

12 I TURN TO THE EVIDENCE IN THE FORM OF THE
13 DEPOSITION THAT WAS TAKEN, AND I LOOK OVER FIRST THE EDUCATION
14 AND EXPERIENCE OF DR. GRAHAM. ON PAGE 62, YOU KNOW THAT
15 DR. GRAHAM IS NOT AN EPIDEMIOLOGIST, HE'S NOT A CARDIOLOGIST,
16 HE HAS NO TRAINING AS A PHARMACOLOGIST, AND HE HASN'T DONE A
17 THOROUGH INVESTIGATION IN THE PATHOLOGY OF VIOXX.

18 "Q. AND YOU REALLY HAVEN'T DONE A THOROUGH
19 INVESTIGATION INTO PHARMACOLOGY?"

20 ON PAGE 27, LINE 24:

21 "A. I'VE LOOKED AT IT TO THE EXTENT THAT I NEED TO
22 ANSWER QUESTIONS IN THIS PARTICULAR CASE. I'M NOT A
23 UNIVERSAL EXPERT IN VIOXX.

24 "Q. NOR ARE YOU AN EXPERT IN PHARMACOLOGY OF VIOXX?"

25 "A. OTHER THAN WHAT I NEED IN THIS CASE, NO, I'M

1 NOT. THAT'S CORRECT."

2 I ALSO LOOK AT HIS KNOWLEDGE OF CLINICAL TRIALS,
3 WHICH IS NOT ESSENTIAL, BUT IT'S HELPFUL IN A CASE OF THIS
4 SORT. QUESTION ON PAGE 64:

5 "Q. WOULD YOU AGREE THAT PLACEBO-CONTROLLED CLINICAL
6 TRIALS ARE THE GOLD STANDARD FOR DETERMINING THE RISKS OF
7 MEDICINE?

8 "A. I WOULD DEFER TO EXPERTS WHO DESIGN STUDIES TO
9 LOOK AT SPECIFIC THINGS. THAT'S NOT IN MY AREA OF
10 EXPERTISE.

11 QUESTION ON LINE 15:

12 "Q. YOU'RE AGREEING YOU'RE NOT QUALIFIED TO
13 DETERMINE THE HIERARCHY OR RELIABILITY IS WITH RESPECT TO
14 THE CLINICAL TRIAL EVIDENCE THAT EXISTS ON VIOXX?

15 "A. CORRECT. YEAH, THAT'S NOT SOMETHING I DO. I
16 WOULD DEFER TO EXPERTS ON A DAILY BASIS."

17 I LOOK TO WRITINGS TO SEE WHETHER OR NOT HE'S
18 DONE ANY WRITINGS OR HAS CONDUCTED ANY RESEARCH. I SEE ON PAGE
19 28 OF HIS DEPOSITION, LINE 22:

20 "Q. ALL RIGHT. SO WOULD I BE CORRECT, SIR, THAT YOU
21 HAVE NEVER PUBLISHED ANY ARTICLE ON THE SPECIFICS OF
22 CARDIAC PATHOLOGY THAT DEALS WITH MR. IRWIN'S DEATH.
23 CORRECT?

24 "A. NOT THE SPECIFICS, THAT'S CORRECT."

25 "Q. AND INDEED, YOU'VE NEVER WRITTEN AN ARTICLE THAT

1 DEALS WITH THE MECHANISM OF SUDDEN CARDIAC DEATH FROM
2 PLAQUE RUPTURE, CORRECT?

3 "A. NOT SPECIFICALLY, NO.

4 "Q. HAVE YOU EVER WRITTEN AN ARTICLE THAT DEALT WITH
5 ATHEROSCLEROTIC OR SUDDEN CARDIAC DEATH?

6 "A. NO."

7 I LOOK TO WHETHER OR NOT HE'S CONDUCTED ANY
8 RESEARCH OF ANY OF THIS.

9 "Q. NOW, YOU'VE NEVER DONE ANY RESEARCH ON THE CLASS
10 OF MEDICINES KNOWN AS NSAIDS, CORRECT?

11 "A. I HAVE NOT.

12 "Q. AND OBVIOUSLY, THAT INCLUDES NO RESEARCH EVER
13 DONE ON COX-2 INHIBITORS?

14 "A. THAT'S CORRECT.

15 "Q. HAVE YOU EVER PRESCRIBED VIOXX OR CELEBREX?"

16 THIS FELLOW IS A PATHOLOGIST. I DON'T THINK HE
17 CAN HELP THE PEOPLE THAT HE EXAMINES FROM THE STANDPOINT OF
18 FREEDOM OF PAIN. GENERALLY, THEY'RE DEAD. SO IT DOESN'T
19 SURPRISE ME. BUT HE DOESN'T HAVE ANY EXPERIENCE. I SIMPLY
20 NOTE THAT.

21 EXPERIENCE BEFORE HE WAS RETAINED, AS I SAID,
22 WAS CONSIDERABLE. OVER 7,000 AUTOPSIES HE'S BEEN ASSOCIATED
23 WITH. HE'S NEVER OPINED THAT A COX-2 INHIBITOR DRUG WAS THE
24 CAUSE OF DEATH. I THINK COUNSEL MAKES A VALID POINT. THIS IS
25 RATHER NEW. IT'S ONLY, WHAT, TEN YEARS OLD NOW OR THEREABOUTS?

1 SO IT'S SOMEWHAT NEW. IT'S NOT TODAY OR YESTERDAY, BUT IT'S
2 SOMEWHAT NEW.

3 BUT NOTWITHSTANDING THAT, I NOTE THAT THAT'S SOMEWHAT
4 NEW. BUT, IN ANY EVENT, HE HADN'T HAD ANY PERSONAL EXPERIENCE
5 WITH EVER DIAGNOSING OR MENTIONING THAT THAT WAS A CAUSE.

6 QUESTION ON PAGE 36:

7 "Q. HAVE YOU EVER, IN ANY OF THE 7,000 AUTOPSIES
8 YOU'VE PERFORMED, EVER COME TO THE CONCLUSION, WHETHER YOU
9 WERE ASKED OR NOT, THAT VIOXX OR ANY OTHER COX-2
10 CONTRIBUTED TO THE CAUSE OF DEATH?"

11 "A. I HAVE NOT."

12 QUESTION ABOUT WHAT IS HIS EXPERIENCE IN HIS
13 DAY-TO-DAY PRACTICE, QUESTION ON PAGE 39:

14 "Q. IS IT FAIR TO SAY THAT YOU NEVER CONSIDERED THE
15 CARDIAC SAFETY OF VIOXX UNTIL YOU WERE CONTACTED BY
16 PLAINTIFF'S COUNSEL?"

17 "A. ...IT WASN'T SOMETHING THAT I DEALT WITH ON A
18 DAILY BASIS."

19 ON PAGE 51:

20 "Q. SO PRIOR TO BEING RETAINED AS PLAINTIFF'S
21 EXPERT, VIOXX, TO YOUR KNOWLEDGE, WAS NOT RELEVANT TO
22 ANYTHING YOU WERE DOING, RIGHT?"

23 "A. IT WAS NOTHING THAT I WAS FOCUSED ON. IT WASN'T
24 ON MY RADAR SCREEN ON INDIVIDUAL CASE MANAGEMENT."

25 I LOOK AT HIS READINGS BEFORE HE WAS RETAINED BY

1 COUNSEL, READINGS ABOUT VIOXX, PAGE 50:

2 "Q. AND PRIOR TO BEING RETAINED IN THIS CASE, YOU
3 WERE JUST A CASUAL READER TO THE EXTENT VIOXX LITERATURE
4 APPEARED IN JOURNALS YOU HAPPENED TO BE READING AT THE
5 TIME, RIGHT?"

6 "A. YES."

7 REVIEW OF THE MEDICAL LITERATURE AFTER HE WAS
8 RETAINED -- AFTER HE WAS RETAINED, THAT HE REVIEWED ARTICLES.
9 BUT THE ARTICLES THAT HE REVIEWED WERE ARTICLES HE WAS GIVEN BY
10 PLAINTIFF COUNSEL, AND I'M NOT QUITE SURE HE REVIEWED ALL OF
11 THOSE.

12 "Q. I MEAN, SO DO YOU RECALL WHAT PART OF THIS LIST
13 YOU PUT TOGETHER AND WHAT PART WAS PUT TOGETHER BY
14 OTHERS?"

15 IT'S ON PAGE 38.

16 "A. I MEAN, AS FAR AS THE LIST GOES, I THINK MOST OF
17 THE VIOXX ARTICLES ON THE LIST WERE LISTED BY THE LAW
18 FIRM" -- MEANING THE LAW FIRM THAT RETAINED HIM. "SOME OF
19 THAT OVERLAPPED WITH ARTICLES THAT I HAD ALREADY HAD, BUT
20 I -- YOU KNOW, I DIDN'T CHANGE THAT. MOST OF THE CARDIAC
21 PATHOLOGY SUDDEN DEATH ARTICLES, I ADDED."

22 WHAT DID HE DO WITH THE ARTICLES? HE SAID THAT
23 HE FLIPPED THROUGH THEM. ON PAGE 35, HE SAYS:

24 "Q. OTHER THAN PERHAPS FLIPPING THROUGH
25 VIOXX-RELATED ARTICLES IN THE NEW ENGLAND JOURNAL PRIOR TO

1 BEING CONTACTED BY THE PLAINTIFF COUNSEL, HAD YOU DONE ANY
2 REVIEW OF CARDIOVASCULAR SAFETY ON THE DRUG?"

3 "A. NO."

4 THE TIME THAT HE SPENT ON THE ARTICLES THAT HE
5 WAS GIVEN, QUESTION ON PAGE 38:

6 "Q. SO, REALLY, YOU'VE GOT EIGHT OR NINE HOURS IN
7 TOTAL THAT POSSIBLY COULD BE CONNECTED TO YOUR REVIEW OF
8 THE CARDIOVASCULAR SAFETY OF VIOXX?"

9 "A. YES."

10 THE REVIEW OF HIS DISCUSSION ABOUT THE ARTICLES
11 CONCERNED ME A LITTLE BIT WHEN HE'S ASKED ON PAGE 66:

12 "Q. OTHER THAN VIGOR, CAN YOU NAME ANY CLINICAL
13 TRIALS OF VIOXX?"

14 "A. WELL, I MEAN, THERE WAS APPROVE, THERE WAS
15 VICTOR, THERE WAS VIM, THERE WAS ADVANTAGE."

16 "Q. WHAT'S THE THIRD ONE YOU SAID? VIM?"

17 "A. VIM."

18 "Q. NEVER HEARD OF VIM."

19 "A. I THINK IT WAS CALLED VIM. IT WAS A, I THINK,
20 PROSTATE CANCER PREVENTION STUDY."

21 "Q. VIP?"

22 "A. OH, VIP, I'M SORRY. YOU'RE RIGHT. YEAH."

23 "Q. YOU SAID APPROVE, VICTOR, VIP, ADVANTAGE. ANY
24 OTHERS?"

25 "A. NOT SPECIFICALLY VIOXX, BUT IT WAS CLASS. I

1 THINK THAT WAS CELEBREX."

2 "Q. RIGHT. ANYTHING ELSE?"

3 "A. THERE WAS A BUNCH WITH NUMBERS. I DON'T KNOW
4 THAT THEY WERE EVER PUBLISHED, BUT THERE WAS A NUMBER OF
5 STUDIES, APPARENTLY, THAT WERE DONE THAT WERE NUMBER
6 STUDIES. I MEAN, THEY HAD, LIKE, A CODE NUMBER ON THEM."

7 I TRY TO DISCERN WHETHER HE HAS SOME KNOWLEDGE
8 ABOUT THE ISSUES THAT ARE PRESENT. ONE OF THE SIGNIFICANT
9 PARTIES OF PLAINTIFF'S CASE IS THAT VIOXX DECREASED OR
10 INHIBITED PROSTACYCLIN AND INCREASED THROMBOXANE; AND WHILE
11 THAT THEORY IS QUESTIONED, IT'S A RATHER VISIBLE THEORY AND A
12 SIGNIFICANT ONE AND EXPLAINED BY COUNSEL TO THE JURY ON
13 OCCASIONS. QUESTION ON PAGE 108:

14 "Q. DO YOU HAVE AN OPINION WHAT DEGREE OF
15 PROSTACYCLIN INHIBITION IN THE VASCULAR SYSTEM IS NEEDED
16 IN ORDER TO INCREASE THE RISK OF CARDIAC EVENTS?"

17 "A. NO."

18 "Q. DO YOU HAVE ANY OPINION TO WHAT DEGREE VIOXX
19 INHIBITS PROSTACYCLIN PRODUCTION IN THE VASCULAR SYSTEM?"

20 "A. NO."

21 AND QUESTION ON PAGE 94:

22 "Q. AND MORE SPECIFICALLY, YOUR OPINION REGARDING
23 THE FACT THAT -- YOUR OPINION THAT VIOXX REDUCES
24 PROSTACYCLIN IN PRODUCTION IN THE VASCULAR SYSTEM IS
25 SOMETHING YOU REACHED IN THE LAST TWO OR THREE WEEKS?"

1 "A. YEAH. LAST MONTH OR SO, SURE. YEAH."

2 I'M CONCERNED ABOUT THE RISKS, THAT HE
3 UNDERSTAND THE RISKS. PAGE 97 QUESTION:

4 "Q. DO YOU BELIEVE THE RISK CHANGES OVER DURATION OF
5 USE?"

6 "A. THERE IS SOME DATA THAT THE LONGER YOU USE IT,
7 THE RISK DOES GO UP TO SOME PERIOD, AND THEN LONG-TERM
8 USE, IT SEEMS TO STABILIZE."

9 "Q. DO YOU RECALL WHAT THAT DATA COMES FROM?"

10 "A. NO, I DON'T OFF THE TOP OF MY HEAD. I MEAN,
11 THERE WERE SOME STUDIES, AND PART OF IT MAY HAVE BEEN
12 SOLOMON THAT LOOKED AT, LIKE, LESS THAN 30 DAYS AND THEN
13 LONGER. THERE WAS ONE THAT LOOKED AT LESS THAN 16 -- OR
14 SIX MONTHS OR LONGER. THEN, AS I RECALL IT, THERE WAS
15 ANOTHER STUDY THAT SHOWED, BASICALLY, AFTER YOU GET TO A
16 CERTAIN POINT, YOU COULDN'T DEMONSTRATE THE RISK ANYMORE."

17 HE ALSO REVIEWED OTHER EXPERT REPORTS, WHICH IS
18 SIGNIFICANT AND HELPFUL, BECAUSE 703 ALLOWS THAT AND INSTRUCTS
19 THE EXPERTS TO DO THAT. QUESTION ON PAGE 73:

20 "Q. I NOTICED THAT YOU DIDN'T REVIEW ANY OF MERCK'S
21 EXPERT REPORTS OTHER THAN DR. WHEELER; IS THAT CORRECT?"

22 "A. I WASN'T GIVEN ANY. NOBODY GAVE THEM TO ME TO
23 REVIEW."

24 "Q. THEY ONLY GAVE YOU DR. RAY ON THE QUESTION OF
25 EPIDEMIOLOGY?"

1 "A. THERE WAS ANOTHER ONE BY, I THINK, SOMEBODY FROM
2 UNIVERSITY OF MICHIGAN."

3 "Q. DR. LUCCHESI?"

4 "A. YES."

5 "Q. YEAH, HE'S ANOTHER PLAINTIFF EXPERT."

6 "A. OKAY. I SAW THAT. THAT'S THE ONLY ONES I SAW.
7 I DID NOT SEE DEFENSE REPORTS OTHER THAN DR. WHEELER'S OR
8 ANYTHING."

9 "Q. SO THE ONLY REPORTS THAT YOU CONSIDERED ON THE
10 QUESTION OF THE RELATIVE RISK OF VIOXX FOR CARDIOVASCULAR
11 EVENTS ARE THE ONES PROVIDED BY PLAINTIFF EXPERTS, NOT
12 MERCK EXPERTS, RIGHT?"

13 "A. THAT -- AS FAR AS EXPERT REPORTS, THAT'S
14 CORRECT. THAT'S ALL THAT WAS GIVEN TO ME TO REVIEW."

15 I LOOK AT IT IN ITS TOTALITY, AND I AM CONCERNED
16 THAT HE HAS ENOUGH EXPERIENCE, ENOUGH EDUCATION, OR ENOUGH
17 HANDS-ON OR KNOWLEDGE OR EVEN WHETHER HE'S BEEN EXPOSED TO
18 ENOUGH OR EVEN UNDERSTANDS WHAT HE HAS BEEN GIVEN. I ALSO AM
19 CONCERNED A BIT ABOUT HIS METHODOLOGY. ON PAGE 51, HE'S ASKED:

20 "Q. RIGHT. BUT THAT -- SO IF WE TAKE YOUR SENTENCE
21 SERIOUSLY, YOU WOULD BE OPINING THAT, INDIVIDUALLY, ANYONE
22 WHO IS TAKING VIOXX, WHO HAD A HEART ATTACK, MORE LIKELY
23 THAN NOT VIOXX CONTRIBUTED TO THE HEART ATTACK?"

24 "A. IF YOU TAKE THEM ONE AT A TIME, THAT WOULD BE
25 CORRECT."

1 AGAIN, ON PAGE 61, LINE 4, HE'S ASKED:

2 "Q. SO JUST SO WE UNDERSTAND YOUR METHODOLOGY FOR
3 GIVING A SPECIFIC CAUSE OPINION, THE METHODOLOGY YOU
4 APPLIED HERE SUGGESTS THAT, ON AN INDIVIDUAL BASIS, YOU
5 WOULD SAY ANYONE WHO TEMPORALLY HAD A HEART ATTACK WHILE
6 ON VIOXX, MORE LIKELY THAN NOT, VIOXX WAS A CONTRIBUTING
7 CAUSE. CORRECT?"

8 "A. ASSUMING THAT WE'RE TALKING ABOUT INDIVIDUALS
9 HAVING HEART ATTACKS BASED ON CORONARY ARTERY DISEASE,
10 YEAH. IF YOU PULLED AN INDIVIDUAL PATIENT AND PRESENTED
11 IT TO ME, I THINK THAT WOULD BE THE PROBABILITY, YES."

12 "Q. AND THAT'S THE METHOD YOU APPLIED?"

13 "A. YES."

14 THAT METHODOLOGY, IF YOU'RE TAKING THE DRUG AND
15 YOU HAVE A HEART DISEASE -- HEART PROBLEM, THE DRUG CAUSED IT.
16 THAT'S A METHODOLOGY THAT I DON'T THINK PASSES THROUGH THE
17 GATES OF 702. HE WAS QUESTIONED ON THE METHODOLOGY ON PAGE
18 109:

19 "Q. NOW, EARLIER YOU AGREED THAT IT WOULD BE YOUR
20 EXPECTATION THAT NOT EVERYONE WHO TEMPORALLY HAD A HEART
21 ATTACK WHILE ON VIOXX NECESSARILY HAD THEIR HEART ATTACK
22 CAUSED BY VIOXX. DO YOU RECALL SAYING THAT?"

23 "A. YES."

24 "Q. HOW DO YOU DISTINGUISH BETWEEN THOSE PEOPLE WHO
25 HAD A CARDIAC EVENT THAT YOU BELIEVE WAS CAUSED BY VIOXX

1 AND THOSE WHOM DO NOT?"

2 "A. AGAIN, IT'S PROBABILITY. IT'S -- YOU'RE LOOKING
3 AT STATISTICALLY. IF THERE IS A MORE OR -- MORE THAN TWO
4 TIMES INCIDENCE THAT ANY INDIVIDUAL PATIENT WOULD MOST
5 LIKELY BE IN THE GROUP, THAT IT WAS RELATED TO VIOXX.
6 IT'S REALLY A STATISTICAL PROBABILITY. THERE IS NOTHING
7 IN THE PATHOLOGY THAT YOU CAN POINT TO AND SAY THIS IS A
8 VIOXX THROMBUS."

9 "Q. ALL RIGHT. LET'S TALK ABOUT THAT LAST ANSWER.
10 WHEN YOU SAY THERE IS NOTHING IN THE PATHOLOGY THAT YOU
11 CAN POINT TO AND SAY THIS IS A VIOXX THROMBUS, DOES THAT
12 MEAN THAT THERE IS NOTHING THAT IDENTIFIES A BLOOD CLOT IN
13 A CORONARY ARTERY AS BEING CAUSED BY VIOXX SPECIFICALLY ON
14 A PATHOLOGICAL REVIEW?"

15 "A. THAT WOULD BE CORRECT."

16 THEN QUESTION ON 110:

17 "Q. DOES THAT MEAN, SIR, THAT YOU CANNOT DISTINGUISH
18 IN THE GROUP OF FOLKS WHO HAD HEART ATTACKS WHILE TAKING
19 VIOXX THOSE WHO HAD HEART ATTACKS FROM VIOXX AND THOSE WHO
20 DID NOT?"

21 "A. YOU CAN DO THEM IN BIG POPULATIONS
22 STATISTICALLY. BUT IF YOU'RE ASKING ABOUT THIS INDIVIDUAL
23 PATIENT, AGAIN, YOU'RE DEALING WITH PROBABILITIES. YOU
24 CAN'T POINT TO THE THROMBUS AND SAY THIS IS A VIOXX
25 THROMBUS VERSUS A NON-VIOXX THROMBUS."

1 I DON'T SAY THAT EVERY PATHOLOGIST HAS THE SAME
2 PROBLEMS THAT THIS DOCTOR DOES. IN FACT, I DIDN'T FEEL THAT
3 WAY. I LOOKED AT THE TWO PATHOLOGISTS THAT WERE SUBMITTED OR
4 QUESTIONED OR ATTACKED, OR OBJECTED TO LAST TIME, AND I FELT
5 THAT THEY WERE QUALIFIED TO TESTIFY.

6 DR. LUCCHESI, HE WASN'T A TREATING PHYSICIAN,
7 BUT HE HAD A LOT OF CREDENTIALS AND WAS A DOCTOR, AN M.D. I
8 FELT HE WAS QUALIFIED TO TESTIFY.

9 SO I DON'T PAINT WITH A BROAD BRUSH IN THIS
10 SITUATION. I'M NOT SAYING THAT YOU NEED TO BE A PATHOLOGIST,
11 THAT YOU NEED TO HAVE DIAGNOSED PEOPLE OR THAT YOU NEED TO HAVE
12 PRESCRIBED OR HAVE SOME EXPERIENCE, BUT A BIT OF SOME OF THOSE
13 THINGS.

14 I DON'T FEEL THAT THIS DOCTOR DEMONSTRATED TO ME
15 THAT HE HAD ANY OF THEM, AND I KEPT LOOKING FOR MORE TO SEE
16 WHETHER OR NOT HE COULD GET THROUGH THE GATE. AND EVERY TIME I
17 LOOKED A LITTLE FURTHER, IT SEEMED MORE PROBLEMATIC.

18 SO I DO TAKE THESE THINGS SERIOUSLY, AND I DON'T
19 JUST WILLY-NILLY SHOOT FROM THE HIP. I FELT THAT THIS DOCTOR
20 MIGHT BE QUALIFIED TO TESTIFY ON OTHER AREAS BUT NOT THE
21 SPECIFIC CAUSATION, AND I REALLY HAVE ALREADY DEALT WITH THE
22 OTHER DOCTOR ON SEVERAL OCCASIONS AND I WON'T CHANGE THAT.

23 SO I UNDERSTAND THE MOTION. I APPRECIATE
24 COUNSEL'S ENTHUSIASM IN BRINGING IT, BUT I DO DENY THE MOTION.

25 MR. BIRCHFIELD: YOUR HONOR, MAY I ASK A QUESTION?

1 THE COURT: SURE.

2 MR. BIRCHFIELD: I JUST NEED TO KNOW THIS FOR TRIAL
3 PURPOSES BECAUSE IF THE COURT IS TELLING US NOW THAT
4 DR. LUCCHESI CAN GIVE A SPECIFIC CAUSATION OPINION --

5 THE COURT: I DID LAST TIME.

6 MR. BIRCHFIELD: YOUR HONOR, I'LL GO BACK AND REREAD
7 YOUR DAUBERT OPINION, BUT IT WAS MY UNDERSTANDING THAT YOU HAD
8 EXCLUDED HIM --

9 THE COURT: I THOUGHT HE TESTIFIED LAST TIME. I KNOW
10 WE HAD TWO DOCTORS TESTIFY. I THINK BLOOR AND LUCCHESI. THAT
11 WAS MY NOTES. THAT'S THE NOTES THAT I MADE. I THOUGHT BOTH OF
12 THEM, BOTH LUCCHESI AND BLOOR, TESTIFIED THAT VIOXX
13 SPECIFICALLY CAUSED IRVIN'S DEATH.

14 MR. BIRCHFIELD: DR. BLOOR DID, THAT IS CORRECT. AND
15 YOUR HONOR, IF THAT'S THE CASE, THEN WE'LL SEE IF WE CAN GET
16 DR. LUCCHESI HERE.

17 MR. BECK: YOUR HONOR, I HAVE A WRITTEN AGREEMENT
18 WITH MR. BIRCHFIELD THAT DR. LUCCHESI IS NOT GOING TO TESTIFY
19 IN THIS TRIAL, AND WE ENTERED THAT AGREEMENT AFTER THE DAUBERT
20 RULINGS WERE MADE AND BEFORE THE TRIAL STARTED. AND I GAVE MY
21 OPENING STATEMENT BASED ON THE AGREEMENT THAT I HAD IN WRITING
22 WITH MR. BIRCHFIELD THAT HE WAS NOT GOING TO CALL DR. LUCCHESI.

23 THE COURT: LOOK, THAT'S ANOTHER ISSUE THAT I'M NOT
24 GOING TO DEAL WITH AT THIS TIME. I'LL LISTEN TO IT, BUT
25 YOU-ALL TALK ABOUT IT AND SEE IF YOU NEED MY INTERVENTION ON

1 THAT.

2 MR. BECK: YOUR HONOR, I HAVE ONE LAST POINT.

3 THE COURT: YEAH. THE QUESTION WAS ASKED BY
4 MR. BEASLEY, I THINK, AT THE TIME, THE QUESTION ON THE
5 TRANSCRIPT, 220, LINE 17:

6 "Q. NOW, THE FINAL QUESTION: DO YOU HAVE AN OPINION
7 AS TO WHETHER VIOXX, BASED ON WHAT YOU'VE TOLD US, CAUSED
8 OR SUBSTANTIALLY CONTRIBUTED TO CAUSE THE HEART ATTACK
9 THAT RESULTED IN THE DEATH OF DICKY IRVIN?"

10 "A. BASED ON REASONABLE MEDICAL PROBABILITY, I THINK
11 IT'S HIGHLY LIKELY THAT VIOXX CONTRIBUTED TO MR. IRVIN'S
12 DEMISE."

13 SAME WAY WITH DR. BLOOR. ON PAGE 314 OF THE
14 TRANSCRIPT, LINE 18:

15 "Q. DOCTOR, BASED UPON YOUR REVIEW OF THE MEDICAL
16 RECORDS AND THE AUTOPSY REPORT, HAVE YOU COME TO A
17 CONCLUSION AS TO WHETHER OR NOT VIOXX CAUSED OR
18 CONTRIBUTED TO CAUSE DICKY IRVIN'S NONATTACHED CLOT?"

19 "A. I THINK, AS I STATED EARLIER, IT'S MY OPINION
20 THAT VIOXX PLAYED A CONTRIBUTING ROLE IN THE FORMATION OF
21 THE THROMBUS."

22 AND HE GOES ON TO RELATE IT TO THE DEATH. SO I
23 THINK BOTH OF THESE FOLKS GAVE SPECIFIC ANSWERS TO THOSE
24 QUESTIONS. I'VE DEALT WITH THEM AND THAT'S -- THERE ARE JUST
25 SOME WITNESSES THAT JUST -- NOT BECAUSE OF THEIR DEGREE, BUT

1 BECAUSE OF THE WHOLE PICTURE, HAVE PROBLEMS AND I KNOW -- I
2 PRACTICED IN THE FIFTH CIRCUIT AND I KNOW HOW THEY ARE. THERE
3 IS NO SENSE IN PLUGGING ERROR INTO A RECORD TO HAVE TO REDO
4 SOMETHING AGAIN.

5 MR. BECK: YOUR HONOR, ON A SEPARATE MATTER, JUST A
6 HOUSEKEEPING THING AND A HEADS-UP FOR THE COURT. THIS HAS TO
7 DO WITH DR. TOPOL. JUST TO ALERT THE COURT THAT TODAY IN
8 NEW JERSEY, I'M TOLD, MR. LANIER ANNOUNCED THAT DR. TOPOL IS
9 LEAVING THE CLEVELAND CLINIC; THAT MR. LANIER IS HIS PERSONAL
10 LAWYER IN HIS NEGOTIATIONS OVER SEPARATING FROM THE CLEVELAND
11 CLINIC AND THAT MR. LANIER IS HOPING TO SECURE HIS TESTIMONY IN
12 FUTURE CASES. SO IN CASE YOU THOUGHT YOUR LIFE WAS GETTING
13 LESS COMPLICATED, YOUR HONOR, WE'VE GOT THOSE THINGS LOOMING.
14 AND I HAVEN'T FIGURED OUT WHAT THEY MEAN FOR DR. TOPOL, BUT I
15 WANTED EVERYBODY TO KNOW THE SAME THING THAT I KNOW.

16 THE COURT: I APPRECIATE IT. OKAY, FOLKS. THANK YOU
17 VERY MUCH.

18 MR. HERMAN: YOUR HONOR, ON BEHALF OF MDL, WE
19 APPRECIATE THE OPPORTUNITY TO BE BEFORE YOU. WE KNOW THAT YOU
20 NEVER SHOOT FROM THE HIP. IT'S OBVIOUS THAT THE DETAILS THAT
21 YOU'VE GIVEN IN SUPPORT OF YOUR CONSISTENT RULINGS ARE GOING TO
22 BE VERY INSTRUCTIVE, AND WE APPRECIATE IT.

23 THE COURT: THANK YOU VERY MUCH. WE'LL STAND IN
24 RECESS.

25 THE DEPUTY CLERK: EVERYONE RISE.

1 (WHEREUPON, THE COURT WAS IN RECESS FOR THE EVENING.)

2 * * *

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25