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Contrary Tales of Vioxx Role in Texan's Death

By [ALEX BERENSON](#)

ANGLETON, Tex., July 14 - Two very different lawyers presented two very different opening arguments - in both style and substance - Thursday in Ernst v. [Merck](#), the first Vioxx-related lawsuit to reach a jury.

In the morning, W. Mark Lanier, representing the widow of Robert Ernst, who died at age 59 in May 2001 after taking Vioxx for eight months, told a tale of corporate greed. Before a packed courtroom in the Brazoria County Courthouse in Angleton, a semirural town 30 miles south of Houston, Mr. Lanier accused Merck of rushing the painkiller Vioxx to market in 1999 despite knowing its risks, and then pressing the drug on patients who did not need it.

Vioxx became a blockbuster for Merck, generating as much as \$2.5 billion a year in sales before the company pulled it from the market last fall.

Mr. Lanier, a trial lawyer from Houston known for his folksy manner and ability to connect with juries, illustrated his statement with a projected PowerPoint presentation that included bricks of money and a bulldozer to indicate the power of Merck's marketing efforts. "They turned science into science fiction," he said of Merck, later referring to the company's "Merck-y ethics."

In the afternoon, it was Merck's turn. David C. Kiernan, a partner with the Washington law firm of Williams & Connolly, opened the defense by saying that the company had thoroughly tested Vioxx before introducing the drug in 1999. Merck continued to research Vioxx for the next five years before withdrawing it last September when a study showed that it had heart risks, he said.

But Mr. Ernst died from an arrhythmia, or irregular heartbeat, and Vioxx has never been shown to cause arrhythmias, Mr. Kiernan said. In comparison to Mr. Lanier's opening, Mr. Kiernan's presentation was staid. He read portions of his statement and illustrated his talk mostly using blue-and-yellow PowerPoint pie charts and long excerpts of letters from the Food and Drug Administration.

Some in the courtroom appeared to nod off at times during Mr. Kiernan's argument, although the jury seemed to attempt to focus on his comments. Nearly 150 spectators showed up for the arguments, including investors, lawyers from other firms, dozens of

print and television reporters and even law students from Mr. Lanier's alma mater, Texas Tech University.

The case has attracted national attention because Merck already faces 4,000 lawsuits from people who claim they suffered heart attacks or strokes after taking Vioxx. About 20 million people took Vioxx before it was withdrawn, and between 20,000 and 100,000 suits could eventually be filed, lawyers connected to the case say.

The start of opening arguments was briefly delayed yesterday after Mr. Lanier said, without the jury present, that he had heard that two local residents had received telephone calls last week from a polling firm claiming to be connected to Merck. After lawyers for Merck denied they conducted polling or were attempting to influence the jury outside of court, Judge Ben Hardin, who is overseeing the case, said he would warn the jurors to report any efforts to influence them.

"If you get phone calls, hang up, and then report them to me," he told the jury just before opening arguments began. "The courtroom is the place where your evidence has got to come."

Mr. Lanier has promised to make the case entertaining for jurors, and he did not disappoint on Thursday. Speaking for nearly three hours with only one break, and without notes or a lectern, he began by introducing Mr. Ernst's widow, Carol, who sat in the front row of the spectators' area. He then went on to attack Merck and its former chief executive, Raymond V. Gilmartin, who resigned under pressure in May. Merck sold Vioxx despite knowing its risks because of Mr. Gilmartin's greed, Mr. Lanier said.

"Ray Gilmartin made it profit first," he said, showing a slide of an automated money machine. He showed the jury dozens of letters from federal drug regulators that criticized Merck's advertising of different drugs as false or misleading. "It's happening all over the company," he said.

Despite Merck's profitability, Vioxx was crucial to its future, and he said Merck rushed to introduce the drug to compete with another new painkiller, Celebrex, made by [Pfizer](#). The company did not properly study the risks associated with Vioxx, he said, and did not disclose the risks it did find. Later, Mr. Lanier told the jury that while the medical evidence was complicated, he would show that a heart attack could have led to the arrhythmia that an autopsy showed caused Mr. Ernst's death. He concluded with an impassioned speech, asking the jury to look beyond Merck's "finger-pointing."

Mr. Kiernan offered a more traditional opening and did not directly address many of Mr. Lanier's allegations. He explained that Merck had carefully researched Vioxx and disclosed all relevant data with outside scientists and the Food and Drug Administration. While Merck's marketing is not perfect, the company actually received fewer warning letters than other drug makers, he said.

Further, Mr. Kiernan asked the jury to focus on the question of causation and to understand the difference between heart attacks and arrhythmias. The coroner's report showed that Mr. Ernst died of an arrhythmia, not a heart attack, he said. Since Vioxx has never been shown to cause arrhythmias, Mr. Kiernan said, it is not responsible for Mr. Ernst's death.

"Vioxx didn't cause Mr. Ernst's death," he said. "He did not have a heart attack."

He finished by listing several top Merck scientists who had taken Vioxx, including Dr. Edward M. Scolnick, its former chief of research, and Dr. Nancy Santanello, head of epidemiology.

At the conclusion of Mr. Kiernan's argument, Mr. Lanier jumped to his feet and asked to be allowed to question Dr. Santanello, who was present in the courtroom, before Judge Hardin dismissed the jury for the day.

"All she's got to do is tell the truth - that doesn't take a lot of practice," Mr. Lanier said loudly, to laughter from the courtroom. Judge Hardin denied his request. The trial resumes Monday.

<http://www.nytimes.com/2005/07/15/business/15vioxx.html?adxnml=1&adxnmlx=1121985342-kK1JWQDEMSSTX3AwSgfA6Q>