

DON SCOTT WINS BAYER CASE - STANDARD-EXAMINER



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Jury sides with Bayer in lawsuit
Ogden woman loses bid for any damages

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OGDEN—A 2nd District Court jury decided the Bayer Corp. was not to blame for Marlus Hardy's stroke, apparently not convinced she even took the company's now-besieged medication.

In a case picked up by a large New York City law firm at no charge to her, the 65-year-old Ogden woman claimed the now-banned decongestant phenylpropanolamine, or PPA, in Alka-Seltzer Plus left her wheelchair-bound, almost totally paralyzed from a Sept. 10, 2000, stroke.

Attorneys after the verdict said it was too early to say what the impact of the Ogden case would be as one of the first to go to trial among up to 1,000 pending PPA lawsuits nationwide.

The FDA took PPA off the market two months after Hardy's stroke, worried about its links to stroke in numerous studies over the years.

The jury came back with its "no" verdict Thursday by 1:30 p.m., almost exactly 24 hours after they received the case following weeks of mind-numbing scientific testimony regarding some 40 studies and hundreds of journal articles about PPA.

And an angry alternate juror denounced the verdict.

"I was surprised at the verdict," said Kelly Moffitt, of Eden, one of three alternates who sat through the entire near four-week trial and were then excused from the case when deliberations began.

"I was so angry when I heard. That verdict was wrong. Bayer is guilty. ... I was there. I saw the evidence. Bayer knew. Bayer has known for years what that product could do."

No other jury members were immediately available.

"There are a thousand more lawsuits pending against manufacturers who used PPA," said Hunter Shkolnik, the New York lawyer who led Hardy's suit and has sued Bayer before over PPA. "They are in every state in the nation."

Bayer officials called that number exaggeration, but they wouldn't say how many they faced, while noting other drug manufacturers also faced the suits.

A happy Don Scott, Bayer's lead lawyer defending the Hardy suit, after Thursday's verdict said he was defending Bayer in several other PPA suits.

A Denver lawyer, he said he wasn't sure exactly which Bayer case he was going to next. Scott and his co-counsel Les Houtz said it was hard to measure how the Ogden victory would affect the other lawsuits.

"They are all different," Scott said. "With different facts in different jurisdictions with different laws."

Another Bayer lawyer, David Slagle, a former Salt Lake lawyer recently moved to San Diego, said he had a Bayer PPA case pending in federal court in Salt Lake City. He also couldn't read the impact of the Ogden case on his pending Bayer suit.

Bayer released a short statement from its West Haven, Conn., office: "The verdict validates Bayer's assertion that PPA, which had been in its effervescent cough and cold medicines, was safe and effective and did not cause Ms. Hardy's injuries."

It's possible Shkolnik could go up against Scott again in a Bayer lawsuit. Among seven other PPA suits Shkolnik has pending, several are against Bayer.

"I've got seven coming up for trial and more in the work-up phase," he said, pointing to suits in Atlanta, New York and Oklahoma as closest to the trial phase.

Shkolnik also sued Bayer twice in the mid-90s and another drug company in 1999 in PPA cases. All three were resolved short of trial.

"They kind of went away is how I'm allowed to describe it," Shkolnik said.

The Ogden case is the second in the country against Bayer to go to trial over the now-banned decongestant, Shkolnik and co-counsel Colin King, of Salt Lake, said.

Bayer lost a PPA case in Texas last fall in a \$400,000 judgment to a young man who recovered from his stroke after five weeks, they said.

The two felt Hardy's case was lost well before the verdict came in because of a question from the jury at 11:30 a.m. Thursday.

Jurors asked if they had to assume Hardy took the Alka-Seltzer Plus or if they had to make a finding that she did or did not.

To King and Shkolnik that meant the jury didn't pass judgment on PPA, but on Steve and Don Crowley, Hardy's son and ex-husband respectively.

The jury apparently didn't believe their testimony about giving Hardy the Alka-Seltzer Plus, they said.

Bayer brought to court the owner of the store where the Crowleys say the medication was purchased. He said he never stocked the stuff.

Members of the legal team that lost the Bayer case in Texas were regular visitors to 2nd District Judge Ernie Jones' courtroom for the Hardy trial, her lawyers said.

"This was school for them, they've got to get ready for more cases," Shkolnik said.

Hardy's disabilities allowed her only two brief visits to the trial. Neither she nor any family members were on hand for the verdict.