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Jury Sets \$9 Million Award in Vioxx Case

By [ALEX BERENSON](#)

A New Jersey jury found today that [Merck](#) had misled the [Food and Drug Administration](#) about the safety of its painkiller Vioxx and awarded \$9 million in punitive damages to John McDarby, a 77-year-old man who had a heart attack in 2004 after taking Vioxx for four years.

By a 7-to-1 vote, jurors in the Atlantic City Superior Court found that Merck had knowingly withheld information from the F.D.A. and that the company's misconduct was "wanton and willful." The verdict was read in Courtroom 3A before Judge Carol E. Higbee, who is overseeing 4,500 other lawsuits against Merck over Vioxx.

The \$9 million award comes six days after the same jury awarded Mr. McDarby and his wife Irma \$4.5 million in compensatory damages for his heart attack. Mr. McDarby broke his hip in a fall as a result of the heart attack and is confined to a wheelchair.

Today's verdict adds to Merck's legal difficulties over Vioxx, an arthritis medication taken by 20 million Americans from 1999 to 2004. The verdict marks the second time in four Vioxx cases that a jury has ordered Merck to pay punitive damages, which are typically awarded only in cases of egregious corporate misconduct.

The jury's award of punitive damages means the case will automatically be referred to the New Jersey attorney general's office for a criminal investigation.

Before today's verdict, no jury in New Jersey had ever awarded punitive damages against a drug maker, and the state is generally viewed as friendly to drug companies, which are among its largest employers. Merck is based in Whitehouse Station, N.J., about 100 miles northwest of Atlantic City, and has 10,000 employees in New Jersey.

Merck shares dropped as much as 1 percent today after the verdict was announced. They had fallen 3 percent after last week's award.

"This is huge," said W. Mark Lanier, the lead plaintiffs' lawyer in the case. "Merck thought they were bulletproof in New Jersey. They just got hit with \$13.5 million in damages for a 75-year-old diabetic who had a heart attack."

About 9,650 lawsuits, representing 19,000 plaintiffs' groups, had been filed against Merck as of Dec. 31, according to Merck. Mr. Lanier predicted that the number of lawsuits would double over the next several months.

In a statement, Merck said it would appeal the ruling.

"Merck's actions were proper and did not, in any way, call for this award," said Chuck Harrell, a member of Merck's defense team. "The evidence was clear that we provided the U.S. Food and Drug Administration with the information about Vioxx that we were required to provide."

The verdict is another big victory for Mr. Lanier, who has also won the only other verdict against Merck in a Vioxx case so far — a \$253.5 million award in Texas in August. Mr. Lanier handled the bulk of the arguments during this trial, including questioning of Raymond V. Gilmartin, Merck's former chief executive, on Thursday. Mr. McDarby was also represented by Robert Gordon and Jerry Kristal.

Before the punitive damages phase of the case began, Merck tried to prevent Mr. Lanier from participating. In a hearing last week before Judge Higbee, Merck argued that Mr. Lanier had represented only Thomas Cona, a second plaintiff in the case. Mr. Cona was not awarded compensatory damages last week and so was not eligible for punitive damages.

But Mr. Gordon, Mr. McDarby's lawyer, quickly responded that Mr. Lanier had handled questions about Merck's liability for both Mr. McDarby and Mr. Cona throughout the case and was the only lawyer capable of cross-examining Merck's witnesses in the punitive phase. Judge Higbee agreed and allowed Mr. Lanier to participate.

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