COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case No. 2012-SC-000162
Court Of Appeals Case No. 2011-CA-000234-MR

JAMES RATLIFF, On Behalf Of Himself And All Others Similarly Situated — **APPELLANT**

V.

On Appeal From The Pike Circuit Court
Action No. 04-CI-01493

MERCK & CO., INC. — **APPELLEE**

REPLY BRIEF OF APPELLANT

This shall certify that this Reply Brief Of Appellant was served by depositing true copies in the United States Mail, first class, postage prepaid, addressed to Susan J. Pope, Esq., Frost Brown Todd, LLC, 250 West Main Street, Suite 2800, Lexington, Kentucky 40507; John H. Beisner, Esq. and Jessica D. Miller, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Avenue, NW, Washington, D.C. 20005; The Honorable Steven Combs, Judge, Pike Circuit Court, 423 Hall of Justice, 172 Division Street, Pikeville, Kentucky 41501; and Mr. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 2nd day of April, 2013.

Respectfully submitted,

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I. ARGUMENT

The Court of Appeals Opinion, which reversed the class certification of Appellant's fraud claim after finding that the predominance and superiority requirements were not met under CR 23.02(c), effectively removes all fraudulent and negligent misrepresentation claims from the purview of CR 23 – a Rule which by its terms is not so limited.[1] The Opinion also ignores Kentucky precedent recognizing that common law fraud claims are properly certifiable. Furthermore, the Appellee, Merck & Co., Inc ("Merck") has failed to establish that the Trial Court erred in finding Appellant James Ratliff ("Ratliff") to be a proper class representative, and this argument is therefore an inadequate alternate basis for upholding the Court of Appeals' reversal of the certification of the fraud claim asserted by Appellant on behalf of this Kentucky class. Finally, the Kentucky Consumer Protection Act claim asserted by Ratliff on behalf of the Class remains viable in light of the Court of Appeals' analysis.

A. Utilization Of A Generalized Method Of Proving Reliance Is Proper With Respect To The Class Fraud Claim.

Merck's Appellee Brief wholly fails to address language cited by Ratliff directly from the Advisory Committee notes to FRCP 23(b) addressing the predominance requirement, and stating that, "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class" (emphasis added). All fraud claims contain an element of reliance, and there is no rule, under the Kentucky or Federal Rules of Civil

[1] In so doing, the Court of Appeals employed an inapplicable "rigorous analysis" of the requirements of CR 23.02 – "rigorous analysis need be undertaken only with regard to CR 23.01." Stewart Title Guarantee Company v. Finney, 2012 Ky. App. Unpub. LEXIS 817, *7 (Nov. 2, 2012) (emphasis added), attached at Tab A of the Appendix for the Court's review and reference.

Procedure, excluding claims containing an element of reliance from class certification. The drafters of the Civil Rules could have easily expressed such an exclusion had it been their intent.

Merck has likewise not set forth any persuasive justification for the Court of Appeals' failure to recognize Kentucky precedent to the effect that it is proper and permissible to certify common law fraud claims, despite the presence of the element of reliance. See Wiley v. Adkins, 48 S.W.3d 20 (Ky. 2001). In Wiley, the Supreme Court upheld certification of a class alleging that its members had been defrauded by a for-profit business school and its administrator. In considering the predominance requirement of CR 23.02(c), this Court noted that "it is not necessary that there be a complete identity of facts relating to all members as long as there is a common nucleus of facts." Id. at 23. This Court specifically found that the predominance requirement was satisfied where "each member of the class was a former student of the college who claimed to have been the victim of fraud." Id. Here, where each member of the class is a consumer claiming to be a victim of the same course of fraudulent conduct by Merck, the holding of Wiley with respect to the predominance requirement of CR 23.02 is directly applicable.

Kentucky has likewise recognized that the predominance requirement is met where elements of a class claim can be established by generalized proof. See, e.g., Stewart Title Guar. Co. v. Finney, supra, at *13, 18, Appx., Tab A. Many courts in fact permit the utilization of a generalized method for proving reliance where undisclosed fraudulent conduct, concealment or omissions of material fact are common to the class. See Appellant's Brief, pp. 28-32, and numerous cases cited therein. See also Krell v.

Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 310 (3d Cir. 1998) (finding commonality, predominance and typicality in a nationwide class of consumers alleging deceptive sales practices by an insurer and asserting common law fraud claims, where there was proof of substantially similar, and sometimes identical, oral and written misrepresentations, the use of pre-approved written marketing materials, and the fact that Prudential trained its agents to use these fraudulent sales techniques); Vasquez v. Superior Court, 4 Cal. 3d 800, 810-812 (Cal. 1971) (approving class certification and generalized proof of reliance where plaintiffs alleged that salesmen memorized a standard statement containing the representations and that this statement was recited by rote to every member of the class – despite the fact that the defendants flatly denied the uniformity of the alleged misrepresentations).

The viewpoint expressed by the drafters of the Federal Rule governing class certification, upon which the Kentucky Rule is based, has been echoed by multiple courts, in several different jurisdictions, contemplating varied and not necessarily uniform misrepresentations or fraudulent omissions by the defendants in question, in the face of denials that the representations were in fact uniform. The holdings of these courts should be carefully considered in relation to the common law fraud claim asserted by Appellant on behalf of the proposed class of Kentucky consumers. Merck has set forth no legitimate basis for distinguishing the cases cited by Appellant, and in fact there is none. Ratliff spent several dollars a month to purchase a drug which had deadly undisclosed side-effects. The financial harm caused to Ratliff by Merck's misleading marketing practices – approximately $350 – is relatively small; however, if his

total expenditures are added up and to a class of over approximately 200,000 individuals, the outlay of money is exponentially higher, resulting in a loss in excess of 60 million dollars to Kentucky consumers. Seeking redress is impractical on an individual basis, but becomes feasible in the context of a class action, where Ratliff's loss is combined with the loss of others similarly situated. Here, and unless this Court holds that Kentucky courts can employ a generalized method of establishing reliance in common law fraud claims where particular fraudulent conduct or practices are common to the class, Kentucky consumers will be without a fraud remedy – an untenable result.

As the Court in Vasquez, supra, commented, "[f]requently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers are often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct." Vasquez, 4 Cal. 3d at 808. The court continued: "A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial." Id.

B. The Trial Court Properly Found That Ratliff Is An Adequate Class Representative.

The Plaintiff Ratliff brought this case as a class action on behalf of all Kentucky residents who have purchased and taken Vioxx and who, upon the recommendation and

advice of the FDA and Merck, have contacted or will contact their physicians to seek advice regarding their use of Vioxx. (Class Action Complaint, R. v. 1, at p. 1). Ratliff is a member of the proposed class certified by the Trial Court – he was prescribed Vioxx by doctors who relied heavily on Merck's misleading and deceptive marketing materials. He then discontinued use, and has since obtained the medical consultation suggested by the FDA. Although Merck attempts to discredit Ratliff's deposition testimony on this point by insinuating that he did not obtain this consultation, his testimony speaks for itself: "Q: And so, how did you arrive at the figure of $180, do you remember? A: That's what the cost was. Q: Okay. A: That's what they charged me. I didn't, you know, arrive at anything. That is what they charged me." (Ratliff Dep., 57:13-19, R. v. 3, p. 317). Including damages arising from work missed as a result of the medical consultation and other consequential damages, Merck's misleading and deceptive marketing practices resulted in a direct monetary loss to Ratliff of approximately $350. Ratliff seeks reimbursement of these costs, on behalf of himself and those similarly situated.

In finding that the claims asserted by Ratliff on behalf of the class are properly certifiable, the Trial Court specifically considered the adequacy of Ratliff as a representative. (Am. Order, R., v. 8, p. 1112). The Court found that Ratliff is a member of the class, "possesses the same interests, has suffered the same injuries, seeks the same economic redress, and his interests are therefore substantially co-extensive with the interests of the Proposed Class." (Id., pp. 1124-25). Merck claims that Ratliff is an inadequate representative because the evidence is conflicting whether he has consulted a doctor concerning the risks of Vioxx, and he may therefore be unable to provide the trial

court with sufficient evidence in support of his claim against Merck. Appellee Brief, pp. 42-45.

First, these same arguments were made by Merck on a Motion for Summary Judgment before the Trial Court, in which Merck argued that Ratliff's claims fail for lack of proof. (See Docket Sheet, Record). The Trial Court considered and rejected these arguments, denying Merck's Motion for Summary Judgment by Order dated April 2, 2012. Id. The Trial Court therefore has already found that, at the very least, genuine issues of fact exist with respect to the proof available to Ratliff in support of his claims, and this finding was not challenged or overturned by the Court of Appeals. If Ratliff's claims can survive summary judgment, then his claims are certainly viable enough to support a finding that he is an adequate class representative. Randall v. Rolls-Royce Corp., 637 F.3d 818 (7th Cir. 2011), cited by Merck, is therefore clearly distinguishable – the trial court in that case had previously granted summary judgment in favor of the named class plaintiffs with respect to the putative class claims, and it was therefore without question that the named plaintiffs were subject to a defense that would not defeat the claims of the other proposed class members, thereby rendering those plaintiffs inappropriate class representatives. Id.

Furthermore, although Ratliff occasionally had difficulty remembering the precise circumstances surrounding past events, courts in Kentucky have held that such difficulties should not result in a denial of certification. See, e.g., Hyland v. Homeservices of America, Inc., 2008 U.S. Dist. LEXIS 90892 at *10 (W.D. Ky. 2008) (holding that "the only issue before a court on a motion for class certification is whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of

Rule 23…as such, [a] Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claim.") (citation omitted). Accordingly, because any alleged inadequacies in Plaintiff's deposition testimony are ultimately an issue of credibility and the merits of his claims, which have already survived the summary judgment stage of litigation, the Trial Court acted properly in refusing to consider these alleged inadequacies when making its certification decision. All that is required is that: (1) Ratliff's claims are common with those of the unnamed members of the class, and that (2) Ratliff will vigorously prosecute his claims through adequate class counsel. See Hyland, supra, at *15. Merck does not dispute that Ratliff has and will vigorously continue to prosecute his claims on behalf of the other class members – he has done so for nearly nine years despite Merck's repeated attempts to derail the litigation.[2]

The remaining cases cited by Merck with respect to this issue are likewise inapposite. Wesley v. Cavalry Invs., LLC, 2006 U.S. Dist. LEXIS 69561 (E.D. Pa. Sept. 27, 2006), does not support Merck's argument that Ratliff is inadequate because his claims lack substantive merit. Instead, it stands for the proposition that a plaintiff cannot be an adequate class representative if he or she does not fit within the definition of a class member. Id. at *2-24 (refusing to certify because plaintiff did not satisfy the elements of commonality or typicality, making it unnecessary to even consider the adequacy of representation requirement, but noting that based on the facts specific to plaintiff's claim

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[2] Reversal of the Trial Court's certification of the class on adequacy grounds would furthermore not necessarily guarantee the ultimate decertification of the class – the Trial Court may order substitution of the named class representative under Rule 23.04(1)(b)(iii). See, e.g., Champ v. Siegel Trading Co., 55 F.3d 269, 272-74 (7th Cir. 1995); Birmingham Steel Corp. v. TVA, 353 F.3d 1331, 1339 (11th Cir. 2003); McKowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380, 389 (3d Cir. 2002).

the named plaintiff did not fall within one definition of the class). No such allegation has been made by Merck – either before the Trial Court or the Court of Appeals, and in fact there is no basis for concluding that Ratliff does not meet the class definition set forth in the Trial Court's Amended Order Certifying Class. Moreover, the court in Solo v. Bausch & Lomb, Inc., 2009 U.S. Dist. LEXIS 115029 (D.S.C., Sept. 25, 2009) did not, as Merck contends, deny class certification because of the inadequacy of the class representative or the representative's inconsistent testimony, but did so because "determining the membership of plaintiffs' proposed class would require countless factual inquiries into the individual circumstances of potential class members, most of whom will have long ago forgotten the details relevant to plaintiffs' allegations." Id. at *23.

C. The Kentucky Consumer Protection Act Class Claim Remains Viable Under The Analysis Employed By The Court Of Appeals, And Ratliff Believes That Portion Of The Court of Appeals' Ruling Remains Viable.

Merck spends several pages of its Appellee Brief arguing that the Court of Appeals' Opinion should be read as holding that Appellant's class claim under the Kentucky Consumer Protection Act ("KCPA") is not properly certifiable. To the contrary, however, and as set forth in detail in Appellant's Brief,[3] the Court of Appeals did not conclude that certification of the Appellant's class claim under the KCPA was not proper. Instead, the Court of Appeals cited with approval and analogized the class' KCPA claim to the analysis employed by the court in Plubell v. Merck, 289 S.W.3d 707,

[3] Appellant's Brief, pp. 19-21. The Court of Appeals specifically found that reliance is not an element of a claim under the KCPA, and then went on to distinguish the fraud claim, which does require the element of reliance, and concluded that individualized questions regarding the element of reliance was what defeated certification of that claim. Opinion, pp. 10-12. Merck's representation of the Court of Appeals Opinion, which does not distinguish the Court's analysis of KCPA claim from its analysis of the fraud claim, at best, is skewed.

714 (Mo. Ct. App. 2009), an opinion holding that a class asserting a claim under a virtually identically worded Missouri Consumer Protection Act was properly certifiable. The Court of Appeals was in fact careful to distinguish between the analysis with respect to the Appellant's KCPA claim and the putative class claim asserting fraud. The Trial Court's Certification Order, on the other hand, did not provide a separate analysis with respect to each of the class claims. Instead, the Order analyzed both the KCPA and fraud claims as if they were the same and required identical elements of proof for the purposes of the class certification analysis. As is evident from the Court of Appeals' Opinion, this is simply not the case. The Certification Order, as written, did not therefore permit the Court of Appeals to reverse certification with respect to one claim and yet uphold it with respect to the other. It is quite clear however, based on the analysis employed by the Court of Appeals, that the class KCPA claim remains viable on remand to the Trial Court for proceedings consistent with the Court of Appeals' Opinion.

Although Merck repeatedly characterizes Appellant's KCPA claim as an "ill conceived" class action, forty-nine such actions under various states' consumer protection acts have been asserted against Merck arising from its practices in marketing Vioxx. A majority of those cases were consolidated in an MDL proceeding, In Re: Vioxx Products Liability Action, 05-MD-01657. In fact, when the instant litigation was initially filed in the Pike Circuit Court, Merck unsuccessfully sought inclusion of the putative class claims in the Multi-District Litigation. On November 29, 2004, Merck removed the Kentucky litigation to Federal Court and also filed a Motion with the Judicial Panel on Multidistrict Litigation seeking to transfer this case to a single court for coordinated pretrial management pursuant to 28 U.S.C. §1407. On January 1, 2005,

Ratliff filed a Motion To Remand. After a thorough analysis of the potential value of Ratliff's and the other potential class members' claims, and based upon its conclusion that Merck failed to show that the damages on each person's claims would exceed the jurisdictional threshold of $75,000, the United States District Court for the Eastern District of Kentucky held that it did not have jurisdiction over this cause of action. On March 3, 2005, the District Court entered an Order remanding the action to Pike Circuit Court. See March 3, 2005 Order, Appendix, Tab B. Merck is on the brink of settling the claims asserted in the MDL proceeding, despite the fact that many of the claims in that proceeding are brought under consumer protection statutes that require the element of reliance, unlike the Kentucky statute and the nearly identical Missouri statute, both of which, as noted by the Court of Appeals, do not contain such a requirement.[4]

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[4] The lead counsel for Merck involved in discussions with respect to the proposed MDL Settlement is John Beisner of Skadden Arps Slate Meagher & Flom's Washington office. Mr. Beisner is also counsel of record along with other Skadden Arps attorneys in this action and is and has been fully aware of the proceedings in the Kentucky case, including the earlier Class Certification by the Pike Circuit Court, and the pending proceedings before this Court. Despite the extensive knowledge and participation of Merck's counsel in this action, at the very end of settlement discussions, Merck's counsel proposed that Kentucky should be included in the settlement and for the first time mentioned this litigation as needing to be included in the MDL proposed settlement, taking the position that Ratliff's KCPA claim had not been certified. Counsel for Appellant has filed a Preliminary Objection to any proposed settlement including Kentucky Consumers, and will continue to argue against the "back door" inclusion of Kentucky in any such MDL settlement.