

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

MARY PLUBELL, ET AL.

Respondent

v.

MERCK & CO., INC.

Appellant

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DOCKET NUMBER **WD69808**

DATE: May 12, 2009

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Appeal From:

Circuit Court of Jackson County, MO  
The Honorable William Stephen Nixon, Judge

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Appellate Judges:

Division One: James E. Welsh, P.J., Thomas H. Newton, C.J. and William E. Turnage, Sr. J.

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**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

MARY PLUBELL, ET AL., Respondent, v.  
MERCK & CO., INC., Appellant

**WD69808**

**Jackson County**

Before Division One Judges: Welsh, P.J., Newton, C.J., and Turnage, Sr. J.

Plubell and Ivey filed suit against Merck & Co. seeking damages under the Missouri Merchandising Practices Act (MMPA) for their purchase of the anti-inflammatory drug Vioxx. They sought to certify a class of Missouri residents who purchased Vioxx for personal or family use, excluding those who claimed personal injury. The trial court certified the class and Merck appeals the class certification.

**AFFIRMED.**

**Division One Holds:**

Merck raises two points on appeal. In its first point, Merck contends that the trial court erred in certifying the class because the requirement of predominance was not met. The company argues that individual evidentiary issues will overwhelm the litigation because no single body of evidence will satisfy the elements of Plaintiffs' action under the MMPA. However, predominance does not require that all issues be common to the class members. Rather, it requires at least one significant fact question or issue, dispositive or not, that is common within the class's claim. Here the legality of Merck's conduct in its manufacturing and merchandizing of Vioxx in Missouri is common to all the class members and significant to the case. Consequently, the trial court did not abuse its discretion in finding the predominance requirement satisfied.

In its second point, Merck argues that Plubell and Ivey are not typical or adequate class representatives because the facts underlying their claims fail to meet the elements required by the MMPA. Merck asserts that Plubell did not "purchase" Vioxx and cannot show loss under the MMPA because her insurer paid for her Vioxx prescription. Merck's argument goes to the merits of the case and is not a proper consideration at the class certification stage. Moreover, Merck has not shown this issue to be atypical of the class. Merck next argues Ivey cannot show

loss under the MMPA because he cannot prove he would not have purchased Vioxx had he known the risks. However, this is again an argument going to the merits of the case, which is not a proper consideration at the class certification stage. Finally, Merck's argument that Plubell and Ivey are not adequate class representatives fails to raise claims of conflicts in their representation other than issues going to the merits of the case. As a result, the trial court did not abuse its discretion in finding the typicality and adequacy requirements met for class certification.

Consequently, the trial court's order certifying the class is affirmed.

**Opinion by Thomas H. Newton Newton, C. J.**

May 12, 2009

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