

P-2
NCA
7

CAUSE NO. 2005-15557

James Miller, II

v.

Merck & Co.

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
157th JUDICIAL DISTRICT
(Trial Court: 270th Dist Court)
Court of Harris County, Texas

FILED
CHARLES BACCHINI
DISTRICT CLERK
HARRIS COUNTY, TEXAS

2005 JUL 19 AM 10:33

BY _____ DEPUTY

Pretrial Order #4

Defendant Merck has moved for Summary Judgment by virtue of the doctrine of judicial estoppel. Specifically, Merck complains of Plaintiff's failure to list his potential Vioxx claim as an asset in his bankruptcy filing. Plaintiff's bankruptcy was discharged on May 23, 2004, and this action was filed on March 4, 2005. Prior to the filing of the bankruptcy, however, plaintiff was actively investigating a possible claim against Merck involving Vioxx.

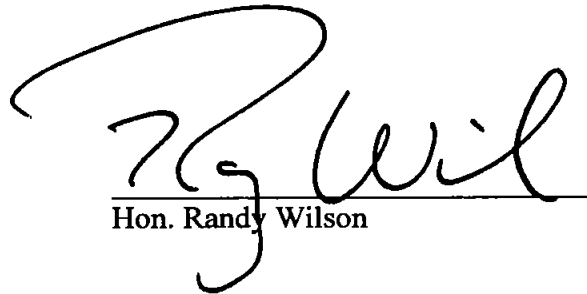
The law in the Fifth Circuit seems clear that judicial estoppel precludes plaintiff's claim against Merck in these circumstances. See *In re Superior Crewboats, Inc.*, 374 F.3d 330 (5th Cir. 2004); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999). Texas courts have similarly applied the doctrine. *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App.—Waco 2004, no pet.); *Stewart v. Hardie*, 978 S.W.2d 203 (Tex. App.—Ft. Worth 1998, pet. denied).

Plaintiff argues that application of such a rule is unfair and bestows a windfall upon Merck. While the Court is sympathetic to this argument, this Court is not writing on a clean slate. The law appears settled that the courts are willing to permit a tort defendant to receive this windfall in order to deter bankruptcy debtors from concealing potential claims.

Plaintiff additionally argues that the application of judicial estoppel is inappropriate in this case since the trustee has appeared and is prepared to prosecute the action on behalf of the creditors. Again, this argument appears foreclosed by the fifth circuit. See *In re Superior Crewboats, Inc.*, supra; *In re Coastal Plains, Inc.*, supra.

For the foregoing reasons, defendant's motion for summary judgment is granted. Plaintiff will take nothing against Merck. This is a final order and resolves all claims in this suit and is appealable.

Signed July 18, 2006.



Hon. Randy Wilson



I, Charles Bacarisse, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date
Witness my official hand and seal of office
this _____

Certified Document Number: _____

CHARLES BACARISSE, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com