

## **Florida Appellate Court Holds Admissible Expert Testimony Rejected by Federal Courts in Zicam Suits**

### ***Product Liability Advisory***

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Florida's Fourth District Court of Appeal, in *Hood v. Matrixx Initiatives, Inc.*, No. 4D09-1994, 2010 WL 5093185 (Fla. Dec. 15, 2010), recently reversed a summary judgment for defendants in a case involving Zicam nasal gel. The court held that the causation testimony of the plaintiff's expert, Dr. Bruce Jafek — despite being rejected by several federal courts as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) — was admissible under Florida law.

Michael Hood sued manufacturers and sellers of Zicam, alleging that he lost his sense of smell after using the product to prevent a cold. He asserted claims of strict liability, negligence and breach of warranty. Hood's sole causation expert, Dr. Jafek, examined Hood, reviewed his medical history and reviewed medical and scientific literature. Jafek's examination revealed damage to Hood's olfactory epithelium (tissue containing nerve cells that detect smell), and he concluded that Hood's allergies, medications, past history, social history, family history and other medical history were not contributing factors. It was Jafek's opinion that (1) Zicam nasal gel, when used according to the directions contained in the package, reached the olfactory epithelium in humans; (2) the active ingredient in Zicam, zinc gluconate, was toxic to the olfactory epithelium; (3) Zicam was toxic to the olfactory epithelium in the amounts delivered with the pump; (4) Zicam toxicity to the olfactory epithelium was permanent in some cases; and (5) the acute nature and strong temporal association of Hood's loss, accompanied by burning pain, strongly supported that Zicam was the cause of Hood's loss of smell.

The standard in Florida for admissibility of scientific expert testimony is general acceptance in the scientific community under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The defendants moved to exclude Jafek's testimony, contending that his opinion that Zicam reached Hood's olfactory epithelium failed to meet the *Frye* standard, and that his opinion concerning the toxicity of zinc

gluconate was new and novel and not based on scientific principles. Among other things, the defendants relied on several federal decisions that excluded Jafek's causation testimony as unreliable under *Daubert*. The trial court agreed with the defendants and granted the motion to exclude Jafek's general causation opinion. Because this ruling excluded the testimony of Hood's only causation expert, the court also granted summary judgment.

The appellate court reversed, relying on the Florida Supreme Court's decision in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), and agreeing with Hood that because Jafek's causation opinion relied on a review of Hood's medical history, a clinical examination, Jafek's personal experience regarding nasal anatomy, published research and a differential diagnosis, it was "pure opinion" testimony — testimony based on the expert's personal experience and training — and therefore was not new or novel and not subject to the *Frye* test.

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