



Cancer case hinges on Hardell testimony

[Jeffrey Silva](#)

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WASHINGTON-In the three months since the unprecedented hearing in an \$800 million cell-phone cancer lawsuit and with a decision nearing on whether the Baltimore case goes to trial, plaintiff and defense lawyers have been battling behind the scenes over new developments that could shape the direction the high-stakes litigation takes next.

U.S. District Judge Catherine Blake, responding to a request last week from RCR Wireless News, released a series of letters she has received from lawyers on both sides since February's hearing on the admissibility of scientific experts.

Before last week, this latest round of jostling between lawyers over fresh information of a potentially decisive nature occurred out of the public eye. Indeed, lawyers picked up where they left off in open court, which was home for five days to bruising examination of scientific experts by industry lawyers and attorneys at the law firm of trial lawyer and Baltimore Orioles owner Peter Angelos. The Angelos firm represents 42-year-old Christopher Newman, who claims his analog cell phone caused his brain cancer.

Much is riding on Blake's ruling. Not only will the decision determine whether the case becomes the first to go to trial, but it likely will set a precedent for the nine or so cancer lawsuits pending against the mobile-phone industry and for others in the queue. Wall Street, already beating up on financially troubled wireless firms, is closely monitoring the case. Blake is expected to rule shortly.

A ruling against Newman would essentially doom the lawsuit and others like it. The industry would rid itself of the controversy for now, but likely not forever.

The letters largely focus on two matters, but actually one: Dr. Lennart Hardell of Sweden.

In an April 2 letter to Blake, Russell Smouse, representing Newman, called attention to the European Journal of Cancer Prevention's decision to publish one of Hardell's recent epidemiology studies. Hardell is the key expert witness for Newman, and by extension, a huge threat to industry.

Hardell's latest study identified a link between mobile-phone use and brain cancer, finding a higher incidence of tumors on the side of the head used by wireless subscribers to make and receive calls.

Industry lawyers responded in an April 15 letter to Blake, repeating criticisms of the

Hardell study forcefully made at the February hearing. At that time, the defendants revealed The Lancet-a prestigious British scientific journal-twice rejected Hardell's manuscript. In the April 15 letter, industry lawyers said Oncology Research also turned away Hardell's manuscript. Hardell volunteered at the hearing that The Lancet rejects more than 90 percent of scientific papers submitted.

"For these reasons, and reasons identified in the defendants' briefs and presented at the Daubert hearing, this court should exclude Dr. Hardell's general and specific causation opinions," stated industry lawyers Jane Thorpe, Terrence Dee and Thomas Watson.

The Supreme Court in a 1993 decision-Daubert v. Merrell Dow Pharmaceuticals Inc.-made federal judges gatekeepers insofar as determining whether expert testimony is relevant and supported by methodology generally accepted in the scientific community.

The second subject of controversy involves a recently published Finnish epidemiology study on cell phones and cancer that had mixed results.

While the study-published in the May issue of the journal Epidemiology and partially funded by Finnish wireless firms-declared "no clear connection between use of cellular phones and risk of cancer," it included a finding familiar to Newman's lawyers and one that may have grabbed Blake's attention. There was a statistically significant association between analog phones and gliomas. Newman used an analog phone and his brain cancer is a glioma.

"Dr. Hardell relies upon the results of this study in support of his opinion in this case," said Smouse in an April 23 letter to Blake that was accompanied by the Finnish study. Smouse also said the results of the Finnish study back Hardell's most recent study findings.

In a May 3 letter to Blake, industry lawyers continued to pound away at Hardell. "Mr. Smouse's description of the article is incomplete and therefore inaccurate," they stated.

Industry lawyers noted that Finnish scientists themselves described the link between analog phones and gliomas as "a weak association" and that the researchers acknowledged limitations of their study.

During the Daubert testimony, Newman's attorneys entered into evidence various studies showing adverse health effects from mobile-phone radiation.

Industry lawyers, for their part, pointed to studies that failed to connect cell phones to cancer or other diseases. Their objective was to cast doubt on the validity of the plaintiff's experts and the methodology underlying the research. Blake's job is not to interpret or decide whether one side's science is better than the other's relative to Newman's claim. That would be a jury's call. At this point, Blake must decide only whether Newman's experts meet the Supreme Court's Daubert standard for expert scientific testimony.

Smouse, by prompting industry lawyers to respond to peer-reviewed and published

science showing a link between cell phones and cancer, may have shifted the debate in the direction of a jury. Blake will decide whether the case goes forward.

Less than a week later, Smouse wrote Blake and asserted the defendants "have clearly misread the paper."



Judge Blake

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Cell-phone cancer suit tossed

[Jeffrey Silva](#)

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WASHINGTON-Lawyers for Christopher Newman said they will challenge the likely dismissal of an \$800 million brain-cancer lawsuit against the mobile-phone industry, but the appeal and other pending health litigation that once threatened to bring down wireless carriers and manufacturers now appear to have little chance of success.

In the decisive, 22-page ruling last Monday, a Baltimore federal judge blocked the

Newman lawsuit from going to trial by resoundingly rejecting the plaintiff's expert scientific testimony. Newman, a 43-year-old neurologist, claimed in a lawsuit two years ago that cell-phone use caused his brain cancer.

Industry lawyers will file a motion with U.S. District Judge Catherine Blake to dismiss the Newman lawsuit, which she is expected to do. Then, Newman can seek an appeal at the U.S. Court of Appeals for the Fourth Circuit in Richmond, Va. The Fourth Circuit has a reputation as one of the most conservative federal appeals courts in the land.

Blake said Newman, represented by the law firm of noted trial lawyer and Baltimore Orioles owner Peter Angelos, failed to bring forth "sufficiently reliable and relevant scientific evidence in support of either general or specific causation" linking mobile-phone use to brain cancer.

"Because of the national and international scientific interest in radio-frequency radiation, there is a substantial body of literature to consult in order to determine whether the plaintiffs' theory and technique of demonstrating cancer causation has attained general acceptance in the scientific community. The short answer is that no such general acceptance has been shown," stated Blake.

"The decision was a significant one," said Norman Sandler, a spokesman for Motorola Inc., the lead defendant in the Newman case. Sandler said Motorola believes the ruling sends a strong message to lawyers with considerable resources who searched far and wide for experts and came up short.

The Cellular Telecommunications & Internet Association said the Sept. 30 decision "is consistent with the overall judgment of the international scientific community that the use of the mobile phones does not play any role in brain cancer or any other known health diseases."

The Food and Drug Administration and government agencies overseas say available scientific data does not link cell-phone use to health problems, but they added that additional research is needed before mobile phones can be guaranteed completely safe for consumers.

"Dr. Newman is disappointed he won't get his day in court," said John Angelos, one of Newman's lawyers.

Most health research on mobile phones is being conducted outside the United States. Legislation expected to be introduced shortly by Vermont lawmakers will call for federally funded wireless health research. Some studies have found DNA breaks, genetic damage and other biological effects from low-level radio-frequency radiation. But industry calls the studies of limited value because they have not been replicated.

"The history of radio-frequency bioeffects research has been that funding is rarely forthcoming for replication of the studies that have indicated adverse health effects. Very little funding comes from sources other than the wireless industry," said Janet Newton,

president of the EMR Network in Vermont.

As a legal matter, it was a complete victory for industry. Not only does Blake's ruling doom the Newman case, it effectively knocks out expert witnesses-like Sweden oncologist Lennart Hardell, and the University of Washington's Henry Lai-from being used by plaintiffs in nine other brain-cancer suits in Blake's court.

Joanne Suder, a Baltimore lawyer who originally filed the Newman lawsuit and now is pressing six brain-cancer cases in Blake's court, said last week's ruling is not necessarily the last word in the controversy.

"This decision is a tragedy for Dr. Newman; however, it is not binding on the remaining large number of brain-cancer victims. In our judgment, we have enough solid scientific evidence to establish a link between cell-phone use and brain cancer," said Suder.

Suder said Blake's ruling echoed early tobacco and asbestos lawsuits that failed because of a lack of generally accepted science on causation.

On Nov. 1, Blake is scheduled to oversee oral argument on an industry motion to dismiss a several class-action lawsuits that seek to require the mobile-phone industry to supply consumers with headsets to reduce injury from radiation.



U.S. District Judge Catherine Blake