IN THE COURT OF APPEALS 6/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00941 COA

ESTELLA BROWN

APPELLANT

v.

PARKE-DAVIS, DIVISION OF WARNER LAMBERT COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT L. GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ISAAC K. BYRD, JR. AND PIETER TEEWISSEN

ATTORNEYS FOR APPELLEE:

STEPHEN P. KRUGER AND WES W. PETERS

NATURE OF THE CASE: PRODUCTS LIABILITY--FAILURE TO WARN

TRIAL COURT DISPOSITION: DIRECTED VERDICT FOR DEFENDANT

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Estella Brown appeals from a directed verdict in favor of the drug manufacturer, Parke-Davis, in a cause of action alleging failure to warn of a potential adverse reaction to the prescription drug Dilantin. Brown assigns as error the trial court's ruling that she failed to establish causation, or rather that Brown failed to prove that an adequate warning would have altered the treating physician's conduct. Finding no error, we affirm.

FACTS

On October 12, 1987, Brown was prescribed Dilantin as treatment for peripheral neuropathy. Within one month, she developed Stevens-Johnson Syndrome, which is a known adverse reaction to Dilantin. Brown subsequently filed suit against her treating physician, Dr. John Pieklik, alleging negligent diagnosis and treatment. She also filed suit against Parke-Davis alleging that Parke-Davis failed to give an adequate race-specific warning of the risks of developing Stevens-Johnson Syndrome.

Dilantin has been in use as treatment for epilepsy and other disorders for over fifty years and has been ingested by millions of individuals. The rate of epilepsy is significantly higher in blacks and in non-whites than in whites. It is undisputed that Parke-Davis warned and Dr. Pieklik knew that Stevens-Johnson Syndrome was a potential adverse reaction to Dilantin and that this type of reaction occurs in less than one percent of the patients taking Dilantin. Brown alleges that she had an increased risk of developing the reaction because she is black and that Parke-Davis should have warned of the increased risk to blacks and other non-whites.

Brown presented the expert testimony at trial to establish that there was a higher incidence of an adverse reaction to Dilantin in non-whites. Rather than relying upon generally accepted epidemiological studies, this expert relied upon forty-nine anecdotal accounts, which are reports submitted by physicians regarding one individual patient's reactions to a certain drug, of assorted hypersensitivity reactions to Dilantin reported in medical literature. However, only one of these accounts involved Stevens-Johnson Syndrome. Of the forty-nine accounts, seventeen of the individuals were white and thirty-two were black or non- white.

Dr. Pieklik testified that he would have prescribed Dilantin for Brown, regardless of the anecdotal accounts. Pieklik also testified that, even if the percentage of non-whites who developed the adverse reaction was doubled, he would still have prescribed Dilantin for Brown. Further, Brown offered no testimony that a reasonable physician would have warned or would not have prescribed Dilantin for her. Brown did not testify and thus offered no proof that she would have refused to take Dilantin if she had been warned of the alleged increased risk of developing Stevens-Johnson Syndrome.

ANALYSIS

The standard for granting a directed verdict is that the evidence must be viewed in the light most favorable to the non-movant, who must be given the benefit of all favorable inferences. *McArn v. Allied Bruce-Terminix Co*., 626 So. 2d 603, 608 (Miss. 1993); *Turner v. Wilson*, 620 So. 2d 545 (Miss. 1993). However, each element of Brown's *prima facie* case must be proven. Since Brown failed to prove causation, we hold that the trial court's granting of a directed verdict in favor of Parke-Davis was entirely proper.

Under Mississippi law, a product may be unreasonably dangerous if the manufacturer fails to warn of a known adverse risk associated with use of the product. *Wyeth Laboratories v. Fortenberry*, 530 So. 2d 688, 691 (Miss. 1988) (citation omitted); *Thomas v. Hoffman-LaRoche*, 949 F.2d 806 (5th Cir. 1992). When the product is a prescription drug, Mississippi follows the "learned intermediary" doctrine which allows the manufacturer to avoid liability for failure to warn as long as the manufacturer has warned the "learned intermediary"--the doctor. *Fortenberry*, 530 So. 2d 688; *Thomas*, 949 F.2d 806 .

The plaintiff must prove two elements: (1) the warning was inadequate; and (2) an adequate warning would have altered Dr. Pieklik's conduct. *Fortenberry*, 530 So. 2d at 691; *Thomas*, 949 F.2d at . To satisfy the element of causation, Brown must introduce either objective evidence of how a reasonable physician would have responded to an adequate warning or subjective evidence of how the treating physician would have responded. *Id*. Since Brown failed to introduce any objective or subjective proof of causation, this issue is without merit.

The trial court held that, at least for purposes of directed verdict, Brown submitted enough evidence that the warning was inadequate. We have reservations about the adequacy of the anecdotal evidence used by Brown's experts, and had the trial court ruled that such testimony was inadequate to create a jury issue, we would be analyzing this issue on an abuse of discretion standard and could readily uphold such a ruling. Since the trial court did accept the testimony, we will accept for purposes of this appeal that the warning was inadequate.

Assuming that the warnings were inadequate, Brown still had the burden of showing that an adequate warning would have altered Dr. Pieklik's conduct. *Fortenberry*, 530 So. 2d at 691 (citations omitted) . Brown has failed to show that adequate warnings would have altered the conduct of either Dr. Pieklik or of any other reasonable physician. Dr. Pieklik unequivocally testified that, regardless of the warning, he would still have prescribed Dilantin for Brown. There was also no testimony that a "reasonable" doctor would have altered his conduct by not prescribing or by warning Brown of any increased risk.

Brown impliedly asks that this Court presume causation in a situation where a warning is inadequate. This State has so far refused to accept such a presumption of causation. *See*, *Thomas*, 949 F.2d at 812-13. Although the Fifth Circuit's position in *Thomas* has not been explicitly adopted by this State's highest court and is certainly not binding, the *Thomas* decision is influential in reaching our decision. Further, we are not confronted here with a situation where a patient was unavailable to testify as to whether she would have refused to take the prescription. As a matter of fact, Brown did not testify that she would not have taken the prescription and no proof was offered that a reasonable consumer would not have taken the prescription. Under these facts, we cannot assume that Brown would not have taken the Dilantin. Since there is an absolute failure of any proof as to causation,

Brown cannot prevail on this issue.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

BRIDGES, P.J., NOT PARTICIPATING