UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4891
Summary Calendar

PAUL LEE KEELE and SHERRY BEASON KEELE,

Plaintiffs-Appellants,

VERSUS

McNEIL-PPC, INC. and MCNEIL CONSUMER PRODUCTS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-0031)

(December 16, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

In this products liability action governed by Louisiana law, plaintiffs appeal the take nothing judgment the district court entered on a jury verdict. We affirm.

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

The plaintiffs are the parents of Lacy Lee Keele, who died just before her sixth birthday from complications resulting from an overdose of Tylenol. The defendant manufactures Tylenol.

Lacy had flu-like symptoms--a fever, cough, sore throat and nasal congestion--which began about ten days before she died. Lacy's mother, Sherry Beason Keele, initially treated Lacy with Tylenol and a decongestant called Triaminic, another McNeil product. Finally, on January 21, Mrs. Keele gave Extra-Strength Tylenol to Lacy and continued to do so intermittently until January 26, when Lacy began demonstrating severe symptoms, including vomiting blood. Lacy was hospitalized and the physicians determined that Lacy had a toxic level of acetaminophen in her blood. Lacy's condition deteriorated over the next seventy-two hours and she died on January 29, 1990, from an overdose of Tylenol.

The case was tried to the jury on the theory that McNeil, Tylenol's manufacturer, failed to give adequate warnings. The warning label on the regular-strength Tylenol had a recommended dosage to adults of one to two tablets three or four times daily; the label also provided that a physician should be consulted for use by children under six or for use longer than ten days. The plaintiffs focused their case primarily on the alleged inadequacy of the warning on the Extra-Strength Tylenol caplets. The Extra-

Strength Tylenol label was silent as to a recommended dosage for children. It provided:

> **USUAL DOSAGE**
>
> **Adults: Two caplets three or four times daily. No more than a total of eight caplets in any 24-hour period.**
>
> **WARNING: Keep this and all medication out of the reach of children. . . . In the case of accidental overdosage, contact a physician or poison control center immediately.**

In response to special interrogatories, the jury found that Lacy's death resulted from the ingestion of Tylenol, but found that McNeil gave adequate warnings of the risks associated with use of Tylenol. The district court entered a take-nothing judgment in favor of the defendants. The plaintiffs then filed a timely motion for judgment as a matter of law and a motion for a new trial. Plaintiffs had filed no similar motion for judgment as a matter of law at the close of all the evidence. The district court denied plaintiffs' post-trial motions and this appeal followed.

II.

Plaintiffs' failure to move for a preverdict judgment as a matter of law triggers a standard of review that usually precludes us from interfering with the district court's denial of a post judgment motion for judgment as a matter of law. In this circumstance, we will disturb such a ruling on appeal only when no evidence exists to support the jury's verdict or when plain error was committed which, if not acknowledged, would result in a gross miscarriage of justice. **Hinojosa v. City of Terrell**, 834 F.2d 1223, 1228 (5th Cir. 1988). Because the record in this case does

not meet that difficult standard, we are relegated to examining the propriety of the district court's denial of plaintiff's motion for new trial. We review a district court's denial of a motion for new trial under a highly deferential abuse of discretion standard. **See Lubbock Feed Lots, Inc., v. Iowa Beef Processors, Inc.,** 630 F.2d 250 (5th Cir. 1980). A district court abuses its discretion in denying a motion for new trial only when there is an "absolute absence" of evidence to support the jury's verdict. **Seidman v. American Airlines, Inc.,** 923 F.2d 1134, 1140 (5th Cir. 1991)(citing **Cobb v. Rowan Cos.,** 919 F.2d 1089, 1090 (5th Cir. 1991)).

In Louisiana, the issue of the adequacy of warnings against dangers associated with the use of a product is a highly factual inquiry. **See Bloxom v. Bloxom**, 512 So.2d 839 (La. 1987). The narrow issue for our consideration therefore is whether there was any evidence exists to support the jury's verdict. **See Perricone v. Kansas City Southern Railway,** 704 F.2d 1376, 1380 (5th Cir. 1983).

In this appeal, appellants recite in some detail the evidence they produced which supported their view that McNeil should have included specific warnings against use of Extra-Strength Tylenol caplets by children. But, unfortunately for Mr. and Mrs. Keele, the jury considered this evidence and rejected their arguments. McNeil, on the other hand, points to the testimony of Mrs. Keele, who admitted that she knew that dangers were associated with the use of Tylenol. Mrs. Keele testified that she had used the regular strength Tylenol and knew that it contained a specific recommended

dosage for children. She saw no recommended dosage for children on the Extra-Strength Tylenol. The defendant also presented medical testimony that Lacy received more Tylenol than was recommended for a child of her age and weight. McNeil also produced evidence that the labeling for Extra-Strength Tylenol had been approved by the Federal Drug Administration. Additionally, McNeil's executive medical director testified that McNeil promotes the safe use of its product through, among other things, making available an "800" number for consumers to obtain additional safety information. Because some evidence supports the jury's conclusion that McNeil's warning was adequate in this case, the district court did not abuse its discretion in denying the motion for new trial.

AFFIRMED.