



**SUPREME COURT OF MISSOURI
en banc**

MIASIA BARRON, et al.,)
)
Plaintiffs,)
)
and)
)
MADDISON SCHMIDT, by next friends,)
GARRY SCHMIDT and)
TAMMY SCHMIDT,)
)
Respondents,)
)
v.)
)
ABBOTT LABORATORIES, INC.,)
)
Appellant.)

FILED

SEP 12 2017

CLERK, SUPREME COURT

No. SC96151

**APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable Steven R. Ohmer, Judge**

Abbott Laboratories, Inc., appeals the circuit court's judgment awarding Maddison Schmidt \$15 million in compensatory damages and \$23 million in punitive damages for her personal injury claim. Abbott argues the circuit court erred in overruling: (1) its pretrial motion to transfer venue; (2) its pretrial motion to sever Schmidt's claim from other plaintiffs' claims; (3) its motions for directed verdict and judgment notwithstanding the verdict on Schmidt's failure-to-warn claim; and (4) its motions for directed verdict and

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judgment notwithstanding the verdict on Schmidt's demand for punitive damages. Because Abbott received a fair trial, the circuit court's judgment is affirmed.

I. Factual and Procedural History

Schmidt was born with spina bifida and other birth defects. She was born and resides in Minnesota. Her mother ingested Depakote, an antiepileptic drug manufactured and marketed by Abbott, while Schmidt was in utero. Her mother ingested the Depakote in Minnesota. Abbott's company headquarters are in Illinois. Despite this lack of connection to Missouri, Schmidt joined with four Missouri plaintiffs and 19 other non-Missouri plaintiffs to file a single action against Abbott in the circuit court of the city of St. Louis. Each plaintiff alleged birth defects from in utero exposure to Depakote and sought both compensatory and punitive damages.¹ Abbott moved to sever the plaintiffs' individual claims, arguing they should not have been joined together in a single action. Abbott also moved to transfer the non-Missouri plaintiffs' claims to the circuit court of St. Louis County, which Abbott argued was the proper venue for these plaintiffs.² After the circuit court overruled Abbott's motions, Abbott raised its venue and joinder arguments in a petition for a writ of mandamus or, alternatively, a writ of prohibition. Both the court of appeals and this Court denied Abbott's writ petition without opinion.

The circuit court then ordered each side to nominate plaintiffs for separate, individual trials, though all the plaintiffs' claims remained joined in one action. Schmidt

¹ Two of the Missouri plaintiffs alleged they were born with birth defects in the city of St. Louis.

² Abbott waived personal jurisdiction. *See* Rule 55.27(g). The United States Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cnty.*, 137 S. Ct. 1773 (2017), therefore, has no application to this appeal.

was nominated by the plaintiffs' counsel, and a jury trial was held solely on Schmidt's claims without severing the other plaintiffs' claim. Schmidt advanced a failure-to-warn theory contending Depakote's label did not adequately warn of the risk of birth defects posed by the drug. At the close of Schmidt's evidence and at the close of all evidence, Abbott moved for a directed verdict on both Schmidt's failure-to-warn claim and her demand for punitive damages. The circuit court overruled Abbott's motions. The jury found in Schmidt's favor and awarded her \$15 million in compensatory damages and \$23 million in punitive damages. Abbott then moved for judgment notwithstanding the verdict or, alternatively, a new trial, and renewed the arguments it made for a directed verdict, as well as its venue and joinder arguments. The circuit court overruled Abbott's motion and entered judgment in accordance with the jury's verdict.³ Abbott appealed and, after opinion, the court of appeals transferred the case to this Court pursuant to article V, § 10 of the Missouri Constitution.

II. Venue and Joinder

In Point I, Abbott argues the circuit court erred in overruling its pretrial motion to transfer venue of the non-Missouri plaintiffs' claims, which included Schmidt's claim. Abbott argues, pursuant to § 508.010.5, RSMo Supp. 2013, the proper venue for Schmidt's claim is St. Louis County and the joinder of Missouri plaintiffs with Schmidt's claim could not be used to make venue proper in the city of St. Louis. In Point II, Abbott argues the circuit court erred in overruling its pretrial motion to sever all individual plaintiffs' claims

³ Although other plaintiffs' claims remained pending in the action, the circuit court entered a separate judgment on Schmidt's claim pursuant to Rule 74.01(b).

because joinder of the claims was improper pursuant to Rule 52.05. Abbott claims this errant ruling resulted in improper venue in the city of St. Louis. Abbott’s first two points on appeal, therefore, contend the circuit court’s errors resulted in Schmidt’s claim being tried in the city of St. Louis, rather than St. Louis County.

Even assuming the circuit court erred by either failing to transfer venue or failing to sever the claims, an error does not warrant reversal on appeal unless the error results in prejudice. *Dieser v. St. Anthony’s Med. Ctr.*, 498 S.W.3d 419, 435-36 (Mo. banc 2016); *Lewis v. Wahl*, 842 S.W.2d 82, 84-85 (Mo. banc 1992). Rule 84.13(b) provides: “No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.” Despite this clear mandate of Rule 84.13(b), Abbott insists it is not required to show prejudice, relying on this Court’s decision in *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284 (Mo. banc 2005).

In *Igoe*, this Court reversed a judgment based on the circuit court’s error in failing to transfer venue, but it did not discuss whether the error resulted in prejudice. *See id.* at 288–89. This silence should not be inferred as an implicit holding that no prejudice is required when error results in improper venue. Such a holding would be contrary to Rule 84.13(b), and would be akin to treating improper venue as a jurisdictional defect—which it certainly is not.⁴ *See State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994) (differentiating between venue and personal jurisdiction); *see also J.C.W.*

⁴ A showing of prejudice is not required for a jurisdictional defect because such a defect renders a judgment void. *See Blanchette v. Blanchette*, 476 S.W.3d 273, 278 (Mo. banc 2015).

ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 253-54 (Mo. banc 2009) (explaining that errors in complying with a statute are not jurisdictional in nature). The circuit court of the city of St. Louis—even if it were the improper venue—had jurisdiction to enter a judgment against Abbott, and its failure to transfer venue or sever the claims is like any other alleged non-jurisdictional error and is subject to Rule 84.13(b). See *In re Marriage of Hendrix*, 183 S.W.3d 582, 590 (Mo. banc 2006).

While maintaining its position that prejudice is not required, Abbott also argues it was prejudiced by the circuit court’s failure to transfer venue or sever the claims because the city of St. Louis is a more favorable venue to plaintiffs than St. Louis County. Essentially, Abbott argues the city of St. Louis is biased in general but fails to point to any specific event or action in the case or trial to support this generality. Abbott fails to identify any particular ruling by the circuit court suggesting bias or any particular juror who should have been disqualified for bias. This claim of prejudice will not suffice.

While Abbott may have preferred a trial in St. Louis County, it cannot establish the trial in the city of St. Louis was unfair. This Court declines to hold Abbott was prejudiced simply because a fair judge and jury in the city of St. Louis rendered the judgment and verdict rather than a fair judge and jury in St. Louis County.⁵ Because Abbott fails to

⁵ Abbott also suggests the city of St. Louis and the circuit court of the city of St. Louis have suffered prejudice by being burdened with tort claims filed by out-of-state plaintiffs. Any burden on the city of St. Louis or the circuit court is not relevant to the prejudice contemplated by Rule 84.13(b).

satisfy the prejudice requirement, this Court need not decide whether the circuit court erred in either failing to transfer venue or failing to sever the claims. Points I and II are denied.⁶

III. Failure to Warn

In Point III, Abbott argues the circuit court erred in overruling its motions for directed verdict and judgment notwithstanding the verdict on Schmidt's failure-to-warn claim because the Depakote label provided adequate warning as a matter of Minnesota law.⁷ "The standard of review for failures to sustain motions for directed verdict and for JNOV is essentially the same." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. banc 2010). "This Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability." *Id.* "Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences." *Id.*

"In general, a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use." *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004). "The duty to warn includes the duty to give adequate

⁶ The concurring opinion suggests this opinion "demands" a showing of prejudice as though such a requirement were arbitrarily created by this opinion. But it is this Court's Rule 84.13(b) that governs and requires the showing of prejudice on appeal in this case. While the concurring opinion is troubled by the difficulty in showing prejudice on appeal for these types of claims, Rule 84.13(b) contains no exceptions for improper venue claims. Perhaps the difficulty in showing prejudice on appeal is why these types of claims are better raised in the pretrial writ context, which requires no showing of prejudice. *See State ex rel. Jakobe v. Billings*, 421 S.W.2d 16, 18 (Mo. banc 1967); *see also State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 367 n.1 (Mo. banc 2009) (Fischer, J., dissenting) ("Direct appeal after completion of a jury trial historically has not been considered an adequate remedy to address improper venue."). Furthermore, if the General Assembly deems it wise to create an exception to the showing of prejudice requirement found in Rule 84.13(b), it is free to do so. *See Mo. Const. Art. V, § 5.*

⁷ The parties agree Minnesota substantive law applies.

instructions for the safe use of the product.” *Id.* “To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury.” *Id.* “Generally, the adequacy of a warning is a fact question for the jury.” *Id.* at 279. Abbott argues Depakote’s label satisfied the three requirements needed to make its warning adequate for purposes of Minnesota law.

Even assuming these three requirements were facially satisfied, the contents of a warning also have to be complete and accurate, so as to not mislead. *See Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012). Depakote’s label stated: there was clinical literature indicating “the use of antiepileptic drugs during pregnancy results in an increased incidence of birth defects;” Depakote had “a possible similar association” as other antiepileptic drugs to birth defects; and the Centers for Disease Control estimated the risk of pregnant women exposed to Depakote having children with spina bifida was 1 or 2 percent. Schmidt, however, presented evidence Abbott was aware of multiple studies concluding: (1) Depakote posed a considerably higher risk of overall birth defects than other antiepileptic drugs, and should be avoided by women of childbearing potential unless all other alternatives had been tried and failed; (2) the overall risk of birth defects was 10 percent or even greater; (3) the risk of spina bifida was significantly higher than 1 or 2 percent; and (4) the risk of spina bifida amounted to a twentyfold increased risk compared with the background rate in the general population. As Depakote’s label did not reflect this relevant information, a reasonable inference could be drawn from this evidence that

Abbott's warning was not complete and accurate and, therefore, did not adequately warn.

Point III is denied.

IV. Punitive Damages

In Point IV, Abbott argues the circuit court erred in overruling its motions for directed verdict and judgment notwithstanding the verdict on Schmidt's demand for punitive damages.⁸ Minnesota law provides:

- (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.
- (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
 - (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
 - (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20.1 (2012). Abbott argues there was not clear and convincing evidence it acted with deliberate disregard for the rights or safety of others because Depakote's label contained a "black box" warning, "the most serious type of warning mandated by the U.S. Food and Drug Administration."

The black box warning is not relevant for purposes of this Court's standard of review. In reviewing a circuit court's overruling of a motion for directed verdict or

⁸ On appeal, Abbott challenges only the *award* of punitive damages, not the amount.

judgment notwithstanding the verdict, this Court views the evidence in the light most favorable to the verdict, gives the plaintiff all reasonable inferences, and disregards all contrary evidence and inferences. *Fleshner*, 304 S.W.3d at 95. As discussed above, there was evidence Abbott was aware there were studies indicating Depakote was much more dangerous in terms of birth defects than its label suggested. In addition, there was evidence presented that, despite this knowledge, Abbott conducted no independent research or studies of its own to evaluate Depakote's risks for birth defects. There was evidence showing Abbott instead spent \$50 million to \$100 million per year marketing Depakote, sought to "squeeze every dollar and every [prescription for Depakote] out of the market," and intended to make Depakote the first choice antiepileptic drug for women, despite internally referring to it as a "dirty drug." A reasonable inference from this evidence is that, motivated by profits, Abbott deliberately disregarded the safety of Depakote users. Point IV is denied.⁹

V. Conclusion

The circuit court's judgment is affirmed.


W. Brent Powell, Judge

Draper, Russell and Breckenridge, JJ., concur;
Wilson, J., concurs in separate opinion filed;
Fischer, C.J., and Stith, J., concur in opinion of
Wilson, J.

⁹ In addition, Abbott argues the award of punitive damages violates due process. This constitutional claim was not properly raised before the circuit court and, therefore, has not been preserved for review. See *Mayer v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. banc 2014).