

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

KC Plaintiff)				
)		
Plaintiff,)		
)		
v.)	Case No.:	06 CV XXX
)		
Defendant Doctor)				
)		
Defendant.)		

**PLAINTIFF’S MOTION IN LIMINE REGARDING
PHYSICIANS’ DESK REFERENCE**

COMES NOW Plaintiff and respectfully files this Motion in Limine regarding the Physicians’ Desk Reference. Pursuant to Kansas law, the Physician’s Desk Reference is subject to the learned treatises exception to the hearsay rule and may be admitted directly into substantive evidence.

This is a medical malpractice case where plaintiff alleges that she was prescribed a drug, Adenosine, by defendant doctor to which the plaintiff had a known contraindication. Plaintiff relies upon expert testimony, medical literature and the Physicians’ Desk Reference to prove the contraindication. The use of the Physicians’ Desk Reference is well known throughout the case and was used as an exhibit in the deposition of defendant’s expert. After extensive questioning regarding the plaintiff’s contraindications, the defendant’s expert was asked:

Q. If the PDR is right, then you’re wrong; is that right?

A. Well, I guess that’s true.

See Expert Deposition, Page. 35, Lines 2 – 4.

The issue in this case couldn’t be any clearer; if the jury believes the Physicians’ Desk Reference about the contraindications, then defendant doctor is negligent.

K.S.A. § 60-460(cc) provides the statutory framework on the learned treatises exception to the hearsay rule. “Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except: . . . (cc) *Learned treatises*. A published treatise, periodical or pamphlet on a subject of history, science or art, to prove the truth of a matter stated therein, if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.”

Kansas appellate courts have further clarified the learned treatises exception to the hearsay rule.

The Kansas learned treatise exception to the hearsay rule permits the admission into evidence of a medical treatise as independent substantive evidence if reliability and relevancy are established. See [K.S.A. 60-401\(b\)](#); [Zimmer v. State](#), 206 Kan. 304, 309, 477 P.2d 971 (1970). This exception is rather unique. Most jurisdictions have more restrictive rules. See 6 Wigmore on Evidence §§ 1690-1700 (Chadbourn rev.1976).

[Wilson v. Knight, M.D.](#), 26 Kan. App.2d 226, 229 (1999)(allowing medical journals to be admitted as independent substantive evidence); but see [Green v. Teter](#), 103 P.3d 502 (unpublished opinion)(Kan. App. 2005)(disallowing medical journals to be admitted where plaintiff could not show they were “reasonably accessible to a doctor”).

In this case, plaintiff is planning on using the Physicians’ Desk Reference with her experts, defense experts and the defendant. The Physicians’ Desk Reference is a text that is literally in the office of almost every doctor in country, including defendant doctor. “[T]he Physicians’ Desk Reference (PDR) [is] an annual volume provided for use by physicians, presented detailed instructions, contraindications, warnings and precautions.” [Wooderson v. Ortho Pharmaceutical Corp.](#), 235 Kan. 387, 409 (1984); see also [Crooks v.](#)

Greene, M.D., 12 Kan App.2d 62, 80 (1987)(requiring the plaintiff to provide expert testimony on causation in addition to the warnings in the PDR). In addition to the Kansas Supreme Court relying on the PDR in Wooderson, 235 Kan. at 409, the Court also used the learned treatise in Savina v. Sterling Drug, Inc., 247 Kan. 105, 109 (1990)(stating that the PDR gives “detailed instructions, contraindications, warnings, risk of use, recommendations as to patient selections, and possible side effects then known.”). The Kansas Supreme Court approved of the PDR being admitted into independent, substantive evidence in Calwell v. Hassan, M.D., 260 Kan. 769, 774 (1996). In the case of State v. Groschang, 272 Kan. 652, 657 (2001) the Kansas Supreme Court even approved of sending the PDR back into the jury room during deliberations. See also, State ex rel. Stovall v. Alivio, 275 Kan. 169 (2003)(relying on the PDR for information about a drug’s proper use). Finally, the Kansas Court of Appeals has placed their stamp of approval on the PDR. State v. Wheeler, 95 P.3d 135 (Kan. App. 2004)(unpublished opinion)(an expert relied upon the PDR for side effects of a drug).

Based upon K.S.A. § 60-460(cc) and the Kansas Supreme Courts application of the learned treatises exception to the hearsay rule, Plaintiff respectfully requests that the Physicians’ Desk Reference be admitted into independent substantive evidence.

THE LAW OFFICES OF
STEPHEN R. BOUGH

By _____
Stephen R. Bough, #18598
917 W. 43rd Street, Suite 100
Kansas City, MO 64111
(816) 931-0048 phone
(816) 931-4803 fax
stephen@boughlawfirm.com

