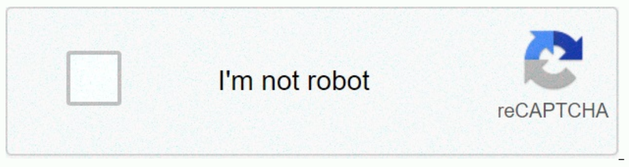

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Missouri board of healing arts complaints

Glenn E. Bradford, Edward F. Walsh, IV, Kansas City, MO, for the appellant. Lori J. Levine, R. Max Humphreys, Daniel P. Card, II, Jefferson City, MO, for the defendant. Mark G. Arnold, St. Louis, MO, for Amicus Cyriae Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons. The State Board of Registration for the Healing Arts (Board) has launched a disciplinary complaint against Dr. Edward McDonagh primarily claiming that he violated Section 334.100.1 of the Missouri Healing Arts Practice Act, through his statements regarding and the use of chelating therapy in the treatment of patients with vascular diseases. The Administrative Committee of Hearings (AHC) found no reason to discipline Dr McDonagh's medical licence. The district court confirmed the AHC's decision. The Chamber refers, arguing that the AHC errdled by not applying the standard for accepting expert testimony set out in Frye v. United States, 293 F. 1013 (D.C.Cir.1923) and that dr McDonagh's expert testimony should have been ruled out. The Court confirms its judgment in Lasky v Union Electric Co., 936 S.W.2d 797 (banc 1997), that the rule laid down in section 490.065 is the rule for the taking of expert testimony in civil matters. As mentioned in this document, this is also a standard used in administrative matters. To the extent that civil cases settled since frye or another stick standard have been applied are incorrect and should no longer be respected. Section 490.065.3 requires that the facts and data on which the expert is based should be those reasonably relied on by experts in the field concerned. In this case, the appropriate field is doctors treating people with vascular diseases. Since the AHC has not properly applied that standard, the Court reverses the judgment of the district court and the case is heard. Accordingly, the district court should refer the AHC to reconsider the AHC's decision in the light of that standard. The court also restined to reconsider the question of whether Dr. McDonagh had committed repeated negligence because his experts had not determined the standard of care in which they evaluated his patients' treatment and it appears the AHC assessed his behavior with regard to treatment recommended by other doctors using chelating therapy. In accordance with section 334.100.2(5), the AHC should have assessed behaviour according to the standard of care for patients treating patients with vascular diseases. Since the principles set out in this document may also affect the determination by the AHC of other matters relating to record-keeping, testing and misreserciption, the Court has fully set aside the case for review in the light of this Opinion.2 I. The FACTS and THE CUSTOMS Board is authorised by Section 334.120.1 to register, license and doctors and surgeons practicing in The board licensed Dr. McDonagh, D.O., as an osteopathic physician and surgeon in 1961. Shortly after obtaining a license, he began to use alternative treatments in his family practice, including EDTA 3 chelation therapy for the treatment of atherosclerosis and other diseases. It has also been certified by the American Board of Chelation Therapy, and has conducted research and written extensively on the use of this therapy.A. Regulation of Chelation Therapy by the Board.Chelation therapy has been approved by the Federal Food and Drug Administration (FDA) only as a means to remove heavy metals from the body. However, non-FDA approved, or off-label, use of the drug by physicians is not prohibited by the FDA and is generally accepted in the medical profession. See 21 U.S.C sec. Buckman Co. against plaintiffs' Legal Comm., 531 U.S. 341, 350-51 & n. 5, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001). About 1,000 physicians in the United States are involved in off-label use of chelation therapy to treat atherosclerosis and other vascular diseases.4 Of these 1,000 physicians based in the United States, 750 belongs to the American College for Advancement in Medicine (ACAM), which has 1,000 members worldwide and which has approved chelating therapy as an important course of treatment for vascular and degenerative diseases associated with aging.5 To this end, ACAM developed a protocol, followed by Dr. McDonagh, using chelation therapy to treat such diseases. In 1989, The Council carried out an in-depth analysis of the effectiveness of chelation therapy, but subsequently adopted no rules, regulations or positions on the use of chelating therapy. Then, in 1992 and 1994, two controlled studies were published that suggested that chelating therapy was ineffective in treating vascular diseases.6 Dr. McDonagh questions the merits of these studies. But, after the publication of the study, the American Medical Association (AMA) adopted a position statement on chelatation therapy, declaring that: (1) [t] here there is no scientific documentation that the use of chelating therapy is effective in the treatment of cardiovascular diseases, atherosclerosis, rheumatoid arthritis and cancer; (2) Proponents of chelation therapy should conduct controlled research and adhere to FDA testing guidelines if they want the therapy to be adopted more widely; and (3) [t] he AMA considers that atherosclerosis chelation therapy is an experimental process without proven efficacy. AMA, AMA Policy Compendium H-175.994, H-175.997 (1994). Despite these changes, neither the FDA, AMA, nor the Board has banned the use of chelation therapy to treat vascular diseases, and Dr. McDonagh continues to prescribe and administer the therapy in his practice. As of 30 October 2001 The Council adopted a provision that the therapy had no medical value, but would not be intended to discipline the doctor for its use in the patient, from which appropriate informed consent is received:(1) In accordance with the authority granted to the Management Board under Section 334.100.2(4) (f), RSMo, the Board declares the use of ethylene-teethylene acid chelation (EDTA) on a patient has no medical or osteopathic value, except for those uses approved by the Food and Drug Administration (FDA) by federal law. (2) The Board may not initiate disciplinary proceedings against the licensee solely on the basis of the unapproved use of edta chelation, if the licensee has the patient sign an informed consent to form EDTA Chelation Therapy, prior to the non-approval of EDTA chelation in a patient.4 CSR 150-2.165.B. Complaints against Dr. McDonagh.In 1994, seven years before the adoption of 4 CSR 150-2.165, and shortly after two recorded controlled studies , the board filed a complaint against Dr. McDonagh stemming from two investigations into his use of chelating therapy. That action was subsequently dismissed without prejudice. In 1996, The Board of Directors filed a complaint against the thirteenth count, in view of the fact that the reason for disciplining Dr. McDonagh's medical license for violation of section 334.100 7, among other things: endangering the health of patients through improper provision of chelating therapy; false representation of the effectiveness of this therapy in atherosclerosis and other diseases; carrying out unnecessary studies and treatment in some cases and insufficient research and treatment in others; and not keeping adequate medical records.8 Dr McDonagh denied that his treatments threatened his patients, denied inappropriate testing or treatment and denied inadequate record-keeping. He also denied making false statements to patients, noting that before starting chelation therapy, his patients signed a consent form explaining the possible benefits and side effects of treatment (very similar to the one later approved in CSR 4 150-2.165), and stating that the treatment was not approved by the FDA, AMA or other recognized medical organizations for the treatment of vascular diseases. In addition to chelation therapy, Dr. McDonagh encouraged patients to follow a diet and exercise plan and did not discourage patients from seeing other doctors, including specialists. The AHC held a hearing in November 1997. The Council presented an expert opinion that the use of chelation therapy in the treatment of vascular diseases is not generally accepted in the field of vascular disease treatment and does not meet the standards of care for the treatment of vascular diseases. Dr McDonagh offered expert testimony that supported his off-label use of chelating therapy to treat diseases The Board objected. The AHC heard all the evidence without ruling on the admissibility, in accordance with the requirements of Section 536.070(1) of the Treaty, The AHC ultimately ruled that the testimony was admible, found no evidence of harm of chelation therapy, rejected all thirteen counts, and found no cause to discipline Dr. McDonagh's medical license. The district court confirmed the AHC's decision. Board of Appeal. Following the opinion of the Missouri Court of Appeals for the Western District, the Court issued a transfer to take account of the standards for receiving expert testimony in civil and administrative matters. Mo. Const. Joke. V, sec. STANDARD REVIEW In appeal proceedings, the Court reviews the AHC's decision, not the decision of the trial court, to determine whether the agency's action:(1) violates constitutional provisions;(2) Exceeds the statutory body or jurisdiction of the agency;(3) It is not supported by competent and relevant evidence relating to the entire register;(4) It is, for any other reason; , unauthorized by law;(5) It is carried out by illegal procedure or without due process; (6) It is arbitrary, capricious or unfounded;(7) It involves abuse of discretion. Sec. 536.140.2; Seconds. Psychcare Mgmt., Inc. against Dep't of Soc. Servs., Div. med. Servs., 980 S.W.2d 311, 312 (Mo. banc 1998). In this case, the Chamber argues that the decision was not supported by competent and relevant evidence of the whole provision and that it was arbitrary, capricious, unjustified or an abuse of discretion. Ross v. Robb, 662 S.W.2d 257, 259 (mo. banc 1983). The appeal court will refrain from replacing the AHC judgment in matters of fact. Psychcare Mgmt., Inc., 980 S.W.2d at 312. Legal issues are a matter of an independent judgment of the Court. Gammaitoni v. Dir. III. STANDARD OF ADMISSIBILITY OF EXPERT TESTIMONY. Section 490.065 contains the standard for receiving testimony from experts in civil matters. The Council suggests that the standard for receiving expert testimony is that set out in Frye and previously used by the Court. See Alsbach v. Bader, 700 S.W.2d 823, 828-30 (Mo. banc 1985). Frye states that, in order for expert testimony to be admissible, the thing from which the deduction is made must be sufficiently established to obtain general acceptance in the area to which it belongs. 239 F. in 1014.Dr. McDonagh counters, that although the Court after the adoption of the Frye test, the relevant standard for the admission of expert testimony is now either that determined by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 USA 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), for use in federal courts, or which specified 490.065. This last statute says:1. In any civil action, where scientific, technical or other expertise helps the evidence-checker to understand the evidence or establish the fact, a witness qualified as an expert in knowledge, skills, experience, training or training may testify in the form of an opinion or otherwise.2. The testimony of such an expert in the form of an opinion or otherwise admissible inference shall not be inadmissible because it covers the final question which the trier of fact takes.3. The facts or data in a particular case on the basis of which the expert bases an opinion or conclusion may be those perceived or known to him at the hearing or before the hearing and must be reasonably appointed by experts in the field when formulating opinions or conclusions on the subject and must be reasonably reliable.4. Where a reasoned basis is put, the expert may give testimony in terms of opinions or conclusions and give reasons without using hypothetical questions, unless the court considers that the use of a hypothetical question will make the expert's opinion more understandable or more helpful to the jury due to the particular circumstances of the case. Although section 490.065 on her face provides that it applies in civil actions and sets an appropriate standard for receiving expert testimony in such activities, various decisions of the Missouri Court of Appeals since section 490,065 was passed in 1989 have expressed confusion as to whether the statutes, Frye or Daubert, provide an adequate standard for the admission of expert testimony.9 Any such confusion should be resolved by a 1997 court decision in the Lasky case. , which ruled that Section 490.065 contains an appropriate standard for assessing the admission of expert testimony in civil matters. 936 S.W.2d at 802. While Lasky did not go on to state explicitly that, to the extent that previous civil cases applied by other rules should no longer be respected, such a holding was hidden in lasky's direction, that in custody the trial court is guided by section 490.065, RSMo, in assessing the admission of expert testimony. Id. in 801.To explanations, however, the court expressly maintains that to the extent that the cases, since Lasky suggest that the standard of admissibility of expert testimony in civil matters is laid down in Frye or other standards, they are no longer respected. The relevant standard is the standard set out in Section 490.065.B. Section 490.065's Applicability to Contested Administrative Proceedings. Alternatively, the Management Board argues that, since the first four words of Section 490.065 are in all civil proceedings, the standard for receiving expert testimony which it presents cannot apply to administrative activities such as this. In order to support the Council cases in which it is found that administrative activities are usually tried in accordance with different rules of administrative procedure and not in accordance with missouri's civil procedure rules, except where the latter have been adopted by law for use in administrative matters. See, for example, Comm'rs Police Department of Kansas City, 918 S.W.2d 800, 803 (Mo.App. W.D.1996); Dillon v. Dir. W.D.1989). However, the admission of expert testimony is not laid down in civil or administrative proceedings, but on the basis of rules on admissibility of evidence. The relevant rules of evidence are not set out in any set of rules, but have been developed under ordinary law and the Law.10 These rules govern the taking of evidence in civil and criminal matters. Cases brought before administrative agencies are usually less formal and structured than civil proceedings in district courts. However, this does not mean that the rules on evidence drawn up in civil matters do not apply to administrative actions. On the contrary, the legislature expressly recommended that many of the principles of evidence developed in civil matters should be applied in administrative matters, including privileges, court notices, the acceptance of letters and documents, testimony, etc.11 The Court has also held that other basic principles of evidence also apply in administrative proceedings. Thus, at the Missouri Church of Scientology v. State Tax Commission, 560 S.W.2d 837, 839 (Mo. banc 1977), the Court found: [a]lthough the technical rules of evidence do not control in administrative hearings, the basic rules of proof apply. The principle set out in the Missouri Church of Scientology repeats a principle that the Court recognized at least as long ago as the state ex rel. De Weese v. Morris, 359 Mo. 194, 221 S.W.2d 206, 209 (1949), in which the Court stated: 'The fact that the technical rules of evidence have no control has been regarded as enabling questions and other informality to be raised, but not in order to set aside the basic principles of evidence. See also Ex rel. Bond v. Simmons, 299 S.W.2d 540, 545 (Mo.App.1957) (accord). The approach set out in these cases applies in this respect. Although they are not required to comply with the technical rules of evidence in the contested administrative proceedings, the basic principles of evidence applicable to civil matters also apply to such administrative hearings. See Mo. Church of Scientology, 560 S.W.2d in 839; De Weese, 221 S.W.2d in 209. Standards for the admission of expert testimony are such a fundamental principle of evidence. The rules set out in section 490.065 therefore guide the admission of expert testimony in the administrative case at issue such as this.C. The comparison of sections 490.065 with FRE 702, FRE 703 and Daubert.The parties and the AHC appear to assume that Sections 490.065 and FRE 702 and FRE 703, as interpreted in Daubert, are indeed identical and that the standard set out in Section 490.065 reflects that Daubert adopted for use in federal courts. Daubert ruled that frye's [t]hat test was displaced by the [Federal] Evidentiary Rules. 509 U.S. at 589, 113 S.Ct. 2786. FRE 702 was found to provide a more flexible standard of admissibility, focusing on scientific validity and thus on the probative relevance and reliability of the principles underlying the proposed presentation. Id. at 594-95, 113 S.Ct. 2786 (noting that [t]he focus . must be solely on principles and methodologies and not on the conclusions they generate). Whereas Daubert has provided a non-exhaustive list of factors to be taken into account when determining whether the evidence in question meets a flexible standard, including: (1) whether [theory or technique] can (and has been) tested; (2) whether the theory or technique has been peer-reviewed and published; (3) known or potential error rate; and 4) general acceptance. The Supreme Court summarized its holding by highlighting the difference between Daubert and frye's test that federal courts had previously hired, stating: General acceptance is not a necessary condition for the admissibility of scientific evidence in accordance with the Federal Evidentiary Rules. Id. at 597, 113 S.Ct. 2786.Few cases have interpreted section 490.065. To the extent that Section 490.065 reflects FRE 702 and FRE 703, as interpreted and applied in Daubert and his offspring, the cases interpreting those federal provisions provide relevant and useful guidance on the interpretation and application of Section 490.065. See Giddens v Kansas City S. Ry. Co., 29 S.W.3d 813, 820 (Mo. banc 2000) (The design given by federal courts to their rules does not control the interpretation of our state rules, even if the laws themselves are almost identical. However, the experience of these courts in applying laws similar to ours is illustrative.) However, to the extent that these two approaches differ, it must regulate the standard set out in section 490.065. The standard set out in section 490.065 is very similar to the standard initially adopted by the federal courts in Daubert and set out in FRE 702. Indeed, at the time when Daubert was established, FRE 702 was identical to section 490.065.1, stating: If scientific, technical or other expertise helps the fact-checker understand the evidence or establish the fact, a witness qualified as an expert in knowledge, skills, experience, training or education may give evidence in the form of an opinion or otherwise, with the exception of section 490.065.1, the initial expression [i]n of any civil action has been added. 12 While the parties assume that paragraph 490.065.3 is also in fact identical to FRE 703, the review of those two principles reveals significant differences. Section 490.065.3 begins by saying: Facts or data in a particular case on which an expert bases an opinion or request may be those perceived or made available to him at the hearing or before the hearing. The first sentence of FRE 703 is identical, except for minor stylistic variations. However, section 490.065.3 requires that the facts or data on which an expert bases an opinion or conclusion must be reasonably appointed by experts in this field in formulating opinions or conclusions on the subject and that those facts and data must otherwise be reasonably reliable. Seconds. Thus, point 490.065.3 expressly requires evidence that facts and data are of the kind to which experts in this field have reasonably invoked opinions or conclusions concerning the subject matter of the expert's testimony. The court must also independently assess their credibility. Id. On the other hand, according to FRE 703, whether the facts or data referred to are of the kind to which experts in the field concerned have reasonably invoked in a given field when formulating opinions or conclusions on the subject is relevant only for the purpose of establishing whether facts or data must otherwise be admissible in evidence. For this reason, unlike Missouri, Daubert ruled that in federal courts an expert does not necessarily have to identify the relevant scientific community or field in which data and facts are accepted. Daubert, 509 U.S. at 594, 113 S.Ct. 2786.IV. APPLICATION OF SECTION 490.065 TO DR McDONAGH EXPERTSDitions between sections 490.065 and FRE 703, as interpreted in daubert, are of great importance here, as the key area of disagreement of the parties concerns the identification of the relevant scientific field in which Dr McDonagh's practices are to be assessed. This is necessary because the law requires that an expert's opinion be admissible must be based on facts or type data reasonably appointed by experts in the field. A. Identification of the relevant field of experts. Dr. McDonagh argued, and the AHC seems to establish that the appropriate field for the purposes of this investigation is the universe of doctors who use chelating therapy. And, according to the transcript that Dr. McDonagh followed a protocol of chelating therapy approved by about 1,000 doctors who are organized into ACAM, it was found that his expert testimony as to whether his treatments were appropriate was acceptable. However, in order to limit the relevant area only to those doctors who have already expressed the opinion that the therapy in question is would make it pointless for experts to investigate the adoption of this field, since by definition only those who have received therapy will be asked for an opinion. The appropriate field must be determined not by the approach of the doctor concerned decides to take, but by the standards in the field in which the doctor has decided to practice. Where appropriate, Dr. McDonagh decided to treat patients with vascular diseases. The board alleges that Dr. McDonagh engaged in repeated negligence or misrepentation and otherwise violates the relevant statutes in his provision of chelation therapy to these patients. Therefore, the appropriate field is doctors treating people with vascular diseases. The facts or data on which Dr McDonagh's experts rely must therefore be those which they perceive at the hearing or must reasonably be relied on by doctors treating vascular diseases.13 In so doing, the Court is not in fact readopting frye's standard under another name. Nothing in section 490.065 suggests that the conclusions drawn from these facts and data must be in line with the general medical consensus or generally accepted. As with Daubert and the cases that apply it, such acceptance is only one of the factors in the relevant investigation. Section 490.065.3 merely requires the court to consider whether the facts and data used by the expert are reasonably supported by experts in this field or whether the methodology is otherwise reasonably reliable. If not, the testimony does not meet statutory standards and is .B. Need for controlled studies. The board argues that even if Daubert-for whom Section 490.065 14 is interpolated-provides standards for receiving expert testimony, expert testimony by Dr. McDonagh should be excluded because controlled studies supporting the use of chelating therapy for the treatment of vascular diseases do not exist. Nothing in paragraph 490.065 explicitly requires such studies. The Management Board cites any case which has not been resolved on the basis of section 490.065, according to which the expert's opinion must be supported by audits in order to ensure an admissible one. On the contrary, Section 490.065.3 provides that an expert opinion is admissible if the facts or data on which the opinion is based are of the kind on which experts in this field have reasonably relied in formulating opinions or conclusions on the subject and are reasonably reliable. Controlled studies are a form of data. Therefore, the admissibility of an expert's opinion does not depend on certain unchanging external standards, such as the presence of audited studies, but on whether experts in a given field can reasonably rely on other types of data when formulating their opinions or whether they are required in this area Controlled. However, the AMA suggested that should be performed before chelating therapy is generally considered effective. See AMA, AMA Policy Compendium H-175.994 (1994) supra. Of course, section 490.065.3 also requires an independent court to determine whether the facts and data based on them are otherwise reasonably reliable. The absence of controlled studies would probably be significant, but not necessarily available, in making this finding. This is in line with the daubert and FRE 703 approaches. Daubert says that whether the theory is or can be tested as a controlled study is just one factor, though important, in determining its admissibility. 509 USA at 593-94, 113 S.Ct. 2786.As used here, it is up to the AHC to consider Dr. McDonagh's expert testimony, along with other evidence offered in this case, and determine whether experts in this field can reasonably rely on the data these experts relied on to reach their conclusions on the use of chelation therapy. Due to confusion in cases concerning the standard of admission of expert testimony, the AHC did not apply those standards when assessing the expert testimony offered. In custody, the AHC may allow parties to supplement the record with additional expert testimony on matters relevant under the statutes.V. OTHER ISSUES IN THE APPEALA CASE. The need for expert testimony on the standard of care for repeated negligence in accordance with section 334.100.2(5). The Board alternatively claims that even the former testimony of Dr. McDonagh's experts was otherwise admissible under an appropriate standard of evidence, it was insufficient to repel the Board's allegations in various cases, and through experts and other evidence that Dr. McDonagh's use of chelatation therapy constitutes repeated negligence, as the term is used in Section 334.100.2(5).15 This section

defines repeated negligence as failure , repeatedly in order to use this level of skills and learning normally used in the same or similar circumstances by a member of the profession of applicant or licensee. Sec. 334.100.2(5). The board says that in order to counter council experts, Dr McDonagh's experts had to testify whether he had used the degree of skill and learning typically used by members of his profession. But, while his experts testified that his treatment of his patients met the standard of care, they never identified that standard of care. The board argues that the standard of care it has met must be a standard of care generally accepted in the profession, and this means that Dr McDonagh is neglected if he treats his patients in a way other than the treatment generally offered by doctors in the field. And, given Dr. McDonagh's admission experts that mainstream doctors generally don't use chelation In the treatment of vascular diseases, the board suggests Dr. McDonagh's experts may not apply the correct standard of care in giving their opinion that his treatment meets the required standards. Dr McDonagh admits that his experts have not determined by what standard of care they assessed his treatment of his patients, but argues to the extent that a certificate on the standard of care was necessary,16 standard is that used by doctors who use chelating therapy. It submits that, since it used a protocol approved by ACAM, it could not be regarded as negligent and necessarily met the required standard of care. Neither party's argument is correct. The appropriate standard of care is neither a reformulating frye's general acceptance test nor a blind acceptance of the views of a subgroup of people to give themselves an opinion. An appropriate standard of discipline for repeated negligence is necessarily set out in the statutes relating to this conduct, point 334.100.2 para. This standard, similar to missouri's standard for evidence of negligence in civil matters17, requires proof of whether a doctor has demonstrated the skills and learning normally used in the same or similar circumstances by a member of the [physician]'s profession. Sec. 334.100.2(5) (emphasis added). Since the problem here is the treatment of people with vascular diseases, the appropriate standard of care is that used by doctors to treat people with vascular diseases. The use of this standard does not require only the determination of which treatment is the most popular. If this were the only determinant of skills and learning, any doctor who used the drug for off-label purposes, or who ran unconventional treatment courses, could be considered involved in repeated negligence and be subject to discipline. This would not be consistent with section 490.065.Rather, the statutes require only what Dr McDonagh says to use this degree of skill and learning used by members of the profession in similar circumstances. Similarly, one doctor can use the drug to treat heart disease, while another may decide to perform a transition and the third to perform angioplasty, but all three may be applying the required degree of skill and learning. The fact that they have come to different conclusions, applying this skill and learning, does not make one neglect and one negligent. So too, here, if Dr. McDonagh's treatment, including his diet and exercise regimen, and the lack of evidence of harm from his approach, shows the application of the degree of skill and learning usually used by members of his profession, it is not grounds for discipline under the act, even if other doctors will use these facts to achieve a different outcome. Since, in finding that Dr McDonagh had not infringed Section 334.100.2(5), the AHC relied on the testimony, and since those testimonies have not shown whether the experts have benefited from the legal standard of care in the event of repeated negligence described in section 334.100.2(5), the Court must reverse and stop. The district court should refer the AHC for reconsideration in accordance with Section 490.065 and in the light of the standard of care contained in section 334.100.2(5).B. Issues of record-keeping, testing and misreassing. The parties dispute the AHC's findings and conclusions regarding allegations that Dr McDonagh does not maintain and maintain adequate documentation. These allegations were made under Counts II, III, IV, V, X and XII and not set out in an independent number, and the Council provided expert testimony on Dr McDonagh's record-keeping practices with regard to the standard of care. While the AHC has independently concluded that no Missouri law or regulation sets standards or recommendations, 18 did not consider the evidence to be part of repeated allegations of negligence in which allegations of improper record-keeping arose. She should do so in custody. The board and Dr. McDonagh also questioned the AHC's findings regarding the Board's allegations of misleading, and its alleged repeated ordering of inappropriate and unnecessary patient testing. These issues should be referred to the AHC for reconsideration in the light of this Opinion.19 VI. The REQUEST, since the expert testimony on which the AHC relied did not provide an adequate standard of legal diligence, the judgment of the district court is set aside and the case is dismissed. In the light of section 490.065 and in the light of the standard of care set out in section 334.100.2(5) and this Opinion, the district court is referred to the AHC for further review. I agree that section 490.065 sets standards for the admissibility and use of expert testimony. Since I believe that the Administrative Hearing Committee was right in stating that Dr McDonagh was not disciplined for any of the acts alleged by the State Council for the Registration of the Healing Arts, I would confirm the Commission's decision, as the district court did. I write separately to offer advice to lawyers on expert witnesses and gentle advice to the board on the future of this case against Dr. McDonagh.Advice for Lawyers on ExpertsThe principal opinion's discussion of section 490,065 is worth reading for an excellent legal analysis. I'd just like to add a helpful summary for practitioners in Missouri courts and administrative agencies: Forget Frye. Forget Daubert. Read the statutes. Section 490.065 is written, conveniently, in English.1 Contains 204 words. These simple statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings. Section 490.065 where scientific, technical or other expertise will help the trier of fact . 2 Dr McDonagh and the doctors he appointed as experts were certainly qualified as experts by knowledge, skills, experience, training or education. The Board of Directors claimed that the testimony of these witnesses was inadmissible under Frye v. United States, 293 F. 1013 (D.C.Cir.1923). Frye was remarkably close to the point. Neither party has duly taken into account the statutes. The board acknowledged that the testimony of Dr. McDonagh and his experts was admissible in section 490,065, but unacceptable under Frye. Why did the 80-year-old federal appeals court case the Trump Missouri statute directly on point? Dr. McDonagh, on the other hand, claimed that the standard application was Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Again, why did the Missouri Law directly point to be disregarded in favor of the U.S. Supreme Court's decision on federal evidentiary rules that were not adopted in Missouri? I think the parties are trying to reach the right standard of care, discussed in the main opinion. There is a problem here: in the proceedings before the committee, the board only raised a general complaint that Dr McDonagh's expert evidence would not have qualified for frye. The board did not object to any specific testimony from Dr. McDonagh or his experts. The board also did not raise a point now pushing in this appeal that Dr. McDonagh's experts had not determined the standard used when they determined that his use of chelating therapy was consistent with the standard of care. The council's evidentiary request to the committee did not apply to the standard of care, nor did the board take the opportunity to question Dr McDonagh's expert witnesses about the standard of care. Setting the right standard of care was not a burden on Dr McDonagh. But the issue of standard of care may be next to the point, as I will discuss in the next section in offering advice to the board. Advice to the Healing Arts BoardThe board should drop this case. The board case against Dr. McDonagh is based on his claim that Dr. McDonagh's use of chelating therapy constitutes repeated negligence for which he should be disciplined. The board lost the case before the administrative hearings committee and then appealed to the district court, where it also lost. Less than a month after the board filed an appeal in 2001, the board announced Rule 4 of CSR 150-2.165, which declares that the use of chelation in a patient has no medical or osteopathic value, with the exception of such uses approved by federal food and (FDA). The rule also says that the board cannot file disciplinary action against the licensee if the licensee uses the patient consent form specified by the rule. The board acknowledges, and the main opinion appropriately notes, that the consent form that Dr. McDonagh has been using for many years is very similar to the consent form in the board rule. How can the board take the view that Dr. McDonagh's practice was repeatedly negligent under the Disciplinary Act, Section 334.100, when the board has a rule that it will not seek discipline against doctors engaging in this practice? What is the exact standard of care? The real question is: Does the healing art board use section 334.100, which mandates discipline for repeated acts of negligence, misuse of the disciplinary process to impose the board's sense of orthodoxy? 3 Dr. McDonagh's use of chelation therapy to treat atherosclerosis and other vascular diseases may be unconventional. None of the major medical organizations approve its use of vascular diseases. But until 2001, after the actions of the board complains in this proceeding,there was no law or regulation regulating its use. Chelation therapy, which administers EDTA intravenously, is a standard treatment for removing heavy metals from the body. The FDA approves chelating therapy drugs for this use. Its use in an attempt to remove the blockage of blood vessels is called off-label use, referring to the use of standard therapy for another purpose. There are many uses of off-label drugs that are generally accepted by doctors. An organization called the American College for Advancement in Medicine, consisting of about 1,000 physicians around the world, including Dr. McDonagh, supports off-label use of chelating therapy, along with various vitamins and minerals, to treat vascular diseases. The administrative committee heard eight days of evidence on the board's complaint against Dr McDonagh for using chelating therapy and related matters.4 The Commission, in 70 pages of findings of fact and legal proposals, found no reason to be disciplined. In particular, in response to the board's position that the use of chelating therapy is a cause for discipline, the Commission concluded: This is not an unnecessary, harmful or dangerous treatment. The Commission characterised McDonagh's behaviour as giving patients treatment that benefited many patients, did no harm to anyone and is given with informed consent and information that the treatment may not work with all patients. The Commission also stated: 'The evidence shows that patients are helped. We cannot conclude that the whole treatment that benefits patients without harming the constitutes incompetent, inappropriate, grossly negligent or negligent treatment. Nor can we say that such treatment is a misdemeanor, unprofessional or a threat to society. The Commission acknowledges, on the basis of the record, that chelating therapy is associated with risks, as are, of course, other treatments for vascular diseases, such as coronary surgery. The risks of chelation therapy are revealed, according to the committee, in an informed consent form that Dr. McDonagh used with all his patients. The form states that chelation therapy for vascular diseases is not approved by the FDA, the American Medical Association, or others. It lists possible benefits, but also notes that you may not receive all of these benefits, as they do not occur predictably in every patient, and in some cases may not occur at all. Dr McDonagh tells his patients that treatment will work better if the patient adheres to the diet, exercise and dietary supplements that are recommended, according to the commission's findings. There are scientific studies discussed in the Commission's findings on the effectiveness of chelation therapy for vascular conditions. Mainstream organizations accept the findings of studies that have shown no value in treating vascular diseases with chelation therapy. Dr. McDonagh and other like-minded physicians, including their American College for Advancement in Medicine, cite case reports and studies, probably less important than the studies on which the mainstream is based, which show benefits in such use of chelation therapy. There is a provision of section 334.100 that seems to include unconventional treatments that have no value. Section 334.100.4(f) provides for a discipline in which the licensee performs or prescribes medical services which have been declared by the Management Board to have no medical or osteopathic value. But the board did not have a rule against chelating therapy that would apply to Dr. McDonagh's acts, which took place between 1978 and 1996. The Board, long after the files contained in the complaint against Dr. McDonagh, announced the principle relating to chelatation therapy, 4 CSR 150-2.165 (Effective October 30, 2001), quoted in full in the main opinion. More to the point where the board finally announced its rule that declares chelation therapy as having no medical or osteopathic value, the board rule states that the board will not seek disciplinary action against the licensee solely on the basis of the unapproved use of EDTA chelation if the licensee has a patient sign of the informed consent form that accompanies the regulation. As mentioned here and in the main opinion, the consent form that Dr. McDonagh used for these patients long before the consent form announced by the board- very similar to the consent form accompanying the 2001 rule. In this case, the the question arises: what is happening here? In fairness to the board, it should be noted that a hearing before the administrative committee hearing in Dr McDonagh's case took place in 1997, four years before the board announced its rules. It seems strange, however, that the board, losing in committee and in the district court, will press its claims on appeal after the publication of the 2001 rule, which undercuts its position. As regards the board's claims heard in 1997, which are the subject of this appeal, it appears that the absence of a provision has left the board to proceedings against Dr McDonagh under 334,100.2(5) for repeated acts of negligence. The board's complaint claimed that Dr McDonagh's practice of chelating therapy constituted repeated negligence in breach of section 334.100.2. Section 334.100.2(5) permits discipline for any conduct or practice that is or may be harmful or dangerous to the mental or physical health of the patient or society, as well as for incompetence, gross negligence or repeated negligence in professional duties. Section 334.100.2(5) defines repeated negligence as repeated non-compliance with this degree of skill and learning normally used in the same or similar circumstances by a member of the profession or licensee. This definition establishes a legal standard of care that must be used to determine the board's claims of repeated negligence. So is this off-label use of negligent chelating therapy? The real question to which the answer is fatal to the board's position is whether acts of negligence, as defined in this statute, can be grounds for discipline if there is no list that the conduct of a doctor is or may be harmful or dangerous. If there is no harm or danger, there is no reason to discipline in this section. Section 334.100.2[5] is a catchall provision; in the context of the entire statutes, does not make negligent actions sucking, unless there is harm or danger.5 This division can not be read for the purpose of subjecting the actions to discipline, if there is no chance of harm. If that were the case, the reading would make unnecessary other provisions of the statutes, such as 334.100.2(4) (f) for treatments considered by the rule to have no medical value. There are provisions in section 334.100, including 334.100.2(4) (f), regarding the disciplining of medical quarrels, even if it does not cause harm. But section 334.100.2(5), according to which the board complains about Dr McDonagh's practice, is not one of those sections. In accordance with section 334.100.2(5), no injury, no foul. Doctors have considerable freedom to use professional judgement to decide on appropriate procedures, especially when applying the standard of negligence. For example, Haase v. Garfinkel S.W.2d 108, 114 (Mo.1967), medical negligence, as long as there is room for honest disagreement between competent doctors, a doctor who uses his own best judgment cannot be convicted of negligence, even if he may later develop that he has made a wrong. Neglect does not seem to be the right concept in which the doctor investigated the problem and issued a recommendation for treatment, even though this is not the prevailing view of most of the profession. The lack of general acceptance of treatment does not necessarily constitute a violation of the standard of care. The use of negligence in licensing situations, in the absence of damage or danger, is particularly inappropriate. It could be argued that because chelating therapy is not accepted by mainstream medicine and is an off-label practice not approved by the FDA, it is therefore harmful and dangerous. If it were a board position, the licensing statute would thwart advances in medical science. A dramatic example is the treatment of stomach ulcers, which have long been considered to be caused by stress. In 1982, two Australians found the bacterium helicobacter pylori in the stomach membranes of ulcer victims. Since helicobacter pylori is a bacterium, some minority doctors to be sure-began prescribing antibiotics to treat stomach ulcers as an infectious disease. The National Institutes of Health did not recognize antibiotic therapy until 1994; The FDA approved the first antibiotic for use in the treatment of stomach ulcers in 1996; and the Centers for Disease Control began publicized treatment in 1997. Today's doctors accept the fact that most stomach ulcers are mainly caused by infection with helicobacter pylori bacteria, not stress.6 But by the chronology of this discovery, if the doctor in the late 80s. I do not want to suggest that chelating therapy for vascular diseases is the same order as the use of antibiotics in the treatment of stomach ulcers. In fact, I doubt it. But What I mean is that medicine is not easily regulated by a standard cookbook or set of rules. The board's position in the publication of its 2001 rule on chelating therapy seems to recognize this point better than its position in this disciplinary proceedings. If chelation therapy for vascular diseases were dangerous, the board rule that allows its use would be unconscionable. In practice, Dr. McDonagh, all his patients have signed a treatment agreement and agreement that discusses the positive and negative aspects of chelating therapy and possible side effects. Patients are advised that the therapy is not approved by the FDA, AMA or others. Patients agreed to Some of Dr. McDonagh's patients chose chelating therapy after running out of more traditional medical treatments. Some may have benefits, perhaps because Dr. McDonagh is accompanied by chelatation treatment with recommendations for diet and exercise, which are well known to be helpful in preventing and resolving certain vascular diseases. The recording does not show damage to any patient. In the absence of damage or likelihood of harm, can repeated standards of negligence resulting from the Licensing Act be lawfully used to enforce the board's opinion on what is conventional and therefore acceptable? The board acknowledged that there was no evidence of harm to chelating therapy. In the 35 years that he has used chelating therapy, Dr. McDonagh reports that the therapy has not caused infection, injury, or death to any of his patients. The Commission has repeatedly stated that chelating therapy does no harm to anyone and benefits many patients. 7 Medicine is an art, as well as a science of how its practitioners are taught. It is also a dynamic field in which beliefs about what is conventional therapy can change over time. What is an effective treatment is often a combination, not only of art and science, but of faith. The patient can improve if the patient is convinced of the usefulness of therapy. The commission found that some of Dr McDonagh's patients had improved. Even if it is hard to believe that these patients have improved due to chelation therapy, the fact that some of Dr. McDonagh's patients were better is not a reason for discipline. On this record, the absence of harm from chelatation therapy, as I read the statute, negates the board's request for repeated negligence. Nor can it be said that the board or committee believes that Dr McDonagh's practice poses a threat to the public. The Board has the right to move quickly to end practices that it considers dangerous. 334.102. The Management Board did not demand such immediate action. This disciplinary procedure was conducted in slow motion. The Healing Arts Council in 1989 apparently studied chelating therapy and issued a public statement saying that it had decided not to take any action on chelatation therapy and would consider cases when they emerged. His first complaint against Dr. McDonagh was filed in 1994, but he later dismissed it without prejudice. The present complaint, in 13 figures, covers practices dating back to 1978 and was lodged in 1996. As noted, the present case was before the committee in 1997, but the Commission's decision was not adopted until 2000. All interested parties are clearly not urgent. If this case goes to the commission in custody, the Commission is to review the evidence on the basis of the evidential principles set out in section 490.065. In my opinion, the Committee the same conclusion as before. In any case, to the extent that Dr McDonagh's practice although before the board date 2001 regulations comply with the Board Regulation on chelation, the board should be bound by its own standard. Dr McDonagh has not yet raised the question of whether the board should be bound by its own standard, as expressed in its 2001 rule. But he will have the opportunity to do so in custody. This case must end. The Board should end the case on its own and not suffer from the indifference of further unfavourable decisions of committees and judicial decisions, not to mention the waste of public resources that such proceedings entail. FOOTNOTES LOWER 1. All statutory references refer to RSMo 2000, unless otherwise indicated.2. The Court does not reach Dr McDonagh's argument that the council's summaries do not comply with Rule 84.04, since, given the fundamental nature of the errors alleged, the result would be the same, regardless of whether it is verified as a mere error or as a retained error3. EDTA stands for tetracetic acid from diaminic ethylene. This substance was developed in 1930.4. This practice, which began to appear in the 1950s, consists in administering an intravenously diluted solution containing EDTA, as well as various vitamins and minerals. Proponents claim EDTA chelates-or bonds with substances that accumulate and block arteries and then, flush these compounds out of the body through urine.5. In 1999, the Federal Trade Commission and ACAM concluded an agreement of consent under which ACAM agreed not to make any statements regarding the efficacy of EDTA chelating therapy in the treatment of atherosclerosis. In re Am. Coll. for Advancement in Med., No.C-3882 (Fed. Trade Comm'n June 22, 1999) http:// www.ftc.gov/os/1999/07 /9623147c3881acam.do.htm. See also American College for Advancement in Medicine, 64 Fed.Reg. 12,338 (Fed. Trade Comm'n Mar. 12, 1999) (extension of the public comment period on the consent agreement).6. The first study was the Guldager study, published in 1992, and the second was the van Rij study, published in 1994. These studies tested the effectiveness of EDTA chelatation therapy in the treatment of intermittent clamation, which is [a]n pain, cramps, tired and sometimes burning pain in the legs that comes and goes. due to poor blood circulation in the arteries of the legs. MedicineNet.com, Medical Dict., at http:// www.medicinenet.com/script/ main/art.asp? ArticleKey=9218 & pf =3 & track=qpadict (last visited October 30, 2003).7. The Management Board alleged infringement of numerous versions of the statutes from 1976 to at least 1994,8. Count VI, who alleged that unskilled workers had not been inadequately transferred to his duties, was not raised on appeal9. See, for example, Mindrup, 108 S.W.3d 662, 665-66 & n. W.D.2002) (whether [section] 490.065 replaces the Frye doctrine . whereas, if anything, the effect of the adoption of [Section] 490.065 is on the application of the principle of general acceptance of Frye, and even more so whether it commissssssssssssssses the Daubert standard by referring to Section 490.065 for the admissibility of expert testimony and stating that Frye is an appropriate standard for analysing the admissibility of expert testimony relating to scientific techniques); Keyser v. Keyser, 81 S.W.3d 164, 169 (Mo.App. W.D.2002) (referring to Section 490.065.3 as a standard for the admissibility of expert testimony without reference to Frye or Daubert); Long v. Mo. Delta Med. Ctr., 33 S.W.3d 629, 642-43 (Mo.App. S.D.2000) (noting that Section 490,065 adoption may raise the question of whether missouri courts should continue to apply the Frye standard to the admissibility of expert testimony, or if Daubert would be more appropriate, then apply Frye to the admissibility of expert testimony regarding scientific techniques and the possession that Section 490,065 applies to the admissibility of expert testimony regarding non-scientific evidence); M.C. v. Yeargin, 11 S.W.3d 604, 619 (Mo.App. E.D.1999) (noting that the Missouri Supreme Court continues to apply the Frye test to the admissibility of expert testimony in criminal and civil matters, and noting that the trial court abused its discretion by granting [the expert's] testimony, since the court did not find that it was based on scientific principles generally accepted in the scientific community or within the limits of section 490,065); Whitman's Candies, Inc. v Pet, Inc., 974 S.W.2d 519, 528 (Mo.App. W.D.1998) ([b]ecause the expert testimony referred to in the bar case meets the requirements of both Frye and Daubert, this court does not have to determine whether [section] 490.065 replaces the Frye test in Missouri (distinction in the original)).10. Indeed, although the Missouri Constitution leaves the Rules of Procedure to the Court, it explicitly prohibits the Supreme Court from creating rules of evidence. Mo. Const. Joke. V, sec. See Status v. Williams, 729 S.W.2d 197, 201 (Mo. banc 1987) ([T]he legislature has plenary power to prescribe or alter the rules of evidence.). 11. See, for example, paragraph 536.070(6) (Agencies notify all cases referred to by the courts.); 536.070(8) (The rules on privileges are effective to the same extent as they are currently or may be in civil actions. (emphasis added)); 536.070(9) (As regards [c]opies of letters, documents and records, the Agency may, however, if it considers that the interests of the judiciary so require, maintain any objections to such which would have been upheld if the evidence presented in the civil action had been presented in the district court. . (emphasis added)); 536.073.1 (The party may accept and use the testimony in the same manner, under the same conditions and under the same conditions, and under the same conditions as is or may be provided for in respect of the admission and use of testimony in civil actions in the district court. . (emphasis added)). 12. Supra is discussed. In 2000, the language at the end of FRE 702 was added, which set out in more detail how the court, as guardian, should review the expert's testimony, stating that the court should consider the testimony admissible if (1) the testimony is based on sufficient facts or data, (2) the testimony is the result of reliable rules and methods. and (3) the witness applied the rules and methods reliably to the facts of the case. 13. Cf. Yantzi v. Norton, 927 S.W.2d 427 (Mo.App. W.D.1996) (the negligence of a professional foundation repair engineer was to be assessed according to the standards of people with experience in repairing foundations, and not only by those who are professional engineers.14 Dr McDonagh argues that the Board did not retain its objections to the acceptance of the testimony of its experts under section 490.065 and instead claimed that the testimony was inadmissible under Frye or Daubert. However, since the parties and the AHC used the term Daubert to refer in general terms to any non-Frye approach to expert testimony, the Court considers it appropriate to achieve the merits of the House's arguments in that regard.15 The Court notes that the term repeated negligence was not added to the statutes until 1987. Consequently, although a significant part of the conduct at issue at the hearing and forms the basis of the Council's action took place before 1987, the repeated negligence of the Council's claims of misconduct against Dr McDonagh may be based only on his conduct after that provision has been added to the Statute16. Dr McDonagh says expert testimony on the standard of care was not necessary. The Court disagrees. Since this case concerns complex issues relating to adequate medical care for patients with vascular diseases, the case does not falls within the competence of the laity, expert testimony was necessary to determine what standard of care was required of Dr. McDonagh and whether he met that standard of care. See e.g. Printz, 468 S.W.2d 34, 40 (Mo.1971) (in cases of medical abuse, experts must incorporate the legal standard of care into their testimony to demonstrate that it is not based on an implicit subscription concept [expert] of acceptable medical standards and not on the required, objective legal standard of care); Ladish v. Gordon, 879 623, 634-35 (Mo.App. W.D.1994) ([i]t it is not necessary for a rule of law to be recited in a ritual manner, but it must generally appear somewhere in the context of expert testimony that the relevant objective rule of law is the rule applied by that expert); Eat v. Williams, 830 S.W.2d 453, 456 (Mo.App. W.D.1992) (agreement).17. See, for example, Berwald, 460 S.W.2d 707, 709 (mo.1970) (The defendant was obliged to apply and exercise the degree of skill and skill which is commonly experienced by an ordinary, skillful, prudent and prudent doctor and surgeon involved in medical practice); Hart v. Steele, 416 S.W.2d 927, 931 (mo.1967) (accord); Williams v. Chamberlain, 316 S.W.2d 505, 510 (mo.1958) (accord).18. In 2002, the Missouri General Assembly passed Section 334.097, which governs the keeping of medical records. Sec. 334.097, RSMo Supp.2002.19. In view of the other issues raised above, the Court does not have to refer to Dr McDonagh's argument that adopting the Council's position on chelating therapy would constitute an unjustified restraint on his right and the right of his patients to choose alternative medicine treatments1. All statutory references are to RSMo 2000.2. Section 490.065, in its entirety, states:1. In any civil action, where scientific, technical or other expertise helps the evidence-checker to understand the evidence or establish the fact, a witness qualified as an expert in knowledge, skills, experience, training or training may testify in the form of an opinion or otherwise.2. The testimony of such an expert in the form of an opinion or otherwise admissible inference shall not be inadmissible because it covers the final question which the trier of fact takes.3. The facts or data in a particular case on the basis of which the expert bases an opinion or conclusion may be those perceived or known to him at the hearing or before the hearing and must be reasonably appointed by experts in the field when formulating opinions or conclusions on the subject and must be reasonably reliable.4. Where a reasoned basis is placed, the expert may testify in terms of opinions or conclusions and give reasons therefor without using hypothetical questions, unless the court considers that the use of a hypothetical question will make the expert's opinion more understandable or more helpful to the jury due to the particular circumstances of the case.3. Section 334.100.2 provides, in a material part: The Management Board may bring a complaint to the administrative committee of the hearing, in accordance with Chapter 621, RSMo, against any holder of any registration certificate or authorisation, authorisation or licence required by that chapter or any person who does not or has provided the person with a certificate of registration or authorisation, authorisation or licence for one or any combination of the following reasons: (5) any conduct or practice which is or may be harmful or dangerous to the mental or physical health of the patient or society; or incompetence, gross negligence or repeated negligence in the performance of the duties or duties of any profession licensed or regulated by this Chapter. For the purposes of this subdivision, repeated negligence means not using, on several occasions, the multiple use of that level of skills and learning normally used in the same or similar circumstances by a member of the profession or the licensee[.] 4. The board's complaint also relates to the record-keeping and use of diagnostic tests, but these fees appear to be based on the board's objection to Dr. McDonagh's practice in the treatment of vascular diseases. The question may be whether Dr. McDonagh ordered unnecessary tests, without reference to chelation therapy, or whether the tests dr. McDonagh ordered were deemed unnecessary by the board because they were part of a chelating therapy that the board believes is useless.5. For those who like the comfort of quoting cases, Missouri's common neglect law is consistent with this reading of section 334.100.2. In the case of ordinary law actions for negligence, the concept of negligence is inextricably linked to the cause of the damage. All negligent actions require the plaintiff to establish that the defendant was obliged to protect her from injury, that the defendant had breached that obligation and that the defendant's failure to act directly and proximately caused her harm. Robinson v Health Midwest Development Group, 58 S.W.3d 519, 521 (Mo. banc 2001). In the case of action on medical negligence, the plaintiff must prove that the defendant has not used the degree of skills and learning normally used in the same or similar circumstances by members of the defendant's profession and that negligence or actions have caused harm to the plaintiff. Washington by Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo. banc 1995).6. The treatment of stomach ulcers by antibiotic therapy is cited as one of the best innovations in medicine over the past 25 years in a study sponsored by the Robert Wood Johnson Foundation and the Henry Kaiser Foundation. His conclusions are summarized on www.MedTech1.com.7. In contrast, according to the committee, cardio-bypass surgery-approved severe stlerosclerose therapy has an operative mortality rate of two to 30 percent, depending on where you are in the United States, and mental retardation occurs in as many as 18 percent of heart bypass patients. LAURA DENVIR STITH, Judge. WHITE, C.J., BENTON, PRICE, limbaugh, JJ., agree. WOLFF, J., agrees in objections in part in a separate opinion. Filed.