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Yet Another Hearsay Exception: How Much Can Labels Prove in Missouri

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Yet Another Hearsay Exception: How Much Can Labels Prove in Missouri?

Moore v. Director of Revenue[1]

I. INTRODUCTION

In *Moore v. Director of Revenue*, the Southern District of the Missouri Court of Appeals encountered a fact situation that, upon a cursory reading, seems to touch upon an established rule of evidence. A cursory perusal, however, would overlook an evidentiary issue previously undetermined in Missouri. *Moore* presents the issue of admissibility of labels used to prove the contents of the package to which the label is affixed, and the court of appeals noted that no Missouri case had addressed this specific issue.[2] By creating a new exception to the hearsay rule, the *Moore* court approved the admissibility of labels used to prove container contents.[3] Because this case presents an unusual context for the introduction of labels used to prove contents of a container and little case law discusses the matters at issue, many questions remain as to the scope and application of this new exception to the hearsay rule. Depending upon future explanation and interpretation, this new exception to the hearsay rule could have very influential ramifications affecting cases far beyond the factual situation presented in *Moore*.

II. FACTS AND HOLDING

Terrence Moore wrecked his automobile on a snowy evening in Rolla, Missouri.[4] Rolla policeman Kevin Johnson arrived at the scene and smelled intoxicants on Moore.[5] After Moore was transported by ambulance to a hospital, Moore agreed to Officer Johnson's request that he submit to a blood test to determine the alcohol content in his body.[6] A registered phlebotomist and employee of the hospital, Tasker, withdrew a blood sample from Moore.[7]

After an administrative review upholding the license suspension decreed by the Missouri Department of Revenue, Moore was granted a trial *de novo* in the Associate Circuit Judge Division of the Circuit Court of Phelps County

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1. 811 S.W.2d 848 (Mo. Ct. App. 1991).
2. *Id.* at 850.
3. *Id.* at 852.
4. *Id.* at 849.
5. *Id.*
6. *Id.*
7. *Id.*

on charges of driving while intoxicated.[8] In accordance with a statute regulating the withdrawal of blood samples,[9] a DWI conviction in Missouri requires proof that the person drawing blood for purposes of determining alcohol content use a sterile needle in drawing the blood[10] and a nonalcoholic antiseptic to cleanse the area of skin surrounding the puncture.[11] At Moore's trial on charges of driving while intoxicated, Tasker testified about the procedure he followed in drawing blood from Moore.[12] He stated that he used a "Betadine prep," a nonalcoholic antiseptic, to clean the area of skin surrounding the puncture.[13] The antiseptic was a prepackaged solution contained in an unopened, sealed package.[14] Tasker also testified as to his preparation of a vacutainer,[15] the device used to draw blood from Moore. Moore objected to the introduction of this testimony, arguing that Tasker's testimony was inadmissible hearsay.[16] The trial court admitted the hearsay testimony into evidence, and subsequently upheld the suspension of Moore's driving privileges.[17]

Moore's only contention before the court of appeals was that the trial court erred in the admitting into evidence the results of the blood alcohol test.[18] Moore argued that the trial court improperly admitted Tasker's hearsay testimony because the witness' knowledge was based solely upon the labels of the respective containers of the antiseptic and the needle.[19] Moore alleged that Tasker believed that the needle and vacuum tube used to draw blood were sterile simply because the packages stated the products were

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8. *Id.*

9. *See* MO. REV. STAT. § 577.029 (1986). The section, in pertinent part, states: "In withdrawing blood for the purpose of determining the alcohol content thereof, only a previously unused and sterile needle and sterile vessel shall be utilized and the withdrawal shall otherwise be in strict accord with accepted medical practices. A nonalcoholic antiseptic shall be used for cleansing the skin prior to venapuncture." *Id.*

10. State v. Setter, 763 S.W.2d 228, 231 (Mo. Ct. App. 1988).

11. State v. Hanners, 774 S.W.2d 568, 569 (Mo. Ct. App. 1989).

12. *Moore,* 811 S.W.2d at 849-50.

13. *Id.* at 849.

14. *Id.* at 849-50.

15. *Id.* at 850. The vacutainer referred to by Tasker is a device comprised of a needle and vacuum tube. Tasker testified that he adhered to the following procedure in taking the blood sample from Moore: the tube was placed in the vacutainer, the needle pierced a rubber stopper, then blood was drawn from the vein into the tube by a vacuum. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

sterile.[20] Similarly, Moore argued that Tasker's belief that the antiseptic cleaning solution contained nonalcoholic substances was based entirely on the fact that the vial was labeled Betadine and because the solution was brown.[21] The court, however, did not accept Moore's contentions. The Missouri Court of Appeals held that the facts of this case sufficed to establish a circumstantial probability of trustworthiness that the needle and vessel were sterile and that the antiseptic was nonalcoholic as labeled, thus supporting the admission of the evidence, in that the statements on the labels and packaging in question were sufficiently reliable and trustworthy on their face to be considered an exception to the hearsay rule.[22]

III. LEGAL BACKGROUND

The Missouri Court of Appeals relied extensively upon policy justifications and persuasive opinions from other jurisdictions in creating a new exception to the hearsay rule.[23] The policy justifications supporting the label exception to the hearsay rule have received nearly universal acceptance from courts entertaining the subject. However, the reasoning employed in the handful of cases treating the admissibility of labels used to prove contents has varied significantly between jurisdictions.

A. Traditional Evidence Analysis of Hearsay

Missouri follows the traditional approach to hearsay evidence: Hearsay evidence is inadmissible unless an exception to the rule renders the statement admissible.[24] Hearsay is defined as a statement other than the statement made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted.[25] Thus, the first issue presented as to the

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20. *Id.*

21. *Id.* The testimony concerning the brown color of the Betadine solution also stated that the solution contained iodine, a commonly used brown antiseptic cleanser. *Id.*

22. *Id.* at 852.

23. The *Moore* opinion cited and discussed four persuasive opinions. *In re* T.D., 450 N.E.2d 455 (Ill. App. Ct. 1983); State v. Winquist, 247 N.W.2d 256 (Iowa 1976); State v. Rines, 269 A.2d 9 (Me. 1970); State v. Mitchell, 246 N.E.2d 586 (Ohio Ct. App. 1969).

24. *E.g.*, Baker v. Atkins, 258 S.W.2d 16, 20 (Mo. Ct. App. 1953); JOHN C. O'BRIEN, MISSOURI LAW OF EVIDENCE, § 11-6 (1984).

25. *In re* A.M.K., 723 S.W.2d 50, 53 (Mo. Ct. App. 1986); O'BRIEN, *supra* note 24, § 11-1. This definition is practically identical to the definition offered in FED R. EVID. 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

admissibility of labels is the determination of whether the evidence offered is actually hearsay. The testimony of a witness describing the statements of a label and the actual statements written on the label itself could both be considered hearsay, for neither piece of evidence would be offered by the actual declarant.[26] Most courts have adopted this approach, holding that where the label is a statement of a manufacturer as to the contents of the product and the label or testimony is offered in court to prove the contents of a package, the information written on the label and testimony regarding that information are hearsay.[27]

However, one of the earliest cases treating the admissibility of labels intimates that labels used to prove contents are not hearsay.[28] In *Kennedy v. State*,[29] the witness testified that a man handed him a box of bullets.[30] The witness, over objection, testified that he realized the box contained bullets because the box stated so and a picture of a bullet appeared on the container.[31] On appeal, the defendant claimed that the witness' testimony as to the box of bullets was inadmissible hearsay.[32] The Alabama Supreme Court held that the defendant's contention that the witness' testimony was "mere hearsay" was "without merit."[33] In *State v. Mitchell*,[34] a more recent decision, the Ohio Court of Appeals followed a hearsay analysis similar to that employed in *Kennedy* by ruling that neither the testimony of a witness as to "his

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asserted."

26. *In re T.D.*, 450 N.E.2d at 457.

27. *See, e.g., In re T.D.*, 450 N.E.2d at 457; *Rines*, 269 A.2d at 13 (doesn't specifically hold that the evidence is hearsay, but treats labels as hearsay evidence); Wirth v. State, 197 N.W.2d 731, 733 (Wis. 1972).

28. *See* Kennedy v. State, 62 So. 49, 52 (Ala. 1913).

29. *Id.*

30. *Id.* at 50.

31. *Id.*

32. *Id.* at 52.

33. *Id.* While the court did not offer an elaborate analysis of why the labels were not hearsay, the court stated "[i]f we treat the inscription as the declaration of a third person, the rule of exclusion fails, for the declaration is in effect made directly to every person who receives the box into his possession, and, when he hands it to another, he in effect repeats the declaration as his own." *Id.* Thus, the court strained to reason that because the label's declaration is made to any person transferring possession of the package, the statement of the label is not hearsay. *Id.*

34. 246 N.E.2d 586 (Ohio Ct. App. 1969). This case was cited and discussed extensively in *Moore*.

knowledge"[35] of contents originating from the manufacturer's label[36] nor labels alone[37] are hearsay.

If the offered evidence is ruled to be hearsay, the second issue presented is whether an exception to the hearsay rule provides for the admissibility of the evidence. While Missouri has not adopted a codified set of exceptions to the hearsay rule,[38] definitive exceptions to the hearsay rule have been developed. In other jurisdictions, several exceptions have been invoked to allow the admissibility of labels to prove contents.

The business records exception to the hearsay rule has been stretched to allow labels as evidence proving the contents of a package.[39] In *Mitchell*, the Ohio Court of Appeals noted that the governing state statute[40] "applies to the record of an act, condition, or event made in the regular course of business, at the time of the act."[41] The label at issue in *Mitchell* was affixed to a "medicinal preparation"[42] purchased from a pharmacy.[43] The *Mitchell* court ruled that the label satisfied the statutory provisions.[44] A similar

35. *Id.* at 590. This language of *Mitchell* suggests that the witness testified *as to his knowledge* of the contents. Thus, *Mitchell* may be distinguishable from the situation in *Moore*. In *Moore*, the hospital technician, Tasker, testified *as to the contents* of the package based upon his reading of the label. *Moore*, 811 S.W.2d at 849-50. While there may be a difference between testifying to contents and knowledge of contents, the difference seems semantical, and not practical.

36. *Mitchell*, 246 N.E.2d at 590.

37. *Id.* at 592. The *Mitchell* court also reached for additional reasoning and support in determining labels are admissible. The court postulated that even if labels were hearsay, they would be admissible under the business records exception, and even further, could have been admitted as real evidence due to the circumstantial probability of trustworthiness of a manufacturer's label. *Id.*

38. O'BRIEN, *supra* note 24, § 1-2 (1988 Supp.). The author noted that as of 1988, thirty-four states had adopted codes of evidence. *Id.* § 1-2 n.1. Thirty-two of the thirty-four state evidentiary codes are based, in full or with modifications, on either the UNIFORM RULES OF EVIDENCE or the FEDERAL RULES OF EVIDENCE. *Id.* § 1-2 n.7.

39. *Mitchell*, 246 N.E.2d at 590, 591-92.

40. *See* OHIO REV. CODE ANN. § 2317.40 (Anderson 1991).

41. *Mitchell*, 246 N.E.2d at 591-92.

42. *Id.* at 589.

43. *Id.* In *Mitchell*, the defendant was charged with violations of narcotics laws. The opinion did not specify whether the label eliciting a hearsay objection was created by the manufacturer or a pharmacist. *Id.* The opinion noted only that the appellant objected to the "testimony of the two pharmacists . . . the labels on the preparation, and the records kept by the pharmacy," charging that all of the above listed evidence was inadmissible hearsay. *Id.*

44. *Id.* at 591.

statute codifies the business records exception in Missouri.[45] Other jurisdictions, however, have explicitly rejected the application of the business records exception to allow the admissibility of labels.[46]

Arguments have also been forwarded that the labels should be admissible under the public records exception to the hearsay rule.[47] Yet, the Illinois Court of Appeals summarily refused this theory, finding that the label was not prepared by a public official or agency or for public business, and therefore, the public records exception could not apply.[48]

The rationale most commonly used to support the admissibility of labels used to prove contents is the "circumstantial probability of trustworthiness"[49] approach. Courts have noted that instances arise where hearsay evidence is supported by sufficient surrounding circumstances to satisfy a probability of trustworthiness, and is then qualified as admissible evidence.[50] The drafters of the FEDERAL RULES OF EVIDENCE enacted Rules 803(24),[51] and

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45. *See* MO. REV. STAT. §§ 490.660-.690 (1986); OHIO REV. CODE ANN. § 2317.40 (Anderson 1991).

46. *E.g., In re* T.D., 450 N.E.2d 455, 458 (Ill. App. Ct. 1983). The Illinois Court of Appeals, however, ruled that the record in the particular case failed to directly establish that the information in question was recorded on a label in the regular course of business by the manufacturer. *Id.* The court also stated that "there was no showing or foundation made for the assertion that these were business records." *Id.* One can certainly offer cogent arguments that preparation of a label is part of the regular course of a manufacturer's business, thus falling under the business records exception. The Illinois court's reliance upon the failure of the record to satisfy the business records exception could imply that a label may be admissible under the business records exception upon a proper showing.

47. *Id.* at 458. This case discussed the admissibility of a label of glue in a juvenile proceeding charging the minor with the unlawful use of an intoxicating compound. *Id.* at 456.

48. *Id.* at 458.

49. "Circumstantial probability of trustworthiness" and "circumstantial guarantees of trustworthiness" are phrases commonly used to signify a type of analysis based upon the reliability of the evidence as shown by various corroborating evidence. *See* CHARLES T. MCCORMICK, EVIDENCE § 324.1 (3d ed. 1984).

50. Wirth v. State, 197 N.W.2d 731, 733 (Wis. 1972).

51. FED. R. EVID. 803(24) states the following:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.

804(b)(5),[52] the residual exceptions, in an effort to avoid the rigidity developed by a narrow interpretation of the hearsay exceptions. The Advisory Committee intended the residual exception to be applicable to "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."[53] In applying a residual exception analysis, the primary issue before a court is whether the factual situation and circumstances surrounding the offered label possess circumstantial guarantees of trustworthiness presumed by the specific hearsay exceptions.[54]

Several of the courts discussing the admissibility of labels used to prove contents have adopted the approach embodied in the residual exception. In *Wirth v. State*,[55] the label at issue was affixed to a sealed, prepackaged bottle of Cosanyl, a cough syrup. The Wisconsin Supreme Court found that circumstances assured the probability of trustworthiness of the label in question.[56] In a similar case, the Illinois Court of Appeals ruled that the trustworthiness attached to a manufacturer's label on a tube of glue was "beyond suspicion," and approved the admissibility of the hearsay testimony.[57]

The Maine Supreme Court has ruled upon the issue of admissibility of labels in a factual context nearly identical to the situation presented in *Moore*.[58] *State v. Rines* dealt with the admissibility of a manufacturer's certificate included with a blood alcohol testing kit.[59] As in Missouri,[60] the

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52. FED. R. EVID. 804(b)(5) is identical to FED. R. EVID. 803(24). The identical provisions were designed to apply to different situations; Rule 804(b)(5) is exercised where the declarant is unavailable, while Rule 803(24) applies regardless of availability of the declarant.

53. FED. R. EVID. 803(24) advisory committee's note.

54. MCCORMICK, *supra* note 49, § 324.1.

55. 197 N.W.2d 731, 733 (Wis. 1972).

56. *Id.*

57. *See In re* T.D., 450 N.E.2d 455, 458 (Ill. App. Ct. 1983).

58. *See* State v. Rines, 269 A.2d 9 (Me. 1970). The Maine court divided the case into four issues dealing with the admissibility of evidence from blood alcohol tests. Two of the issues the court analyzed were:

> (1) Does the interior label on the blood alcohol kit, which describes the contents of the kit, and the manufacturer's certificate constitute prima facie evidence or competent evidence to raise a jury question as to the nature and quality of the contents of the blood alcohol kit? . . . (4) Does the evidence, as a matter of law, constitute sufficient foundation for the admissibility of the results of the blood alcohol test?

Id. at 12.

59. *Id.* at 12. The blood alcohol kits at issue in *Rines* and *Moore* are nearly identical. Both kits used vacutainers sealed with a rubber stopper to draw blood from

Maine court followed a two step analysis of the potential hearsay problem, first ascertaining whether the offered evidence is hearsay, then determining whether the hearsay evidence is admissible through an exception to the general rule of exclusion.[61] After examining the alternatives[62] to allowing a label into evidence as proof of the contents of the package, the court stated Wigmore's "necessity principle"[63] as a justification for the admission of labels. The court held that the manufacturer's certificate upon its face exhibited "sufficient trustworthiness to raise a presumption as to the truth of the facts asserted," thus allowing admission of the label.[64] The *Rines* court tempered this holding,[65] however, ruling that the use of the label as evidence does not conclusively prove the attributes and functions of the chemicals and also fails to obviate the necessity of explaining the attributes and functions of the chemicals to the jury.[66] The practical effect of the holding in *Rines* is to allow a label as admissible evidence proving the contents of a package while requiring testimony from a qualified witness, subject to cross-examination, as to the function and effect of the contents.[67]

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the patient.

60. *See supra* notes 24-25 and accompanying text.

61. *See Rines,* 269 A.2d at 13.

62. The court noted that the only real alternative to allowing labels as evidence of contents would be to call witnesses possessing personal knowledge of the facts described in the label. *Id.* at 13. The opinion offered a discursive example of the difficulty of proving the contents of a product, sodium fluoride, through only witnesses possessing first-hand knowledge of the actual contents and composition of sodium fluoride. *Id.* at 13-14. The court hypothesized that to prove the contents of a package of sodium fluoride purchased from a pharmacist, a party would have to present the pharmacist, a representative of the manufacturer, the chemist responsible for the actual production, and other persons along the chain of distribution and production. *Id.* at 13. This illustration exemplifies the practical impossibility of a literal application of the hearsay rule.

63. *Id.* (citing JOHN H. WIGMORE, EVIDENCE, § 1420-21 (James H. Chadbourn ed., 1974)). Wigmore declares that the "necessity principle" applies "[w]here the test of cross-examination is *impossible of application*" or where "[t]he person whose assertion is offered may now be . . . *otherwise unavailable.*" WIGMORE, *supra*, at § 1420-21.

64. *Rines,* 269 A.2d at 15.

65. *Id.* at 16. As noted earlier, the opinion dissected the case into four issues. The holding cited in the previous sentence was in response to issue (1). *See supra* note 58. The court's analysis of issue (4) tempered the holding of issue (1). *See supra* note 58; *infra* notes 66-67 and accompanying text.

66. *Rines,* 269 A.2d at 16.

67. *Id.*

B. Consideration of Facts and Policy

While the preceding paragraphs have recognized opinions enumerating the "circumstantial probability of trustworthiness" rationale, it is imperative to also elaborate upon the factual circumstances and policy arguments justifying the rationale. Of the cases finding a circumstantial probability of trustworthiness, the core of facts supporting the probability of trustworthiness has often been very similar. The issue of admissibility of labels used to prove contents has usually arisen in criminal cases where the defendant has objected on the grounds of hearsay.[68] Most of the cases involving the instant topic have examined labels of chemical or medical products.[69] In addition, the cases examining this topic have only dealt with the admissibility of labels produced by the manufacturer.[70]

Several policy arguments have been repeatedly offered to support the admissibility of labels to prove contents. A justification cited by nearly every court in supporting the admissibility of labels is the extensive governmental regulation of the labeling of many products.[71] Although the applicable regulations differ with the nature of the product at issue, federal[72] and state[73] regulations have been cited as providing the circumstantial probability of trustworthiness necessary for the hearsay evidence to be admitted. Not coincidentally, the threat of significant penalties imposed upon the manufactur-

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68. *See, e.g.*, Kennedy v. State, 62 So. 49, 49 (Ala. 1913); *In re T.D.*, 450 N.E.2d 455, 455 (Ill. App. Ct. 1983) (juvenile proceeding); *Rines*, 269 A.2d at 9; Moore v. Director of Revenue, 811 S.W.2d 848, 848 (Mo. Ct. App. 1991); State v. Mitchell, 246 N.E.2d 586, 586 (Ohio Ct. App. 1969); State v. Wirth, 197 N.E.2d 731, 731 (Wis. 1972).

69. *See e.g., In re T.D.*, 450 N.E.2d at 455; *Rines*, 269 A.2d at 9; *Moore*, 811 S.W.2d at 848; *Mitchell*, 246 N.E.2d at 586; *Wirth*, 197 N.E.2d at 731. *Contra Kennedy*, 62 So. 49. (However, little analysis was offered in *Kennedy*. *See supra* notes 28-33).

70. The fact that courts have only dealt with labels produced by manufacturers could be significant. No analysis has been offered as to the admissibility of labels produced by non-manufacturers. In *Mitchell*, evidence of labels prepared by pharmacists may have been at issue, but the opinion did not specify so. Even if a pharmacist's label was ruled admissible in *Mitchell*, the court did not indicate any distinction between labels produced by a manufacturer and a non-manufacturer.

71. *See, e.g., In re T.D.*, 450 N.E.2d at 458; *Rines*, 269 A.2d at 15; *Mitchell*, 246 N.E.2d at 588; *Wirth*, 197 N.W.2d at 732-33.

72. *Rines*, 269 A.2d at 15. The *Rines* opinion propounded the reliability of labels regulated under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-393 (1988). *See also* Federal Hazardous Substances Act, 15 U.S.C. § 1263(c) (1988).

73. *Id.* at 458 (citing ILL. ANN. STAT. ch. 111 1/2, para. 251-266 (Smith-Hurd 1988)).

ers of misbranded products also serves as a basis for establishing the reliability of product labels.[74]

Courts have also recognized that technologically improved manufacturing processes act as guarantees of the contents produced.[75] The Ohio Court of Appeals acknowledged improved technology, stating:

> This is no longer an age when the processor puts the ingredients into a vial with an "eyedropper," with highly variable results appearing in the finished 'preparation,' but an era characterized by automatic mixing, measuring, and filling apparatus, the entire productive process being controlled by electronic and nucleonic gauges, measuring to infinitesimal precision, to produce an absolute result in meeting a required standard.[76]

Another policy argument often given to support the admissibility of labels to prove contents is the gross inconvenience that would occur if the hearsay rule was extended to its logical extreme.[77] Taken to a logical extreme, the hearsay rule would require that a person with first-hand knowledge of each aspect of the production process must testify as to her first-hand knowledge.[78] As the Maine Supreme Court noted, the justification for requiring first hand knowledge in such a situation is to protect the right of effective cross-examination.[79] However, the Maine court arrived at the pragmatic conclusion that "[f]rom all practical considerations the test of cross-examination is impossible to apply."[80]

Other justifications have also been offered to support the admissibility of labels to prove contents. Courts have opined that the lack of any motive to falsify[81] and the general unlikelihood of tampering with the product[82] also provide circumstantial guarantees of trustworthiness. The nature of the packaging of products, often sealed by the manufacturer, also provides for the trustworthiness of the label as an accurate index of the enclosed contents.[83] Consumer reliance upon the assertions in labels has also been cited as a justification.[84]

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74. *In re T.D.*, 450 N.E.2d at 458-59; *Mitchell*, 246 N.E.2d at 589.
75. *E.g., Mitchell*, 246 N.E.2d at 589.
76. *Id.*
77. *State v. Rines*, 269 A.2d 9, 13-14 (Me. 1970); *Mitchell*, 246 N.E.2d at 590.
78. *Rines*, 269 A.2d at 13-6; *see supra* note 62.
79. *Rines*, 269 A.2d at 13.
80. *Id.* at 14.
81. *Id.* at 15.
82. *In re* T.D., 450 N.E.2d 455, 459 (Ill. App. Ct. 1983).
83. *Id.* at 459; State v. Mitchell, 246 N.E.2d 586, 589 (Ohio Ct. App. 1969); State v. Wirth, 197 N.W.2d 731, 733 (Wis. 1972).
84. *Rines*, 269 A.2d at 14.

IV. THE *MOORE* DECISION

As noted earlier, no Missouri court had ever ruled on the admissibility of labels to prove contents prior to the decision in *Moore v. Director of Revenue*.[85] Because of the dearth of precedent on the issue, the court of appeals studied the analyses of four other courts, all of which found the label admissible.[86] The *Moore* court embarked on its analysis by noting the appellant's sole objection, that the trial court erred in admitting hearsay evidence of the results of his blood alcohol test.[87] Immediately after stating that no Missouri case treated the appellant's contention, the court noted that other jurisdictions had determined that labels placed on pharmaceutical and hazardous substances establish a circumstantial probability of trustworthiness and are admissible to prove the contents of the container.[88] While explaining the facts and holdings of four persuasive cases, the *Moore* court briefly discussed several of the policy arguments examined earlier:[89] the difficulty of proving the contents of substances through the use of witnesses with first hand knowledge;[90] the lack of motives to falsify labels;[91] consumer reliance upon the veracity of product labels;[92] and the heavily regulated nature of the drug industry.[93]

The *Moore* court prefaced its application of the persuasive authority to the instant fact situation by acknowledging that under Missouri evidentiary case law, special circumstances may exist in some types of cases that warrant recognition of a special exception to the traditional hearsay rule.[94] The court proceeded to recognize some of the "circumstances" surrounding this case. The court noted that the vacutainer was taken from an unopened, prepackaged container labeled as sterile, and that these products are used and relied upon

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85. 811 S.W.2d 848 (Mo. Ct. App. 1991); *see supra* text accompanying note 2. The *Moore* opinion stated that neither party had cited an applicable Missouri case, and the court's independent research also failed to discover any applicable Missouri case law. *Moore,* 811 S.W.2d at 850.

86. *See supra* note 23.

87. *Moore,* 811 S.W.2d at 850.

88. *Id.*

89. *See supra* notes 68-84 and accompanying text.

90. *Moore,* 811 S.W.2d at 850; *see supra* notes 62-63, 77-80 and accompanying text.

91. *Moore,* 811 S.W.2d at 851; *see supra* note 81 and accompanying text.

92. *Moore,* 811 S.W.2d at 851; *see supra* note 84 and accompanying text.

93. *Moore,* 811 S.W.2d at 851; *see supra* notes 71-74 and accompanying text.

94. *Moore,* 811 S.W.2d at 852 (citing *In re* Marriage of P.K.A., 725 S.W.2d 78, 80-82 (Mo. Ct. App. 1987)).

every day at the hospital.[95] The court also noted that the Betadine solution was labeled as a nonalcoholic solution, and that hospital employees regularly relied upon the accuracy of this label in conducting day-to-day activities.[96] The court mentioned that Tasker, the phlebotomist, had been certified in his technical specialty by the American Society of Clinical Pathologists, and that Tasker followed the procedures prescribed by professional training in withdrawing the blood sample from the appellant.[97]

After reiterating the circumstances of the fact situation, the court held that the facts presented in *Moore* were sufficient to establish a circumstantial probability of trustworthiness that the needle and tube used to withdraw the blood were sterile and that the Betadine solution was a nonalcoholic antiseptic, just as the respective labels purported.[98] The court continued its holding, ruling that the statements on the labels and packaging at issue were sufficiently reliable and trustworthy on their face to be considered an exception to the hearsay rule.[99]

V. ANALYSIS

The decision of *Moore v. Director of Revenue* was certainly forthcoming. The dearth of case law on the subject of the admissibility of labels to prove contents is surprising; one of the primary reasons behind the lack of authority on the issue is likely the failure to object to this form of hearsay evidence.

A. Policy and Reasoning Behind the Decision

The policy justifications behind the *Moore* decision are indisputably sound.[100] The United States drug industry is strictly regulated. Not only do serious penalties[101] exist for those manufacturers failing to comply with mandatory standards, but any misinformation or omissions in labeling resulting

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See supra* notes 68-84 and accompanying text.
101. For example, penalties enforceable under the Federal Food, Drug, and Cosmetic Act and the Federal Hazardous Substances Act are listed in 21 U.S.C. §§ 331-337 (1988) and 15 U.S.C. §§ 1263-1267 (1988), respectively. Federal and state restrictions apply to the labeling of all types of products. Citations to penalties imposed under each governmental labeling regulation are beyond the scope of this Note.

in harm to consumers would almost certainly provide a basis for imposing tort liability upon the manufacturer.[102]

The reasoning behind the *Moore* decision is very interesting. Of the four persuasive opinions followed by the *Moore* court,[103] three of the opinions are distinguishable as to the actual holding issued or the scope of that holding. The Iowa Supreme Court decision in *State v. Winquist*[104] is readily distinguishable. Just as in *Moore*, the admissibility of evidence of the results of a blood alcohol test was the primary issue in *Winquist*.[105] In *Winquist*, however, the appellant contended that evidence of the results of the blood alcohol test should not have been admitted because the lab technician was unqualified to withdraw blood and the test was not conducted under sanitary conditions.[106] In upholding the conviction, the *Winquist* opinion did not discuss any issues of hearsay evidence. The *Winquist* holding, based on the qualifications of a hospital employee, is clearly not persuasive as to the hearsay issue presented in *Moore*.

The *Moore* court also relied upon the decision in *State v. Mitchell*,[107] yet the analysis applied in *Mitchell* is readily distinguishable from the facts of *Moore*. In *Mitchell*, the Ohio Court of Appeals found that neither testimony relating to a label nor the label itself, when used to prove contents, are hearsay evidence.[108] The Ohio court added that even if the evidence of labels was considered hearsay, it would still be admissible under the business records exception.[109] The *Mitchell* rationale is very dissimilar to the reasoning employed by the *Moore* court.

The *Rines* decision is also distinguishable in that the court held that the evidence did not constitute sufficient foundation as a matter of law for the admissibility of the results of a blood alcohol test.[110] As noted earlier,[111] the *Rines* decision allowed the admission of labels as evidence of contents, but also ruled that the introduction of labels could not prove contents as a matter of law.[112]

The *Mitchell* court's ruling as to the propriety of the business records exception merits additional consideration. Although Missouri has a business

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102. *In re* T.D., 450 N.E.2d 455, 459 (Ill. App. Ct. 1983).
103. *See supra* note 23.
104. 247 N.W.2d 256 (Iowa 1976).
105. *Id.* at 258.
106. *Id.*
107. 246 N.E.2d 586 (Ohio Ct. App. 1969).
108. *Id.* at 591; *see supra* notes 34-37 and accompanying text.
109. *Mitchell*, 246 N.E.2d at 591; *see supra* notes 39-44 and accompanying text.
110. *Rines*, 269 A.2d at 16.
111. *See supra* notes 64-67 and accompanying text.
112. *Rines*, 269 A.2d at 16.

records statute very similar to the Ohio statute applied in *Mitchell*,[113] the *Moore* court did not discuss the applicability of the statute to labels. Under the Missouri statute, evidence of a business record is admissible as an exception to the hearsay rule if the evidence is (1) a record of an act, condition, or event, (2) otherwise relevant, (3) accompanied by a custodian or otherwise qualified witness testifying as to the identity and mode of preparation of the evidence, (4) made in the regular course of business, and (5) within the discretion of the court, satisfactory as to the method and time of preparation and sources of information so as to justify admission.[114]

This statute could be construed to provide for the admissibility of labels. A manufacturer's label is unquestionably relevant evidence as to the contents of the package, and the label records the act of manufacturing the product. Missouri courts have defined the condition of "made in the regular course of business" as being in the inherent nature of the business and in the method systematically employed for the conduct of the business.[115] Because labelling is a facet of business inherent to the manufacturing industry and the method of labelling is systematically followed, labels would appear to satisfy the condition of being made in the regular course of business. The circumstantial probability of trustworthiness found by the *Moore* court[116] could certainly justify the discretionary admission of a label. If accompanied by a "qualified witness," a label could be admitted under the Missouri business records exception to the hearsay rule. The *Moore* court, however, did not consider this analysis.

B. The Undefined Scope of the Labels Exception

Because the *Moore* court declined to extend the business records exception and chose to invent an exception to the hearsay rule, problems of determining the scope of the special label exception arise. The *Moore* court noted that a "special exception"[117] may be created where "*circumstances warranting* a special exception to the hearsay rule exist."[118] While the

113. *See supra* notes 39-45 and accompanying text.

114. MO. REV. STAT. § 490.680 (1986).

115. *E.g.*, Kitchen v. Wilson, 335 S.W.2d 38, 43 (Mo. 1960).

116. *Moore*, 811 S.W.2d at 852.

117. *Id.*

118. *Id.* at 852 (emphasis added). The *Moore* court cited *In re* Marriage of P.K.A., 725 S.W.2d 78, 80-82 (Mo. Ct. App. 1987), as another case creating a special exception to the hearsay rule. *P.K.A.*, 725 S.W.2d at 81, created a hearsay exception providing for the admission of the hearsay statements of children in child abuse proceedings.

Moore court created a special exception to the hearsay rule, *Nickels v. Nickels*,[119] a decision rendered by the same court two months after *Moore*, conclusively stated that Missouri has not adopted an "omnibus exception"[120] to the hearsay rule. The holding in *Nickels v. Nickels* is a clear rejection of a general, catch-all hearsay exception based on a circumstantial probability of trustworthiness analysis. The clear rejection of an omnibus exception implies that the special exception allowing the admission of labels is limited to precisely that scope, and not applicable to any type of evidence other than labels.

Stating that the *Moore* hearsay exception is limited only to labels offers very little definition as to the type of labels that will fall under this exception to the hearsay rule. The *Moore* court held that "*the facts of this case* support the admission of that evidence in that the statements on the labels and packaging *in question* are sufficiently reliable and trustworthy on their face to be considered an exception to the hearsay rule."[121] Because of the unequivocal references to the facts of this case, the *Moore* holding may be qualified upon the circumstances of this particular case.

The *Moore* opinion cited several facts and circumstances supporting the trustworthiness of the offered hearsay evidence in this particular case.[122] In finding a circumstantial probability of trustworthiness, however, the *Moore* court did not rely upon the labyrinth of governmental regulations controlling the branding and labeling of manufactured goods, a factor that certainly indicates a circumstantial probability of trustworthiness. In *Moore*, the state's evidence backing the finding of trustworthiness was limited to facts directly related to Tasker and the hospital in question. No extrinsic evidence tending to show the reliability of the labels appeared on the record. By analogy, one might assume that the *Moore* exception would apply to labels of manufacturers upon a showing of compliance with regulations, strict quality control standards, precise technological control of product components, and other factors bolstering the circumstantial probability of trustworthiness. The record in *Moore* did not display such a level of trustworthiness, yet the court found circumstantial guarantees of trustworthiness justifying a new exception to the hearsay rule.

A more difficult problem is posed in trying to determine the minimal showing of trustworthiness necessary to invoke the label exception. For example, the label affixed to a product of a local pharmacist may not display

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119. 817 S.W.2d 632, 639-40 (Mo. Ct. App. 1991).

120. The omnibus exception is another nickname attached to an exception based on a circumstantial probability of trustworthiness, such as the residual exception and the catch-all exception. *See supra* notes 49-54 and accompanying text.

121. *Moore*, 811 S.W.2d at 852 (emphasis added).

122. *See supra* notes 94-98 and accompanying text.

the circumstantial guarantees of trustworthiness necessary to invoke the labels exception. No jurisdiction has delineated a clear standard for determining the reliability or admissibility of labels. Clearly, the scope of the label exception will be molded by future determinations of the factors necessary to show the required circumstantial probability of trustworthiness.

C. Potential Impact and Implementation of the Labels Exception

The impact of the labels exception may not be revolutionary, but the new exception should expedite proof of the contents of packages or containers and offer a simple, common sense approach to proving the contents of containers or packages. The labels exception could provide another alternative to manufacturers in proving the contents of a package. A manufacturer could introduce the label into evidence and argue that the label is an accurate representation of the contents. The manufacturer would likely offer other, more complex evidence, especially evidence strengthening the circumstantial probability of trustworthiness, such as compliance with regulations, quality control standards, and technological control of product components.

If a label is not admissible to prove the contents of a product, the available alternatives would rarely be palatable. The party could call a lengthy series of witnesses, each possessing first-hand knowledge of an aspect of the production process.[123] The party could also introduce complex, often confusing, expert testimony in an attempt to prove the contents of the package.

Courts should definitely apply the labels exception to allow proof of contents of a package when that issue is secondary or collateral to the major issues in the case. If a party is required to introduce significant amounts of expert testimony or call witnesses with first-hand knowledge to prove the contents of any labeled package, a significant amount of litigants' and judicial resources will be needlessly wasted while a jury would become mired in an ocean of superfluous issues.

A practical consideration that should accompany the implementation of the labels exception was discussed in the *State v. Rines*.[124] In *Rines*, the Maine Supreme Court held that evidence of labels alone was not a sufficient foundation, as a matter of law, to introduce the results of a blood alcohol test as evidence.[125] The *Rines* court stated that evidence of the labels is admissible, but standing alone, the use of a label as evidence does not obviate the necessity of explaining the nature of the product to the jury.[126] The court

123. *See supra* notes 62-63, 77-80 and accompanying text.
124. 269 A.2d 9 (Me. 1970).
125. *Id.* at 16; *see supra* notes 65-67 and accompanying text.
126. *Rines*, 269 A.2d at 16.

continued, noting that "any qualified witness," subject to cross-examination, could inform the jury as to the function and effects of the product.[127] The essence of the *Rines* restriction is two-fold: labels, in the absence of other evidence, are not sufficient to prove contents, and other evidence, such as a corroborating witness, is necessary to prove the contents of a container. The *Rines* restriction provides a useful standard for the implementation of the labels exception.

The need for guidance as to the admissibility of evidence under a new hearsay exception is apparent. The Missouri Court of Appeals devised standards for the application of another recently created hearsay exception, a rule allowing for the admissibility of a child's statements in a child abuse proceeding.[128] Standards for the implementation of the labels exception must also be established.

The restriction enunciated in the *Rines* opinion is very similar to the requirement of a "qualified witness" included in the Missouri business records exception.[129] A qualification similar to the *Rines* restriction and the Missouri business records exception would require that additional testimony accompany the introduction of the label evidence. The addition of a similar requirement would certainly augment the sufficiency of the evidence of contents. Adding such a proviso to the labels exception would also ensure an accurate, thorough explanation of the product to the jury, while protecting the important policy of affording an opportunity for cross-examination. Whether Missouri should choose to adopt the standards of the business records exception or create new standards applying only to the special labels exception is debatable; however, the need to establish some criteria for the application of the labels exception is manifest.

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127. *Id.*

128. *In re* Marriage of P.K.A., 725 S.W.2d 78, 81 (Mo. Ct. App. 1987). The court proffered several guidelines for the use of this exception, including "(a) substantial basis to believe that the statements of the child are true," a qualification that the evidence should only be used "where the best interest of the child is the primary concern" and that the "child might not be competent or reasonably expected to testify." *Id.* at 81.

129. MO. REV. STAT. § 490.680 (1986). The business records exception requires that a business record must be accompanied by a custodian or otherwise qualified witness testifying as to the identity and mode of preparation of the record in order for the evidence to be admissible. *See supra* text accompanying note 114. Similarly, the *Rines* restriction requires that "any qualified witness" inform the jury as to the function and effect of the contents at issue. *Rines*, 269 A.2d at 16.