

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GEORGE H. PETERS,

Plaintiff,

v.

ASTRAZENECA, LP and
PROCTER & GAMBLE DISTRIBUTING
COMPANY,

Defendants.

ORDER

05-C-649-C

Plaintiff George Peters has moved to supplement the record on appeal with additional affidavits plaintiff obtained from inmates who have been prescribed the drug PrilosecOTC and who aver that when they receive the drug, they receive defendant's packaging and package insert, neither of which contains a warning that they may suffer special sense injuries from taking the drug. I construe plaintiff's motion as a motion pursuant to Fed. R. App. P. 10(e) to modify the record on appeal and will deny it.

Fed. R. App. P. 10 (e) states in relevant part,

(2) If anything material to either party is omitted from or misstated in the

record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties;
- (B) by the district court before or after the record has been forwarded; or
- (C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

The affidavits plaintiff submitted with his motion were not before this court when defendant's motion for summary judgment was taken under advisement or at any time before final judgment was entered. Because the affidavits were not a part of the court's record before plaintiff filed his appeal, they are not material to the appeal and have not been omitted from the record erroneously.

ORDER

IT IS ORDERED that plaintiff's motion to modify the record on appeal pursuant to Fed. R. App. P. 10(e) is DENIED.

Entered this 16th day of October, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge