

IN THE MISSOURI SUPREME COURT

PHILIP WHITE,)
)
 Plaintiff/Appellant,)
 v.) **Case No. SC87991**
)
 MARK ZUBRES, D.O.,)
 ZUBRES RADIOLOGY, INC.,)
 and WAYNE E. PUTNAM, d/b/a)
 CARTHAGE RADIOLOGISTS,)
)
 Defendants/Respondents.)

RESPONDENT DR. PUTNAM'S, SUBSTITUTE BRIEF

APPEAL FROM THE CIRCUIT COURT OF
JASPER COUNTY, MISSOURI
THE HONORABLE JON DERMOTT AND
TRANSFERRED FROM THE SOUTHERN DISTRICT
COURT OF APPEALS

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SUBSTITUTE BRIEF

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	2
STATEMENT OF FACTS.....	3
POINTS RELIED ON.....	6
ARGUMENT.....	7
STANDARD OF REVIEW.....	13
CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	15
CERTIFICATE OF COMPLIANCE.....	16

TABLE OF AUTHORITIES

Cases

Butler v. Mitchell-Hugeback, Inc. 895 S.W.2d 15 (Mo. 1995).....8

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,
854 S.W.2d 371 (Mo.banc. 1993).....11

Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968).....9, 10

Montgomery v. South County Radiologist, Inc., 2000 WL 1846432
(Mo.App. E.D. 2000).....9

Scott v. SSM Health Care St. Louis, 70 S.W.3d 560 (Mo.App.
E.D.2000).....8

Weiss v. Rojanasathit, 975 S.W.2d 113 (Mo. 1998)..... 8, 10

Statutes and Rules

Rule 84.04.....3

Mo.Rev.Stat. §516.105.....7, 8

STATEMENT OF FACTS

Appellant's Statement of Facts is not complete; therefore, Respondent Dr. Putnam, includes the following pursuant to Rule 84.04 (f).

On June 22, 1998, Mr. White presented to Dr. Bowling with complaints including pain in the lower right ribs that radiated to the right upper quadrant and to the mid-epigastric region. *L.F., Vol. I, 155-6.* Dr. Bowling's plan for treating these symptoms included ordering a bone scan of the Appellant. *Id.*

A bone scan includes the intravenous injection of a radionuclide substance which passes through the body and eventually localizes in the bones. *L.F., Vol. II, pg. 150.* A camera then scans the body and radiation from the radionuclide substance is detected on the image produced. *Id.* Regions that appear brighter on the image are called areas of increased uptake and indicate a relatively higher concentration of the radionuclide substance. *Id.*

The bone scan ordered by Dr. Bowling was taken of the patient on or around July 10, 1998. *L.F., Vol II, pg. 159.* The bone scan was not limited to the Appellant's ribs but was taken of his entire skeletal system. *L.F., Vol. II, 247 and Vol. III, 505-06.* The bone scan images included areas of increased uptake throughout the skeletal system. *L.F., Vol. II, 249; Vol. III, 505-06.*

On or about July 10, 1998, Dr. Zubres was the radiologist who interpreted the bone scan and reported the results of the bone scan to Dr. Bowling. *L.F., Vol. I, 159.*

When reading the bone scan, Dr. Zubres knew that Mr. White was a male, 56 years old, and that his doctor believed the test was indicated because of pain in the lower anterior ribs and the right posterior rib pain. *Id.*

In reading the bone scan, Dr. Zubres observed increased uptake throughout the Appellant's skeletal system including the increased uptake in both of Mr. White's knees. *L.F. Vol. II, 248.* Dr. Zubres further observed that the uptake in the right knee was greater than the uptake in the left knee. *Id.*

At his deposition, Dr. Zubres explained why he interpreted the bone scan as normal after observing the asymmetrical uptake in the Appellant's knees:

a) Because in his age group, I believe that it was a normal part of the aging process, and that he had arthritic change, as there were other areas of increased uptake within different joints in the body.”

L.F. Vol. II, 248;

b) Because in my case, when I look at these studies, I have to make a clinical decision whether something may be significant or not, and osteoarthritis is very common in someone in his age group, and very commonly is asymmetric, meaning it's greater on one side than the other. A very common finding. *L.F. Vol. II, 249;* and

c) Because as I stated before, there are – it all depends on the clinical circumstances, and that there are multiple areas of increased

trace or uptake present, which are typical for middle-age men. *L.F.*

Vol. II., 250.

Finally, when asked at his deposition if he agreed with original report of the results of the bone scan, Dr. Zubres responded, “I have no change in what I would say.” *Id.*

By at least July 17, 1998, Dr. Bowling received Dr. Zubres's report and noted in his progress notes, “His bone scan was normal.” *L.F., Vol. I, 156.* Dr. Bowling informed the Appellant that his bone scan was reported as normal. *L.F., Vol. III, 401.*

Dr. Zubres's alleged negligence took place in July of 1998. *L.F., Vol. I, 134.*

Nearly four years later, in May of 2002, Mr. White was diagnosed with osteosarcoma in the right proximal tibia. *L.F., Vol. I, 135.* Mr. White sued Dr. Putnam d/b/a Carthage Radiologists on April 23, 2004. *L.F., Vol. I, 7.*

POINTS RELIED ON

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST APPELLANT'S CLAIM BECAUSE IT WAS FILED OUTSIDE THE LIMITATIONS PERIOD FOR MEDICAL NEGLIGENCE CLAIMS SET OUT IN MO.REV.STAT. 516.105 AND THE EXCEPTION SET OUT IN MO.REV.STAT. 516.105(2) DOES NOT APPLY WHERE THE NEGLIGENCE ALLEGED IS THE APPLICATION OF MEDICAL JUDGEMENT IN INTERPRETING MEDICAL DATA.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AGAINST THE APPELLANT'S CLAIM BECAUSE IT WAS FILED OUTSIDE THE LIMITATIONS PERIOD SET OUT IN MO.REV.STAT.105(2) BECAUSE THE UNDISPUTED EVIDENCE WAS THAT DR. ZUBRES EXERCISED MEDICAL JUDGMENT IN INTERPETING THE BONE SCAN AS NORMAL.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST APPELLANT'S CLAIM BECAUSE IT WAS FILED OUTSIDE THE LIMITATIONS PERIOD FOR MEDICAL NEGLIGENCE CLAIMS SET OUT IN MO.REV.STAT. 516.105 AND THE EXCEPTION SET OUT IN MO.REV.STAT. 516.105(2) DOES NOT APPLY WHERE THE NEGLIGENCE ALLEGED IS THE APPLICATION OF MEDICAL JUDGMENT IN INTERPRETING MEDICAL DATA.

Appellant's claim was dismissed because it was filed more than two years from the date of the alleged medical negligence. *Mo.Rev.Stat. 516.105*. The act of alleged negligence was the interpreting and reporting a bone scan as normal rather than reporting the bone scan as abnormal and reporting increased uptake in the Appellant's right knee. *L.F., Vol. I, pg. 135*. The bone scan was interpreted by Dr. Zubres on or around July 10, 1998 and the report was communicated to the ordering physician by July 17, 1998. *L.F., Vol. II, pg. 159; L.F. Vol. I, 156*. Respondent Dr. Putnam was added to this case under an agency theory in April, 2004. *L.F., Vol. I, pg. 7*. Because Appellant's claim was filed nearly six years after the date of the alleged negligent act, it was properly dismissed by the trial court for failure to file within the applicable limitations period. *Mo.Rev.Stat. 516.105*.

Appellant seeks to avoid the harsh result of the general medical negligence statute of limitations by an expansive reading of the exception for the “failure to inform the patient of the results of medical tests.” Mo.Rev.Stat. 516.105(2). This exception, according to its plain meaning and historical background, reaches claims where the error alleged is the “negligent failure to inform the patient of the results of medical tests.” It does not reach claims of negligence in the exercise of medical judgment in interpreting medical data.

Statutes of Limitation are favorites of the law. *Butler v. Mitchell-Hugeback, Inc.* 895 S.W.2d 15, 19 (Mo. 1995). Statutes of limitations are not to be interpreted broadly. Rather, a party seeking to avoid a statute of limitations must fall strictly within any claimed exception. *Id.* Exceptions to the statute of limitations are to be strictly construed and cannot be enlarged by the courts upon considerations of hardship. *Id.* Statutory language including statute of limitation exceptions may be considered with reference to historical background. *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 570 (Mo.App. E.D. 2002).

The historical background of the failure to inform exception is found in the case *Weiss v. Rojanasathit*. 975 S.W.2d 113 (Mo *en banc* 1998). In *Weiss* the plaintiff claimed that test results were not communicated to her by her doctor. *Weiss* at 166. The defendant doctor performed a gynecological examination on the plaintiff including a Pap smear. *Id.* The doctor did not have the laboratory equipment necessary to analyze the

Pap smear test and so sent it off to an independent laboratory for analysis. *Id.* The doctor received a negative report from the laboratory but never communicated this report to the plaintiff. *Id.* More than two years later, plaintiff was diagnosed by another physician with an advanced stage of endocervical cancer.

The court found that the statute of limitations barred Ms. Weiss' claim because it was filed more than two years from the date of the alleged negligent act. *Id.* The court noted that its finding was a harsh result and advised the plaintiff to bring her hardship arguments to the legislature. *Id.* The court's holding followed closely the principles set forth in its earlier opinion, *Laughlin v. Forgrave*. *Id.* (which cites throughout *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo *en banc* 1968)).

One year after the *Weiss* opinion, the legislature amended the medical malpractice statute to add an exception for "negligent failure to communicate the results of medical tests." 516.105(2). This was observed by the Eastern District when it stated, "Following, *Weiss*, the General Assembly amended Section 516.105 to modify the statute of limitation in cases where the act of neglect is the negligent failure to inform the patient of medical test results. *Montgomery v. South County Radiologist, Inc.*, 2000 WL 1846432, fn8 (Mo.App. E.D. 2000).

In this case, the Appellant complains that Dr. Zubres interpreted his bone scan as normal despite observing increased uptake over his right knee. *L.F., Vol. I, pg. 135*. One anticipates Appellant's medical experts will testify that the standard of care required Dr.

Zubres to report the bone scan as abnormal and that his report should have noted the increased uptake over the right knee. Dr. Zubres testified that in his opinion, given the Respondent's age, the increased uptake throughout the different joints of the body, that uptake in knees of men his age is commonly asymmetric, and the clinical circumstances of the test, given the same circumstances as in 1998, he would report the bone scan as normal. L.F.Vol. II, 248-50. Thus the dispute is over the application of medical judgment to the interpretation of medical data and so is governed by the general statute of limitations rule.

The trial court then correctly refused to expand a narrow exception to the statute of limitations growing out of the *Weiss* case, where test results were had but not communicated to a patient, to a claim that a physician negligently interpreted medical data. Whether the current statute of limitations creates a hardship for plaintiffs is, in Missouri, a question for the legislature. *Weiss v. Rojanasathit*, 975 S.W.2d 133 (Mo *en banc* 1998); *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo *en banc* 1968).

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT AGAINST THE APPELLANT'S CLAIM BECAUSE IT WAS FILED OUTSIDE THE LIMITATIONS PERIOD SET OUT IN MO.REV.STAT.105(2) BECAUSE THE UNDISPUTED EVIDENCE WAS THAT DR. ZUBRES EXERCISED MEDICAL JUDGMENT IN INTERPETING THE BONE SCAN AS NORMAL.

Appellant's argument that the trial court was first required to find that Dr. Zubres's interpretation of the bone scan as normal was within the standard of care before it could grant summary judgment on the statute of limitations is incorrect. In fact, the trial court was required to assume that the Dr. Zubres's interpretation of the bone scan was beneath the standard of care. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The trial court's holding that the two-year statute of limitations applied to Plaintiff's claim was based on uncontroverted evidence that Dr. Zubres's decision to report the bone scan as normal was based on medical judgment. This evidence included Dr. Zubres's testimony that he exercised medical judgment in interpreting the bone scan as normal. *L.F. Vol. II, 248-250.*

III. STANDARD OF REVIEW

The standard of review is de novo review of the trial court's decision.

IV. CONCLUSION

Appellant's claim fails because it was filed more than two years after the date of the alleged medical negligence. The trial court, therefore, properly dismissed Appellant's claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certified that a hard copy of Respondent Dr. Putnam's Substitute Brief and a copy on disc were mailed to the following counsel, via U.S. Mail, postage prepaid, on this the _____ day of November , 2006, as follows:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Substitute Brief of Respondent:

- a) Includes the information required by Rule 55.03;
- b) Complies with the limitations contained in Rule 84.06(b);
- c) Relying on the word processors' word count system, contains 2,148 words;
and
- d) That the disk filed with this Brief was scanned for viruses by the Semantic anti-virus program and found virus free.

Brian D. Malkmus