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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment, dated August 15, 2005, of the Circuit Court of Jasper County granting summary judgment in favor of all Defendants on the ground that Appellant's claim is barred by the statute of limitations. L.F., Vol. III, pg. 503. On September 26, 2006, this Court ordered this case transferred from the Southern District Court of Appeals pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction of this case under Article V, section 9 of the Missouri Constitution.

STATEMENT OF FACTS

On July 10, 1998, Appellant Philip White underwent a whole body bone scan at the recommendation of his family doctor, Brett Bowling, M.D., to evaluate symptoms of rib pain. L.F. Vol. I, pg. 281. A bone scan is a medical test that utilizes radioactive materials (radionuclides) to evaluate bone metabolism. L.F., Vol. III, pg. 392. Increased density of the radionuclide material within a bone indicates increased metabolism (uptake) of the bone and signifies bone infirmity. L.F., Vol. III, pg. 392. Increased uptake can be caused by a myriad of medical conditions in the bone ranging from benign degenerative conditions, such as arthritis, to potentially life threatening conditions, such as osteosarcoma (bone cancer). L.F., Vol. III, pgs. 392, 395. A bone scan is diagnostic only for increased (or decreased) uptake within the bone -- it cannot diagnose the etiology of the increased uptake. L.F., Vol. III, pgs. 392, 395. Once increased uptake is detected, further medical tests must be undertaken to investigate the cause. The determination as to which additional medical tests should be undertaken to investigate the cause of increased uptake in a bone is generally left to the patient's family doctor. L.F., Vol. III, pg. 394. The patient's family doctor, however, will not know about the presence of increased uptake and therefore will not know if additional medical tests are warranted unless the radiologist

who reads the bone scan reports seeing increased uptake. L.F., Vol. III, pg. 395.

Appellant's bone scan was a whole body scan (head to feet) and was performed in the nuclear medicine department at McCune Brooks Hospital by a nuclear medicine technician. L.F., Vol. III, pgs. 393, 397. The technician performing Appellant's bone scan preliminarily looked at the bone scan films before forwarding them to the radiologist, and noted increased uptake in both knees. L.F. Vol. III, pgs. 397, 398, 400. That technician prepared a handwritten note reflecting increased uptake in the knees and sent the note, along with the bone scan films, to the interpreting radiologist, Mark Zubres, D.O. (hereafter Defendant Zubres.) L.F., Vol. III, pgs. 397, 400. Defendant Zubres' practice is to review the technician's notes when reading the bone scan films. L.F., Vol. III, pg. 397.

Upon reviewing the bone scan, Defendant Zubres similarly found increased uptake in both Appellant's knees, particularly the area of the proximal tibias, with the uptake being greatest in the right proximal tibia. L.F., Vol. III, pgs. 394, 395, 396. Defendant Zubres had "no idea" what was causing this greater concentration of increased uptake in Appellant's right knee, and specifically could not exclude osteosarcoma as a cause. L.F., Vol. III, pgs. 396-397, 398. Since Defendant Zubres is not an orthopedist,

oncologist, or family practitioner, he did not know if this greater concentration of increased uptake in Appellant's right knee constituted an abnormality that needed further investigating. L.F., Vol. III, pg 394. For his part, however, Defendant Zubres made no effort to determine the etiology of the increased uptake. L.F., Vol. III, pg. 396.

With "no idea" what was causing this greater concentration of increased uptake in Appellant's right knee, Defendant Zubres simply "assumed" there was a benign cause and reported the bone scan as "normal" with "satisfactory uptake" throughout the bony structures and "no evidence of [radionuclide uptake] to suggest bone pathology." (Emphasis added.) L.F., Vol. II, pg 281; Vol. III, pg. 395. Defendant Zubres specifically "did not mention" the increased uptake in Appellant's right tibia when preparing the bone scan report. L.F., Vol. II, pg. 281; Vol. III, pg. 394. Further, Defendant Zubres did not tell either Dr. Bowling or Appellant about the prominent increased uptake exhibited in the bone scan of Appellant's right knee. L.F., Vol. III, pgs. 391, 398.

In April of 2002, approximately four years after the subject bone scan, Appellant presented to an orthopedic doctor at the University of Missouri, Columbia complaining of right knee pain. L.F., Vol. II, pg. 282; Vol. III, pgs. 401-02. Medical tests performed at that time, including x-rays, an MRI,

and a biopsy, revealed osteosarcoma in the proximal tibia of Appellant's right knee. L.F. Vol. II, pgs. 282-3, 284-5; Vol. III, pgs. 401-02. The final diagnosis of osteosarcoma was rendered in a pathology report dated April 25, 2002. L.F. Vol. II, pgs. 284-05.

Appellant initiated his medical malpractice action against Defendant Zubres, among other defendants, by filing a petition in the Circuit Court of Jasper County on August 7, 2002. L.F. Vol. I, pg. 28. That petition alleged that Defendant Zubres failed to properly read the bone scan and therefore failed to inform him of the true and actual results thereof. L.F., Vol. I, pg. 31. Defendant Zubres moved to dismiss the petition, arguing that the action was barred by the two year limitations period set out in Mo. Rev. Stat. § 516.105. L.F., Vol. I, pg. 26. The Circuit Court overruled the motion to dismiss. L.F., Vol. I., pg. 2.

By fourth amended petition, filed March 30, 2004, and a fifth amended petition, filed April 30, 2004, Appellant added Defendant Zubres Radiology, Inc., and Defendant Wayne E. Putnam d//b/a Carthage Radiologists, respectively, as additional defendants, alleging that Defendant Zubres was their agent at the time he read the subject bone scan and therefore such Defendants were vicariously liable under the doctrine of respondeat superior. L.F., Vol. I, pgs. 6, 59.

Appellant took the deposition of Defendant Zubres on October 20, 2004. L.F. Vol. III, pg. 391. The above statement of facts is taken directly from that deposition testimony. Importantly, Defendant Zubres testified that he, indeed, observed increased uptake in Appellant's bone scan which was greatest in the area of the right proximal tibia, that he did not know the cause of that increased uptake and could not exclude the possibility of osteosarcoma, and that he failed to report this finding in his report of the bone scan. L.F., Vol. III, pgs. 394, 396, 398. In light of this testimony, Appellant filed a sixth amended petition on February 22, 2005, alleging that Defendant Zubres observed and diagnosed increased uptake in the bone scan but negligently failed to inform Appellant of such results. L.F., Vol. I, pg. 133.

Defendants moved for summary judgment, arguing that Appellant's action was barred by Mo. Rev. Stat. § 516.105. L.F., Vol. I, pg. 142; Vol. II, pg. 167. Appellant filed oppositions to the motions, asserting that his action came within the provisions of Mo. Rev. Stat. § 516.105(2) which provides a discovery rule in cases where the healthcare provider negligently fails to inform the patient of the results of medical tests. L.F., Vol. III, pgs. 357, 375.

The hearing on Defendants' motions for summary judgment took place on July 29, 2005, before Judge Jon Dermott of the Circuit Court of Jasper County. L.F., Vol. III, p. 503; Transcript of Hearing, July 29, 2005, pgs. 1-18. The Circuit Court sustained Defendants' motions for summary judgment, finding that Appellant's action is governed by the general two year limitations period of Mo. Rev. Stat. § 516.105 rather than the "negligent failure to inform" exception contained in subsection 2 of that statute. L.F. Vol. III, pg. 503; Transcript of Hearing, July 29, 2005, pgs. 16-18. A final Judgment in defendants' favor was entered on August 15, 2005. L.F., Vol. III, pg. 503. Appellant timely filed his notice of appeal on August 23, 2005. L.F., Vol. III, pg. 507.

On July 31, 2006, the Southern District Court of Appeals affirmed the Circuit Court's grant of Summary Judgment. By Application, filed August 15, 2006, Appellant applied to the Court of Appeals for transfer to the Supreme Court, which the Court of Appeals denied on August 22, 2006. Appellant then applied for transfer directly to The Supreme Court pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure. The Supreme Court granted the application and ordered this case transferred on September 26, 2006.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT’S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR LIMITATIONS PERIOD SET OUT IN MO. REV. STAT. § 516.105 BECAUSE BOTH THE PETITION AND THE MATERIAL FACTS ESTABLISH THAT APPELLANT’S ACTION FALLS WITHIN THE EXCEPTION CONTAINED IN MO. REV. STAT. § 516.105(2) WHICH CREATES A DISCOVERY RULE IN CASES INVOLVING THE “NEGLIGENT FAILURE TO INFORM THE PATIENT OF THE RESULTS OF MEDICAL TESTS” IN THAT DEFENDANT ZUBRES KNEW THAT THE BONE SCAN IN QUESTION SHOWED INCREASED UPTAKE WHICH COULD BE CAUSED BY A POTENTIALLY LIFE THREATENING CONDITION BUT FAILED TO INFORM APPELLANT ABOUT THAT FINDING AND APPELLANT FILED HIS PETITION WITHIN TWO YEARS OF DISCOVERING DEFENDANT’S FAILURE TO INFORM.

Cook v. Newman, 142 S.W. 3d 880 (Mo.banc 2005);

Montgomery v. South County Radiologists, Inc., 2001 WL 826839

(Mo.App. E.D. 2001);

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

Wright v. Barr, 62 S.W.3d 509 (Mo.App. W.D. 2001);

Mo. Rev. Stat. § 516.105;

Mo. Rev. Stat. § 516.105(2);

“Inform.” *Merriam-Webster Online Dictionary*, 2006.

<http://www.merriam-webster.com> (1 Mar. 2006);

Merriam-Webster’s New Collegiate Dictionary, 10 Edition, 1996.

II. THE CIRCUIT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR LIMITATIONS PERIOD SET FORTH IN MO. REV. STAT. § 516.105 BECAUSE DEFENDANTS FAILED TO MAKE A PRIMA FACIE SHOWING FOR SUMMARY JUDGMENT IN THAT THEY FAILED TO OFFER COMPETENT EVIDENCE SHOWING THAT DR. ZUBRES' FAILURE TO REPORT THE DISPARATE INCREASED UPTAKE IN APPELLANT'S RIGHT KNEE WAS BASED UPON APPROPRIATE MEDICAL JUDGMENT THAT COMPLIED WITH THE STANDARD OF CARE FOR RADIOLOGISTS WHEN READING A BONE SCAN.

Doss v. United States, 476 F.Supp. 630, 633 (Mo. E.D. 1979);

Fisher v. Wilkinson, 382 S.W.2d 627, 630 (Mo. 1964);

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371, 376 (Mo. banc. 1993);

McKersie v. Barnes Hosp., 912 S.W.2d 562, 565 (Mo.App. E.D. 1995);

Mo. Rev. Stat. § 516.105;

Mo. Rev. Stat. § 516.105(2);

Merriam-Webster Online Dictionary, 2006.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT’S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR LIMITATIONS PERIOD SET OUT IN MO. REV. STAT. § 516.105 BECAUSE BOTH THE PETITION AND THE MATERIAL FACTS ESTABLISH THAT APPELLANT’S ACTION FALLS WITHIN THE EXCEPTION CONTAINED IN MO. REV. STAT. § 516.105(2) WHICH CREATES A DISCOVERY RULE IN CASES INVOLVING THE “NEGLIGENT FAILURE TO INFORM THE PATIENT OF THE RESULTS OF MEDICAL TESTS” IN THAT DEFENDANT ZUBRES KNEW THAT THE BONE SCAN IN QUESTION SHOWED INCREASED UPTAKE WHICH COULD BE CAUSED BY A POTENTIALLY LIFE THREATENING CONDITION BUT FAILED TO INFORM APPELLANT ABOUT THAT FINDING AND APPELLANT FILED HIS PETITION WITHIN TWO YEARS OF DISCOVERING DEFENDANT’S FAILURE TO INFORM.

A. Introduction & standard of review.

The question presented by this appeal is whether the “negligent failure to inform the patient of the results of medical tests” exception to the general

two year limitations period of Mo. Rev. Stat. § 516.105 applies to a situation where a medical test reveals a potentially life threatening finding, the healthcare provider reading the medical test is aware of that finding but does not report it and instead prepares a medical report describing the result of the medical test as normal, and the patient later discovers the actual test result and files suit within two years of such discovery. The plain and ordinary meaning of the language contained in Mo. Rev. Stat. § 516.105(2), as well as the legislature’s objective in enacting that exception, indicates that the answer to this question is “yes;” therefore, the trial court erred by entering summary judgment in favor of Defendants on the ground that Appellant’s action was barred by the two year statute of limitations.

Appellant contends that the circuit court misinterpreted and misapplied Mo. Rev. Stat. § 516.105. Since the interpretation of a statute is a question of law, appellate review is de novo. *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo.banc 2005).

B. The plain and ordinary meaning of the language used in Section 516.105(2) shows that the legislature intended the exception to apply in cases where the healthcare provider fails to provide the patient with any information about the results of medical tests, as well

as cases where the healthcare provider misinforms the patient about the results of medical tests.

Mo. Rev. Stat § 516.105¹ provides a general two year limitations period for medical malpractice actions, commencing on “the date of the occurrence of the act of neglect complained of...” The statute, however, provides three exceptions to this general limitations period. Of particular importance to this case is the exception set out in section 516.105(2), which provides:

In cases in which the act of negligence complained of is the *negligent failure to inform the patient of the results of medical tests*, the action for failure to inform shall be brought *within two years of the date of the discovery* of such alleged negligent failure to inform, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligent failure to

¹ All statutory references are to the Missouri Revised Statutes.

inform, whichever date first occurs; . . . (Emphasis added.)²

The operative petition in this case alleges a cause of action for medical malpractice against a radiologist and the radiology group that provided healthcare services through the radiologist. L.F., Vol. I, pg. 133. The testimony of the radiologist, Defendant Zubres, demonstrates that he read Appellant's bone scan as showing increased uptake in some of the bones throughout Appellant's body, with a disparate concentration of uptake appearing in the bones of the right knee. L.F., Vol. III, pgs. 394, 395, 396. Increased uptake can be a sign of several disease processes, including arthritis and cancer. L.F., Vol. III, pgs. 392, 395. Defendant Zubres testified that a bone scan is diagnostic only for increased or decreased uptake, not the disease process causing the increased or decreased uptake. Consequently, a bone scan can neither rule out nor confirm any of the possible causes of increased uptake. L.F., Vol. III, pgs. 392, 395.

² On August 28, 2005, the legislature repealed section 516.105 and, using the same section number, enacted a new statute of limitations for medical malpractice actions. H.B. No. 393 (2005). The new section 516.105 applies to cases filed after August 28, 2005. Since Appellant's case was filed in 2004, the 2004 version of section 516.105 is the controlling statute.

Thus, once a finding of increased uptake is made in a bone scan, another medical specialist will decide which additional medical testing should be undertaken to investigate the cause, assuming the radiologist informs that specialist about that finding. L.F., Vol. III, pg. 394. Regarding Appellant's bone scan, Defendant Zubres testified that when he prepared his report concerning the bone scan, he did not mention the high concentration of increased uptake he found in Appellant's right knee, even though he had "no idea" as to the possible etiology and could not rule out any disease process, including osteosarcoma. L.F., Vol. III, pgs. 394, 395, 396-397, 398.

The gravamen of Appellant's action is not that Defendant Zubres negligently interpreted the bone scan, indeed he correctly interpreted the scan as showing greater concentrations of increased uptake in the right proximal tibia, but that Defendant Zubres' negligently failed to *communicate* that finding in the radiology report. L.F., Vol. I, p. 133. Due to Defendant Zubres' failure to inform Appellant, or Appellant's family doctor, about the finding of increased uptake, Appellant did not discover such negligence until four years later when a subsequent bone scan revealed increased uptake in the right tibia and additional tests showed the cause to be osteosarcoma. L.F., Vol. II, pgs. 282-3, 284-5; Vol. III, pgs. 401-402. Appellant then filed this action three months later. L.F., Vol. I, pg. 28.

While Appellant agrees with the circuit court's finding that the negligent act occurred on July 10, 1998, when Defendant Zubres read the bone scan and reported it as normal, this does not answer the question of when Appellant's cause of action accrued. The circuit court's finding that Appellant's cause of action accrued on the same date as the negligent act appears to have been based on the misguided assumption that the limitations period begins running once the radiologist reports *something* about the bone scan result; the question of whether that *something* is the radiologist's actual finding or the actual result being unimportant. Had the legislature not enacted the "negligent failure to inform" exception to the general two year limitations period, Appellant's action would be time barred. However, when the facts and allegations of the case are viewed against the plain and ordinary language of the "negligent failure to inform" exception, it is apparent that Appellant's cause of action did not accrue until May of 2002 when he discovered Defendant Zubres' failure to report the finding of increased uptake. The interpretation of the exception set out in Section 516.105(2) is a matter of first impression and will require this Court to apply rules of statutory interpretation.

When considering the meaning of a statute, the primary rule is to "ascertain the intent of the legislature from the language used, to give effect

to that intent if possible, and to consider the words used in their plain and ordinary meaning.” *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo.banc 2004). “In determining whether the language is clear and unambiguous, the standard is whether the statute’s terms are plain and clear to one of ordinary intelligence.” *Id.*; *Wright v. Barr*, 62 S.W.3d 509, 536 (Mo. App. W.D. 2001). “The plain and ordinary meaning of statutory language not expressly defined by statute is typically found in the dictionary.” *Polzin v. Bank of Holden*, 153 S.W.3d 353, 357 (Mo. App. W.D. 2005). “Only when the statutory language is ambiguous or its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute.” *Id.* at 357.

Application of Missouri’s rules of statutory interpretation demonstrates that the plain, ordinary meaning of the language used in section 516.105(2) encompasses cases where a healthcare provider fails to inform the patient of the actual results of medical testing. Since the word “inform” is not defined by the statute, it is instructive to consider the dictionary definition of that word. *Id.* The dictionary definition of “inform” is “to communicate knowledge to” and “to impart information or knowledge.” *Merriam Webster’s New Collegiate Dictionary*, 10th Edition, 1996, p. 599; “Inform.” *Merriam-Webster Online Dictionary*, 2006.

<http://www.merriam-webster.com> (1 Mar. 2006). The dictionary further states: “Inform implies the imparting of knowledge *especially of facts . . .*” *Id.* (Emphasis added.) Accordingly, the plain and ordinary meaning of the phrase “failure to inform” as used in section 516.105(2) includes both the failure to communicate any information to the patient and the situation presented in this case where the healthcare provider fails to impart *facts* or *information* to the patient – the *facts* or *information* being the increased uptake that Defendant Zubres observed but failed to mention.

Another canon of statutory interpretation is that “[t]he meaning of the word must depend to some extent on the context in which it appears.” *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo.banc 1995). By its very language, section 516.105(2) applies in cases where “the act of neglect complained of is the *negligent* failure to inform the patient of the results of medical tests....” (Emphasis added.) The use of “negligent” to modify the word “failure” implies that the exception covers situations not only where the healthcare provider fails to impart any information or knowledge as to the result of a medical test, whether the result is favorable or unfavorable, but also where the healthcare provider misinforms the patient about test results. A presumption exists that the legislature does not insert idle verbiage or superfluous language in the statute, but that every

word, clause, sentence, and provision of a statute is intended to have effect. *Cook*, 142 S.W.3d at 892. Interpreting section 516.105(2) as applying only in cases where the healthcare provider fails to tell the patient *any* information about medical test results renders the term “negligent” idle and superfluous.

Had the legislature intended to limit the “discovery rule” of section 516.105(2) to only those cases where the healthcare provider fails to impart *any* information about a medical test, good or bad, to the patient, as the circuit court found, it could have easily done so with plain, simple language. Instead, the legislature chose the word “informed” which entails the imparting of knowledge, particularly facts. This in turn implies the imparting of *true, actual* test results. The legislature further used the word “negligent” to describe the failure to inform. Misinforming a patient of test results, particularly where the healthcare provider knows the actual results, thus falls within the plain language of the exception. If section 516.105(2) is interpreted in the manner proposed by Defendants, and adopted by the circuit court, healthcare providers, particularly radiologists, in effect will be granted a license to behave as negligently as they wish, provided they impart something to their patients regarding their medical testing, regardless of whether the information imparted is the actual test result.

With the creation of the “negligent failure to inform” exception, the legislature has added an additional “discovery rule” exception as it dictates that an action must be filed “within two years of the date of the discovery of such negligent failure to inform...” Section 516.105(2). It is only this limited “discovery rule” that Appellant seeks to enforce in this action. Appellant is not seeking to create a “discovery rule” for all failure to diagnose cases. The operative petition in this case does not allege failure to diagnose. Instead, Appellant contends that Defendant Zubres properly read the bone scan but failed to communicate the facts of that test result to either Appellant or his treating physician. Thus, the facts of this case come within the plain and ordinary meaning of the statute’s language. To interpret the statute otherwise would require this Court to look beyond the plain and ordinary meaning of “inform,” a proposition a court should not do unless it would lead to an illogical result. *Wright*, 62 S.W.3d at 536. Applying the exception to the factual circumstances of this case would not engender an illogical result.

C. **Should the Court find section 516.105(2) ambiguous or uncertain, an examination of the legislature’s objective in creating the “discovery rule” of section 516.105(2) shows**

**that it was intended to address factual situations similar to
the present case.**

Only if this Court finds that the language of section 516.105(2) is somehow ambiguous, uncertain or would lead to an illogical result, can the legislature's intent in adopting the statute be considered. *Cook*, 142 S.W.3d at 887. ("Only when a statute's language is ambiguous or uncertain or if its plain meaning would lead to an absurd result will extrinsic matters, such as the statute's history, surrounding circumstances and objectives to be accomplished through the statute, be considered.") However, examining the legislature's objective when creating section 516.105(2) shows that it intended the "discovery rule" to apply to the facts of the present case.

A primary canon of statutory construction is that when enacting a statute, the legislature is presumed to have acted with knowledge of the state of the law. *Leiser v. City of Wildwood*, 59 S.W.3d 597 (Mo.App. E.D. 2001). As originally enacted in 1976, section 516.105 created a two year limitations period on medical malpractice actions, commencing on the "date of occurrence of the act of neglect complained of." *See, Weiss v. Rojanasathit*, 975 S.W.2d 113, 117 (Mo. banc 1998), *superseded by statute*. A limited exception was created where the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a

living person, in which case the statute commenced running from the date of discovery. *Id.*

The “negligent failure to inform exception” of 516.105(2) was born out of what the Missouri Supreme Court described as a “distasteful” result it was reluctantly compelled to reach in *Weiss v. Rojanasathit*. *Id.* at 121.

Weiss involved a medical malpractice action brought by a patient against her gynecologist for failing to tell her that her Pap smear was abnormal and showed a cancerous or precancerous condition. *Id.* at 116. The Pap smear was correctly read by an outside laboratory as showing a cancerous or precancerous condition and those results were sent to the gynecologist’s office. *Id.* The gynecologist did not contact the patient to inform her about the results. *Id.* Almost four years later, the patient underwent another gynecological examination with a different doctor, and a Pap smear done at that time revealed that she had developed cervical cancer. *Id.* The patient filed her petition for medical malpractice one year after the date of discovering the malpractice, but five years after the original gynecologist received the results of the first Pap smear and failed to communicate those results. *Id.* The trial court sustained the defendant gynecologist’s motion for summary judgment on the ground that the action was barred by the two-year statute of limitations set out in section 516.105. *Id.*

On appeal to the Missouri Supreme Court, the plaintiff advanced several arguments calling for a “discovery rule” whereby a cause of action for medical malpractice under such circumstances would not accrue until the patient discovered the doctor’s negligence. Feeling constrained by the 1976 version of section 516.105 and the policy determination expressed by the legislature, the Supreme Court affirmed the judgment. *Id.* at 121. Noting that the conclusion it reached “is distasteful to us,” the Supreme Court impliedly called upon the legislature to correct the manifest injustice compelled by the statute. *Id.*

Answering the Supreme Court’s call, the legislature amended section 516.105 the following year by adding the “negligent failure to inform” exception of section 516.105(2). See, *Montgomery v. South County Radiologists, Inc.*, 2001 WL 826839 (Mo.App. E.D. 2001) (unreported decision.) It should be remembered that unlike most medical malpractice legislation, the “negligent failure to inform” exception was not enacted with the general purpose of maintaining the integrity of health care for all Missourians by limiting the liability of healthcare providers for harms caused by their acts. See *Cook*, 142 S.W.3d at 894. Instead, the exception was enacted for the specific purpose of redressing an injustice created by the

1976 version which barred actions where the patient, through no fault of her own, did not learn the results of a medical test.

The interpretation given to section 516.105(2) by the circuit court in the present case is no less distasteful than the result reached in *Weiss*. The precise evil the legislature sought to correct through the 1999 amendment is the same in both cases – the patient was not informed of facts revealed through a medical test and known by the healthcare provider. In *Weiss*, the Pap smear revealed a cancerous or precancerous finding, the healthcare provider was aware of that finding but failed to inform the patient of that finding. By parity of reasoning, Appellant’s bone scan showed increased uptake in both knees with higher concentrations of uptake in the right tibia, Defendant Zubres was aware of that finding but failed to inform Appellant of that finding. The two cases are thus analogous.

In view of the factual circumstances involved in *Weiss* and the language chosen by the legislature to correct the injustice created by that decision, the question of whether the “discovery rule” of section 516.105(2) applies in any case involving the alleged negligent failure to inform can easily be answered by the following three questions: (1) what were the results of the medical test, (2) was the healthcare provider aware of those results, and (3) did the healthcare provider inform the patient of those

results. Defendant Zubres provided the following answers to these questions: (1) the bone scan showed increased uptake in both knees, with the greatest concentration of uptake being in the right tibia, (2) Dr. Zubres was admittedly aware of the increased uptake, having seen it for himself in the bone scan, and (3) he “did not mention” the increased uptake to the patient or the patient’s family doctor. L.F., Vol. III, pgs. 391, 398 . Applying this analysis to the facts of the present case leads to the unavoidable conclusion that Defendant Zubres did not inform (i.e., impart facts to) Appellant about the results of the bone scan. More importantly, this analysis produces a result consistent with the concern raised by the Supreme Court in *Weiss*, which the legislature intended to address, and the specific language of section 516.105(2).

As they argued in the circuit court, Defendants’ will undoubtedly attempt to limit the exception of section 516.105(2) to cases where the healthcare provider *completely fails* to give *any* information about the results of a medical test to the patient. Such an interpretation is absurd and would lead to illogical results. This Court need only look to the factual situation in *Weiss* to see how illogical results would arise from such an interpretation. Under the same facts, *Weiss* unquestionably would have been decided differently under the 1999 amendment which created the “negligent failure

to inform” exception. Yet, under Defendants’ proffered interpretation, the result reached in *Weiss* would have to be the same after the 1999 amendment if the gynecologist, rather than telling the patient nothing, had instead informed the patient that the Pap smear was normal. Conceptually, there is no meaningful difference between (1) a healthcare provider getting the patient’s test results and not telling her about those results, and (2) a healthcare provider telling the patient that a medical test was normal when it was either not normal or the healthcare provide had no idea if it was normal. Thus, the legislature could not have reasonably intended to create a distinction between cases where the healthcare provider omits to tell the patient anything about the medical test results, and cases where the healthcare provider misinforms the patient about those results. In both cases, the healthcare provider has remained silent about the actual results of the test. In both cases, the healthcare provider is negligent in failing to communicate facts about a medical test when the doctor is fully aware of those facts. As a consequence, the patient, through no wrongdoing of her own, may be left with an untreated condition that progresses into a life threatening or life ending disease.

Appellant is in no way encouraging this Court to apply the discovery rule of section 516.105(2) to all cases involving allegation of failure to

diagnose a condition. Rather, Plaintiff urges the court to apply the exception in a manner consistent with the legislature's intent to redress the distasteful result reached in cases like *Weiss* and the present case.

II. THE CIRCUIT COURT ERRED BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR LIMITATIONS PERIOD SET FORTH IN MO. REV. STAT. § 516.105 BECAUSE DEFENDANTS FAILED TO MAKE A PRIMA FACIE SHOWING FOR SUMMARY JUDGMENT IN THAT THEY FAILED TO OFFER COMPETENT EVIDENCE SHOWING THAT DR. ZUBRES' FAILURE TO REPORT THE DISPARATE INCREASED UPTAKE IN APPELLANT'S RIGHT KNEE WAS BASED UPON APPROPRIATE MEDICAL JUDGMENT THAT COMPLIED WITH THE STANDARD OF CARE FOR RADIOLOGISTS WHEN READING A BONE SCAN.

A. Introduction and standard of review.

Another question presented by this appeal is whether a physician's use of medical judgment which leads to a decision to omit a potentially serious finding from a report for a medical test comes within the exception to the two year limitations period set out in MO. Rev. Stat. § 516.105(2), where it is alleged that such medical judgment was below the standard of care for a physician and, as a result of such negligent judgment, the physician negligently failed to inform the patient of the results of a medical

test. Appellant contends that the circuit court erred by entering summary judgment because Defendants failed to make a prima facie showing for summary judgment. More particularly, Appellant contends that Defendants did not offer competent evidence showing that Dr. Zubres' judgment call to omit from his medical report the finding of disparate increased uptake in Appellant's right knee was an acceptable judgment call for a radiologist practicing within the standard of care.

Appellate review of the trial court's grant of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc. 1993); *Bost v. Clark*, 116 S.W.3d 667, 672 (Mo.App. W.D. 2003). In determining whether summary judgment was properly granted, the reviewing court employs the same principles used by the trial court. *ITT*, 854 S.W.2d at 376. However, the reviewing court gives no deference to the trial court's grant of summary judgment, as the propriety of summary judgment is strictly an issue of law. *Id.* Furthermore, the record is reviewed in the light most favorable to the non-moving party. *Id.*; *Caballero v. Stafford*, 2006 WL 2422558, pg. 5 (Mo.App. S.D. 2006).

B. A defendant moving for summary judgment must make a prima facie showing for summary judgment by alleging

**facts, supported by evidence, that establish the right to
judgment as a matter of law.**

Defendants in this case allege that there is no genuine dispute as to the existence of each of the facts necessary to support the statute of limitations as an affirmative defense to Appellant's case. This is a recognized means for a defending party to move for summary judgment, provided that they establish a prima facie showing for summary judgment. *ITT*, 854 S.W.2d at 381; *Millard v. Corrado*, 14 S.W.3d 42, 46 (Mo.App. E.D. 1999). To make a prima facie showing for summary judgment, the movant must allege facts, which are supported by specific references to the pleadings, discovery, exhibits or affidavits, demonstrating the lack of a genuine issue as to such facts and which establish a right to judgment as a matter of law. *Bost*, 116 S.W.3d at 674; Rule 74.04(c)(6). When, and only when, the movant has made a prima facie showing for summary judgment does the burden then shift to the non-movant to show a genuine issue for trial. *ITT*, 854 S.W.2d at 381.

Before deciding if Defendants made a prima facie showing that the general two year limitations period bars Appellant's negligence action, the Court must determine the nature of Appellant's claim from the operative sixth amended petition. Appellant again emphasizes that the essence of his

negligence action is *not* that Dr. Zubres *misdiagnosed* osteosarcoma, as a bone scan is not diagnostic for the disease itself. Instead, Appellant criticizes Dr. Zubres for not reporting what he saw in the bone scan; namely, disparate increased uptake in the right knee. Misdiagnosis of the disease is only collaterally related in the sense that Appellant asserts that if Dr. Zubres had reported the disparate increased uptake in the right knee, this would have prompted Appellant's family doctor to order additional medical tests that would have eventually led to the diagnosis of osteosarcoma. This theory is clearly alleged in the sixth amended petition. L.F., Vol. I, pgs. 135-36.

C. **The Circuit Court erroneously concluded that Appellant's case was about the misdiagnosis of a medical condition because Dr. Zubres used medical judgment when reading the bone scan.**

The circuit court, as well as the Southern District Court of Appeals, mischaracterized Appellant's case against Dr. Zubres as involving a claim of *misdiagnosis* of a medical condition. This mischaracterization arose out of Dr. Zubres's assertion that he used "medical judgment" when reading the bone scan and determining what to report. *See*, Transcript of Hearing, July 29, 2005, pgs. 15-16; Opinion from the Southern District Court of Appeals,

July 31, 2006, pg. 7. That use of medical judgment, the two courts reasoned, defines the negligent act as one involving misdiagnosis of a medical condition rather than failing to inform the patient of the results of a medical test. Where misdiagnosis of a medical condition is the negligent act alleged, the general two year limitations period of section 516.105 applies.

The analysis of the lower courts is puzzling in that it equates the concept of “medical judgment” with “medical diagnosis.” The two concepts are not synonymous. “Judgment” means the process of forming an opinion or evaluation by discerning and comparing. *Merriam-Webster Online Dictionary*, 2006. “Diagnosis” means the art or act of identifying a disease from its signs and symptoms. *Merriam-Webster Online Dictionary*, 2006. Thus, the concept of medical judgment is much broader than the act of making a diagnosis. Physicians do not reserve the use of medical judgment solely for when they are making a diagnosis. Medical judgment is used in practically all areas of a physician’s professional decision making. By way of example, medical judgment is also used by physicians when deciding what medication to prescribe to treat a particular illness, whether to refer the patient to a specialist, whether to come to the hospital to see a patient after the nurse calls concerning a change in the patient’s condition, and, as

relevant here, whether to report certain findings in a medical report. The use of medical judgment in these examples is unrelated to making a diagnosis.

In the instant case, the conclusion that Dr. Zubres used his medical judgment when reading Appellant's bone scan as normal does not answer the question as to whether he was negligent by failing to report the increased uptake he observed. This is not a case where Dr. Zubres failed to observe or diagnose disparate increased uptake; he made the diagnosis but failed to inform anyone about it. Not informing the patient about disparate increased uptake can be a negligent act that is divorced from the diagnosis Dr. Zubres reached. *See, e.g., Doss v. United States*, 476 F.Supp. 630, 633 (Mo. E.D. 1979) [holding that the defendant doctors did not simply commit an error of judgment in reaching their diagnosis of plaintiff's condition, but instead were negligent in failing to perform the tests and references which would have allowed them to make a diagnosis]. This is why the legislature chose the language "*negligent* failure to inform the patient of the results of medical tests" when enacting section 516.105(2). Section 516.105(2) (Emphasis added).

It is not uncommon for radiologists when reading an x-ray, MRI, CT scan or bone scan to report possible abnormalities even when such abnormalities are not thought to be the cause of the patient's present

complaints. Thus, when interpreting the bone scan as normal in this case, Dr. Zubres was still faced with the decision to either report the disparate increased uptake in Appellant's right knee so that the primary care doctor could decide whether to undertake further investigation, or, as he ultimately decided, to not report it. It is *this* judgment call which forms the basis of Appellant's negligence action.

Under Missouri law, not all medical judgment calls are protected from liability. The physician must exercise his medical judgment consistent with the standard of care. The standard of care imposed upon a defendant in a malpractice case has been stated by this Court as follows: "The defendant [is] required to use and exercise that degree of care, skill and proficiency which is commonly exercised by the ordinarily skillful, careful, and prudent physician and surgeon engaged in similar practice under the same or similar conditions." *Fisher v. Wilkinson*, 382 S.W.2d 627, 630 (Mo. 1964); *see also, McKersie v. Barnes Hosp.*, 912 S.W.2d 562, 565 (Mo.App. E.D. 1995). It is not sufficient that the physician may have possessed the requisite training and skill; he must also have used and applied it in the treatment of the plaintiff. *Fisher*, 382 S.W.2d at 630. Pursuant to these principles, the law protects only "honest errors of judgment" of the type that other prudent physicians would make under the same or similar circumstances. *See*,

McKersie, 912 S.W.2d at 565. An error of judgment that falls outside the standard of care is itself negligence and subjects the physician to liability. *See, McKersie*, 912 S.W.2d at 565-66; *Doss*, 476 F.Supp. at 632-33. Thus, the issue in this case is not whether Dr. Zubres simply used his medical judgment when deciding not to report his observations of disparate increased uptake in Appellant's right knee, but whether such judgment was *appropriately* exercised. Stated differently, was this judgment call within the standard of care for a radiologist?

D. Defendants' failed to show that Dr. Zubres' decision to not report disparate increased uptake was a judgment call within the standard of care.

Generally, in a medical malpractice case, the parties must introduce expert testimony to prove the degree of skill and care ordinarily used under the same or similar circumstances by members of the profession. *Boehm v. Pernoud*, 24 S.W.3d 759, 761 (Mo.App. E.D. 2000). Here, Defendants failed to offer any supporting evidence to show that Dr. Zubres' judgment call to not mention the high concentration of increased uptake in the right knee was appropriate and within the standard of care. The only evidence adduced on the subject was from the deposition of Dr. Zubres himself, who summarily stated: "[I]n my case, when I look at these studies, I have to make

a clinical decision whether something may be significant or not.” L.F., Vol. II, pg. 249. This bald statement about his personal practice does not establish a standard of care. Even if Dr. Zubres’ testimony qualified as expert testimony on the subject, an expert’s opinion “must be based upon an established standard of care and not upon a personal standard.” *Boehm*, 24 S.W.3d at 762. Dr. Zubres’ testimony about his personal standard and practice is alone insufficient to establish the standard of care. Absent competent evidence establishing the standard of care that radiologists follow when reporting a bone scan that shows disparate increased uptake, Defendants failed to meet their burden of proving a prima facie case for summary judgment. The judgment should therefore be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse the Judgment of the circuit court and hold that (1) Appellant's action is governed by the limitations period of section 516.105(2), and (2) that Appellant timely filed his action within two years of discovering Dr. Zubres' alleged negligent failure to inform Appellant of the results of his bone scan.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Replacement Brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words in this brief is 7,044.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Norton anti-virus program.

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