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STATEMENT OF FACTS[1]

On July 10, 1998, a bone scan was performed on Phillip White which was read and interpreted by Dr. Mark Zubres. L.F. p. 180. The order for the bone scan indicates that the patient was experiencing anterior and posterior rib pain. L.F. p. 179. The results of Dr. Zubres' interpretation of the bone scan were forwarded to Mr. White's family doctor, Bret Bowling, M.D., on or about July 17, 1998, who in turn communicated the results to Mr. White. L.F. pp. 172, 190, 196-197, 200-201, and 208.

Mr. White filed his petition against Dr. Zubres on August 9, 2002, more than four (4) years after the bone scan results were communicated to Mr. White. L.F. p. 1. Mr. White's petition alleged that Dr. Zubues negligently read the bone scan as "normal". L.F. pp. 212-213. On February 22, 2005, Mr. White filed his Sixth Amended Petition. L.F. p. 15. In his Sixth Amended Petition, Appellant does not allege any continuing care and/or treatment by Dr. Zubres after July 10, 1998. L.F. pp 216-221. Additionally Mr. White's Sixth Amended Petition does not allege fraudulent concealment. L.F. pp. 216-221.

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[1] Appellant's statement of facts fails to comply with Supreme Court Rule 84.04(c) in that it is not a fair and concise statement of facts relevant to the questions presented for determination without argument. Rather, the statement of facts in Appellant's brief presents a slanted or jaded statement of facts (many of which are irrelevant) and is also tainted with argument and conjecture. Therefore, pursuant to Supreme Court Rule 84.04(f) Respondents offer the statement of facts set forth herein.

Section 516.105 RSMo. sets forth the statute of limitation for medical malpractice cases. Generally, an action against a physician must be brought within two years from the date of the alleged negligence. Section 516.105 RSMo. also sets forth three exceptions to the general two year statute of limitations. First, when the negligence complained of is permitting a foreign object to remain within the patients body, the action must be brought within two years from the date the retained object is discovered or from the date when the patient, using ordinary care, should have discovered the alleged negligence. Second, when the neglect complained of is the negligent failure to inform the patient of medical test results, the action must be brought within two years from the date of the discovery of the alleged negligent failure to inform, or the date the patient, using ordinary care, should have discovered the alleged negligent failure to inform. Third, when the plaintiff is a minor, under the age of eighteen years old, the plaintiff has until his or her twentieth birthday to bring the cause of action. In the interest of completeness, there is also an exception to the statute of limitation in certain instances when the health care provider continues to provide treatment to the patient. Finally, there is an exception to the statute of limitations when the defendant takes affirmative actions to fraudulently conceal the existence of a medical negligence cause of action.

POINTS RELIED ON

I. THE CIRCUIT COURT PROPERLY ENTERED SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE CLAIM WAS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS SET OUT IN MO. REV STAT SECTION 516.105, BECAUSE PLAINTIFF FILED THE CAUSE OF ACTION MORE THAN TWO YEARS AFTER THE DATE OF THE ALLEGED ACT OF NEGLECT, AND THE EXCEPTION CONTAINED IN MO. REV STAT SECTION 516.105(2), DOES NOT APPLY IN THAT THE PHYSICIAN, APPLYING CLINICAL JUDGMENT, INTERPRETED THE BONE SCAN RESULTS AS NORMAL, AND THOSE RESULTS WERE RELAYED TO APPELLANT IN A TIMELY FASHION.

II. THE CIRCUIT COURT DID NOT ERROR BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR STATUTE OF LIMITATIONS SET FORTH IN MO. REV. STAT. SECTION 516.105, BECAUSE DEFENDANTS DID ALLEGE FACTS, SUPPORTED BY SPECIFIC REFERENCES TO PLEADINGS, DISCOVERY, AND EXHIBITS DEMONSTRATING THE LACK OF A GENUINE ISSUE AS TO SUCH FACTS AND WHICH ESTABLISHED A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE ONLY EVIDENCE PRESENTED AT THE TRIAL COURT WAS THAT THE RESULTS OF A BONE SCAN ARE REACHED BY THE

PHYSICIAN APPLYING HIS JUDGMENT TO WHAT HE SEES, TAKING INTO ACCOUNT CLINICAL HISTORY, AND INTERPRETING THE BONE SCAN TO REACH IT'S RESULT, AND THE RESULT OF THE BONE SCAN WAS REPORTED TO THE APPELLANT HEREIN.

ARGUMENT

POINT RELIED ON I

THE CIRCUIT COURT PROPERLY ENTERED SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE CLAIM WAS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS SET OUT IN MO. REV STAT SECTION 516.105, BECAUSE PLAINTIFF FILED THE CAUSE OF ACTION MORE THAN TWO YEARS AFTER THE DATE OF THE ALLEGED ACT OF NEGLECT, AND THE EXCEPTION CONTAINED IN MO. REV STAT SECTION 516.105(2), DOES NOT APPLY IN THAT THE PHYSICIAN, APPLYING CLINICAL JUDGMENT, INTERPRETED THE BONE SCAN RESULTS AS NORMAL, AND THOSE RESULTS WERE RELAYED TO APPELLANT IN A TIMELY FASHION.

A. INTRODUCTION AND STANDARD OF REVIEW

Respondents agree that the standard of review is essentially de novo. However, Respondents disagree with Appellant's characterization of the issue on appeal. The issue on appeal is when a radiologist, exercising his medical judgment and expertise, interprets the results of a bone scan as normal, and the interpretation is communicated to the patient (regardless of whether the interpretation is correct or not) does section 516.105(2) RSMo. toll the statute of limitation or does the general two year statute of limitation for medical negligence cases apply to bar Mr. White's cause of action. It should be noted that Mr. White's petition was filed four years after the results of the bone scan had been communicated to him. As the facts, testimony, and law dictate, the trial court properly

held that Mr. White's cause of action was time barred pursuant to Section 516.105 RSMo. and therefore appropriately granted summary judgment herein.

B. MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

Section 516.105, RSMo, is the statute of limitations that applies to claims brought against healthcare providers. This statute provides that all actions against healthcare providers for damages for malpractice, negligence, error or mistake related to healthcare "shall be brought within two (2) years from the date of occurrence of the act of neglect complained of . . ." (emphasis added). The courts of this state have held that there is no "discovery rule" in medical malpractice actions, and therefore any action must be brought within two (2) years of the date of the alleged act of neglect, unless a specific exception to the statute applies. See, e.g., Weiss v Rojanasathit, 975 S.W.2d 113, 118 (Mo. banc 1998). On the undisputed facts herein, and on the face of the Petition, Appellant's action is out of time unless his action falls within a specifically recognized exception to the two (2) year statute of limitations.

Statutes of limitation are favored in law, and exceptions to such statutes are to be strictly construed. See, e.g., Pritle v Cook, 956 S.W.2d 235, 244 (Mo. banc 1997), Ridder v Hibsch, 94 S.W.3d 470, 475 (Mo. App. 2003) (Southern District), Chambers v Nelson, 737 S.W.2d 225, 227 (Mo. App. 1987) (Eastern District). "Courts are not at liberty to extend them [exceptions] even in cases of hardship." Chambers, 737 S.W.2d at 227. See also, Kellog v Kellog, 989 S.W.2d 681, 685 (Mo. App. 1999). The party seeking to avoid the affects of a statute to limitations must bring himself within some clear cut exception or disability, and strict compliance is required. Chambers, 737

S.W.2d at 227; Pirtle, 956 S.W.2d at 244; Kellog, 989 S.W.2d at 685; Grus v Patton, 790 S.W.2d 936, 944, (Mo. App. 1990). "As the party claiming the exemption, **plaintiff had the burden** of showing exemption from the operation of the statute of limitations." See Kellog, 989 S.W.2d at 685, and cases cited therein. Appellant has and will argue herein that subsection 2 of Section 516.105, RSMo, provides an exception from the statute of limitations in this case. As is noted by the case law cited immediately above, appellant has the burden of establishing this fact, the exceptions are to be strictly construed, and the court may not extend exceptions, even in cases of hardship. For the reasons which are discussed below, appellant can not meet his burden, and subsection 2 of Section 516.105, RSMo, when strictly construed as required by law, does not apply to this case.

C. THE EXCEPTION FOUND AT SECTION 516.105(2), RSMo, DOES NOT APPLY HEREIN

Subsection 2 of 516.105, RSMo, states in its entirety:

> In cases in which the act of neglect 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 (2) years from 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 inform, whichever date occurs first; except that, no such action shall be brought for any negligent failure to inform about the results of medical tests performed more than two (2) years before August 28, 1999.

"When construing a statute, a Court must endeavor to ascertain the intent of the legislature and the words used and, if possible, give affect to that intent." Scott v SSM Healthcare St. Louis, 70 S.W.3d 560, 570 (Mo. App. 2002) and cases cited therein. "Statutes may be considered with reference to the historical background," Id., and it is important to first note the circumstances under which subsection 2 of Section 516.105 was adopted. This exception to 516.105 came about as a result of the Missouri Supreme Court's holding in Weiss v Rojanasathi, 975 S.W.2d 113 (Mo. banc 1998). See Montgomery v South County Radiologist, Inc., 2000 WL 1846432 fn 8 (Mo. App. E.D. 2000).

In Weiss, Dr. Rojanasathit had performed a pap smear on the plaintiff, which was sent to an independent laboratory for analysis. The results of this pap smear were abnormal, indicating either a cancerous or pre-cancerous condition. Weiss, 975 S.W.2d at 116. These results were not communicated to the plaintiff. Almost four (4) years after the pap smear, another physician performed a gynecological exam on the plaintiff, and found that she had developed stage IIb cancer of the endocervix. Id. The plaintiff filed an action for medical malpractice against Dr. Rojanasathit alleging that he failed to inform her of the abnormal pap smear results, failed to perform further diagnostic testing and failed to treat her or refer her to an appropriate specialist. Summary Judgment was granted by the trial Court and affirmed by the Missouri Supreme Court en banc on the basis that the action was barred by the two (2) year statute of limitations. Id.

The Weiss case also rejected the "continued and repeated wrong rule," holding that the statute commences upon the occurrence, not upon the ascertainment of damages resulting from the wrong. Weiss, 975 S.W.2d at 119.

Finally, the Missouri Supreme Court held that principles of equitable estoppel, and fraudulent concealment did not apply, holding: "although Dr. Rojanasathit's failure to notify was a negligent act of omission, it can not be transformed into an affirmative act to induce Ms. Weiss to delay bringing suit." The Missouri Supreme Court held that it was "constrained by the language of Section 516.105 from adopting any of the discovery theories urged by Ms. Weiss," and that it "must follow the policy determination expressed" by the General Assembly. Weiss, 975 S.W.2d at 121.

At the time the Weiss opinion was authored, the "General Assembly evidenced its clear intent to limit a discovery rule to causes concerning foreign objects." Weiss, 975 S.W.2d at 121. In response to the Weiss case, subsection 2 of 516.105, was passed in 1999. This section applies to facts such as those found in the Weiss case, where the patient was not informed of the results of tests, and does not apply to alleged negligent reading or interpretation of tests or test results or x-rays or bone scans. After 1999, the discovery rule is recognized as an exception to the two (2) year statute in three (3) instances: 1) When a foreign object has been left; 2) When there was a test, the results of which were not communicated to the patient; and 3) Where there has been fraudulent concealment. Section 516.105 RSMo.

D. THE RESULTS OF THE BONE SCAN WERE COMMUNICATED TO MR. WHITE AND MR. WHITE'S CAUSE OF ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATION.

Appellant's position in this case ignores the simple fact that it is first up to the radiologist to interpret a bone scan as to what it shows and then to apply his expertise and clinical judgment as to what the "results" or "findings" are. The fundamental question presented herein is: when a radiologist, exercising his medical judgment and expertise, interprets the results of a bone scan as normal and this interpretation is communicated to the patient, (whether the interpretation ultimately was correct or not), can section 516.105(2) toll the two-year statute of limitations? The answer to this question is no as will be discussed below, and therefore, the trial court properly sustained respondent's motion for summary judgment.

The only evidence before the trial Court, and consequently before this Court, on the issue of how bone scans are read and interpreted, and how the scan at issue was read and interpreted, is through the deposition of Dr. Zubres. Dr. Zubres' testimony on those issues can be summed up as follows:

1) A bone scan detects metabolic activity. L.F. p.273.
2) When Dr. Zubres interprets a bone scan, he considers the clinical history, and the area of patient complaint. L.F. pp. 274 and 277.
3) The history Dr. Zubres was given for Mr. White was that he was complaining of rib pain. L.F. pp. 273-274.

4) There is increased activity within different joints and areas in Mr. White. L.F. pp. 275, 276, 277.

5) Some types of increased activity are considered typical for middle aged men. L.F. p. 277.

6) Because these were typical indications throughout Mr. White's joints which did not relate to his complaints, Dr. Zubres, using his judgment, would interpret the bone scan results as normal. L.F. pp. 273, 274, 275, 276, 277, 278

Appellant's position in this case ignores the evidence, and ignores the reality of medicine. Appellant would like this Court to ignore the fact that the results of medical tests, particularly tests like bone scans and other radiological exams, are the interpretation and conclusion of a physician applying his expertise and judgment as to what he sees and what it means. The results are not reached in a vacuum without reference to patient complaints, and without the application of the expertise and judgment of the physician as to what is significant or not. The result of a radiological study that must be communicated to the patient to avoid the exception set forth in subsection 2 of section 516.105 RSMo. is the radiologists interpretation of a study. There is no question but that in this case the result that the bone scan was normal (the conclusion of Dr. Zubres reached after applying his judgment in interpreting the bone scan) was communicated to the patient. See L.F. pp. 147, 200, 208.

While, as indicated by Appellant, a bone scan may look for an abnormal process, increased activity "may or may not indicate an abnormal finding." L.F. p. 248. While

increased uptake, as indicated by Appellant, may be a sign of bone cancer, it can also be a "typical finding," a "normal part of the aging process," from a benign cause or from infection, a fracture or arthritis. L.F. pp. 246, 247, 248, 249.

Throughout Appellant's Brief, he cites Dr. Zubres' deposition testimony as if Dr. Zubres is testifying as to what he saw in July, 1998, when he allegedly reviewed the bone scan. Appellant ignores the fact that Dr. Zubres is uncertain that he actually read the bone scan at issue (L.F. pp. 248-242), and that his testimony regarding what he sees in the bone scan is based upon his review of the bone scan at his deposition in October, 2004, more than six (6) years after the scan was originally interpreted and with the benefit of hindsight. (See generally deposition of Dr. Zubres at L.F. pp. 239-263). Appellant's recitation, throughout his Brief, as to what Dr. Zubres did or did not see in July, 1998, must be read with the understanding as just set forth. Dr. Zubres clearly testified as to how he read bone scans, and what judgment he applied, and this information must also be taken into consideration because it is through his expertise, judgment and interpretation that the <u>result</u> of the bone scan is determined.

Appellant, in his Brief, admits that Dr. Zubres assumed that the cause of any increased uptake was benign. Appellant then argues that because Dr. Zubres, when reviewing the bone scan during his deposition, may have seen increased uptake, he erroneously stated that the result was normal six years prior. This conclusion, however, simply ignores the testimony of Dr. Zubres, which is the only evidence before the Court on this issue. When asked about including reference to increased uptake in the findings, Dr. Zubres testified that whether he would refer to such things would depend on "the

case, and the clinical circumstances." L.F. p. 246. He testified there are certain instances in certain age groups where there are "pretty typical findings that can be normal in that age group or typical in that age group." L.F. p. 246. He specifically gave arthritis as an example. Dr. Zubres testified that whether he would report increased uptake in the legs even though a person is having a bone scan performed because of rib pain, would depend on the clinical history, what he feels is an atypical finding, and that he would direct himself to the areas that the clinician had asked him to look at with the most fervor. L.F. p. 246. When asked whether he would report on the entire body, Dr. Zubres explained "that depends on what I am asked to address my specific attention to and my clinical – you know, I have clinical decision to make as to – from my past experiences over 20 years, what I feel would be the appropriate areas to direct my attention to." L.F. p. 247. Dr. Zubres testified that in certain age groups "there are going to be areas of abnormal uptake that I would consider typical of those age groups." L.F. p. 247. Dr. Zubres was asked why he would not have included increased uptake in a report, and testified that: "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. p. 248.

Dr. Zubres also indicated that increased uptake may or may not indicate an abnormal finding. L.F. p. 248. And that "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. p. 249. Dr. Zubres

testified that he was "assuming that there was a benign cause for the uptake. . .Because there were additional areas of increased uptake, also, within the bone scan that demonstrated increased activity." L.F. p. 249. When asked why this scan was reported as normal, Dr. Zubres indicated: "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-aged men." L.F. p. 250. Finally, Dr. Zubres indicated that reviewing the bone scan in October, 2004, he would, not knowing what was known in 2004, still report the bone scan the same. L.F. p. 250.

The fundamental basis of Appellant's argument is that Dr. Zubres allegedly observed a fact (increased uptake), and did not report that fact to the patient, and therefore, failed to inform the patient. See page 18 of Appellant's Brief. What Appellant either fails to appreciate, or chooses to ignore, is that the results of the bone scan are the findings of Dr. Zubres applying his medical judgment based upon his training, qualifications and expertise. Respondents do not admit that Dr. Zubres was in anyway negligent, but that the only claim Mr. White has in this case, the cause of action that he is attempting to pursue, is grounded in Dr. Zubres' interpretation of the bone scan, and the basis for that claim or cause of action is in ordinary negligence, not failure to inform. Appellant's argument in this case, is nearly identical to the argument presented by the appellant in Davidson v. Lazcano, _____ S.W.3d _____ 2006 WL 2128697 (Mo.App ED 2006), and rejected by the Eastern District Court of Appeals which held: "By its plain language, the "failure to inform" exception of Section 516.105(2) applies to toll the statute of limitations in those situations where a healthcare provider has negligently failed

to inform the patient of the results of medical tests. Where test results have, in fact, been communicated, **regardless of their accuracy**, the exception in Section 516.105 has no application." (Emphasis added).

There are two possible scenarios with respect to this case. The first scenario is that Dr. Zubres completely missed the fact that there was increased uptake. If that was the scenario, Appellant appears to admit that this would be characterized as a "misdiagnosis" case, to which the two-year statute of limitations would apply and would act as a bar to the cause of action herein. The second scenario is that Dr. Zubres appreciated increased uptake, not only in the right knee, but as indicated by the reading of the bone scan in October 2004, throughout the joints in Mr. White's body. Under this scenario Dr. Zubres, being aware of Mr. White's age, and the fact that his complaints were of abdominal pain and rib pain, applied his medical judgment in determining that increased uptake, not only in the right knee but throughout the scan, which was apparently causing no symptoms, was one of those "typical findings" for a person of Mr. White's age, and resulted from a benign cause, and therefore Dr. Zubres interpreted the result as normal.

Under scenario #2, Appellant may complain about Dr. Zubres' interpretation and about Dr. Zubres' clinical judgment or medical judgment, but the complaint is still one involving the application of medical judgment, and a simple allegation of medical negligence as is governed by the two-year statute of limitations. While Appellant's arguments to try and avoid the statute herein are creative, they are not supported by the

facts of this case, and are not supported by the evidence which is before the Court and upon which this Court must pass judgment.

In his Brief, Appellant cites the case of Butler v Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995), to support his argument that the phrase "negligent failure to inform the patient of the test results" should be interpreted broadly herein. It should first be noted that the Butler case dealt with the word "conceal" in a fraudulent concealment exception to the ten year statute of limitations established in 516.095 RSMo. Appellant has admitted that this case does not involve an issue of fraudulent concealment when he admitted paragraph #10 of these defendants' Motion for Summary Judgment. L.F. p. 372. Second, the rules of interpretation discussed in the Butler case not only do not support Appellant's argument herein, but do support the position of defendants.

The Butler Court first noted that: "All cannons of statutory interpretation are subordinate to the requirement that the Court ascertain the intent of the legislature from the language used and give affect to that intent, if possible, and to consider the words used in their plain and ordinary meaning." Butler, 895 S.W.2d at 19. Recognizing that the meaning of a word depends to some extent on the context in which it appears, the Butler Court noted that the context of the word conceal was in a statute of limitations, and that: "The General Assembly is presumptively aware of this Court's prior decisions establishing rules for construing statutes of limitation and their expectations. Statutes of limitations are favored in the law and can not be avoided unless the party seeking to do so brings himself strictly within a claimed exception. Statutory exceptions are strictly construed and are not to be enlarged by the Courts upon consideration of apparent

hardship." Butler, 895 S.W.2d at 19-20 (citation omitted). Finally, the Butler Court held: "To construe the word 'conceals' broadly to mean merely 'cover-over' or to 'not inform' would, in effect, cause the exception to consume the statute of limitation and defeat the legislative purpose." Butler, 895 S.W.2d at 20.

The Butler Court, applying the rules of interpretation, construed the work "conceals" narrowly, and so as to not enlarge the statute of limitations therein. Appellant in this case wants to do the opposite. The Butler Court acknowledged that legislative intent and history can be considered, and that the Assembly is aware of the court's prior decisions, and applying those principals of interpretation, the legislative intent in passing subsection 2 of Section 516.105, was clearly to apply to the facts set forth in Weiss v Rojanasathit, 975 S.W.2d 113 (Mo. banc 1998), where, contrary to this case, the results of the medical tests performed were not communicated to the patient.

Perhaps most important in the Butler Court's rationale was the consideration that to construe the word "conceals" broadly would cause the exception to consume the statute of limitation and defeat the legislative purpose. Despite Appellant's protestations to the contrary, if Appellant's interpretation were to be adopted, the exception set forth in subsection 2 of Section 516.105 RSMo, would in fact consume the applicable statute of limitations. If Appellant's interpretation of Section 516.105(2) was adopted herein, then there would effectively be no statute of limitations for any failure to diagnose case which involved a test.

As discussed in these Respondents' original Legal Memorandum in Support of their Motion for Summary Judgment, almost every case alleging a failure to diagnose

based upon a test, relies upon something being in that test which was not allegedly appreciated by the physician or acted on by the physician. There would be no statute of limitation for failure to diagnose a fracture, because of necessity the fracture would have to be demonstrated on the film for plaintiff to make a case, and plaintiff could simply argue that the physician failed to report the true and accurate result, that being a fracture. The same rationale would apply to all such cases, whether the test at issue was an x-ray, a bone scan, a blood test or any other of the countless medical tests currently available.

Appellant's argument regarding interpretation of the word "inform" also ignores the rest of the sentence in 516.105(2) which includes the word "results." It is the results of the test, which are arrived at by the application of medical judgment, that must be relayed to the patient. If the results are wrong, if they are erroneously reached, if there has been a mistaken judgment made, subsection 2 of Section 516.105 does not apply, because giving the words in the section their plain and ordinary meaning, it only applies when the results are not communicated, not when those results might be incorrect.

Appellant goes on at great length regarding the rules of statutory interpretation in an effort to distort the text of section 516.105(2) RSMo. to help further his position. In doing so, Appellant relies upon the dictionary definition of the word inform. However, what is really at issue herein is what must the patient be informed of. With regard to the exception to the two year statute of limitations for medical negligence cases proffered by Appellant, the statute explicitly states that before the exception applies, there must be a negligent failure to inform the patient of medical test results. It is not enough that the patient is not informed. The failure to inform must be negligent. Certainly there could be

a case where a patient is not informed through no negligence of the physician. For example, the patient could relocate without advising the physician. The physician may attempt to inform the patient of the test results but is unable to do so. In such an instance, the physician would not be negligent in failing to inform the patient of the test results. Appellant argues that because the terms negligent and inform are both found in the statute that the legislature intended the exception to be applied more broadly than if the legislature had omitted the word negligent. However, the more logical result, using the plain meaning of the words and the rules of statutory interpretation, is that by using the word inform together with the word negligent that the legislature intended the exception to be applied more narrowly. That is, the exception will not be applied in cases where there is a failure to inform by itself, but only in cases where there is both a failure to inform the patient of test results and that such failure constitutes negligence.

Interestingly, Appellant does not address the dictionary definition of the word result. The very same dictionary used by Appellant defines result, when used as a noun, as "something obtained, calculation or investigation." *Merrian Webster's New Collegiate Dictionary, 10th Edition, 1996*. It further states "something results as a consequence, issue, or conclusion." When addressed in the context of section 516.105(2) RSMo., it is clear that the result means the physicians interpretation or conclusion using his judgment, expertise, and training. The bone scan <u>result</u> is the physicians conclusion or calculation. This is precisely what was communicated to Mr. White when he was informed that the bone scan was normal. Mr. White was informed of the test result, i.e. Dr. Zubres' conclusion regarding the bone scan. As such the exception to the statute of

limitations for medical negligence claims found in the section 516.105(2) RSMo. does not apply to Mr. White's cause of action.

POINT RELIED ON II

THE CIRCUIT COURT DID NOT ERROR BY ENTERING SUMMARY JUDGMENT ON THE GROUND THAT APPELLANT'S MEDICAL MALPRACTICE ACTION WAS BARRED BY THE GENERAL TWO YEAR STATUTE OF LIMITATIONS SET FORTH IN MO. REV. STAT. SECTION 516.105**,** BECAUSE DEFENDANTS DID ALLEGE FACTS, SUPPORTED BY SPECIFIC REFERENCES TO PLEADINGS, DISCOVERY, AND EXHIBITS DEMONSTRATING THE LACK OF A GENUINE ISSUE AS TO SUCH FACTS AND WHICH ESTABLISHED A RIGHT TO JUDGMENT AS A MATTER OF LAW IN THAT THE ONLY EVIDENCE PRESENTED AT THE TRIAL COURT WAS THAT THE RESULTS OF A BONE SCAN ARE REACHED BY THE PHYSICIAN APPLYING HIS JUDGMENT TO WHAT HE SEES, TAKING INTO ACCOUNT CLINICAL HISTORY, AND INTERPRETING THE BONE SCAN TO REACH IT'S RESULT, AND THE RESULT OF THE BONE SCAN WAS REPORTED TO THE APPELLANT HEREIN.

Appellant's argument in Point II, is essentially that the judgment of Dr. Zubres in not reporting increased uptake is the alleged negligent failure to report test results. First, this is the exact argument made by Appellant in Point I of his brief, see eg, Appellant's Brief at page 20, and this point has been fully addressed by Respondent in Point I of this brief, which is incorporated herein by reference. Second, Appellant's Point II ignores the fundamental fact that the only evidence before the trial court, and upon which Summary Judgment was based, was that the **results** of the bone scan at issue can only be reached after application by the physician of his medical judgment and interpretation of what he is

seeing. See *supra*, Argument and Citations to Legal File contained on pages 11 through 15 of Respondent's Brief. It is this evidence, and the uncontested evidence cited *supra*, that the results of the tests were relayed to the Appellant, that forms the prima facie showing, supported by the pleadings, discovery and exhibits, that defendants are entitled to summary judgment as a matter of law.

Summary Judgment was granted in this case based upon the statute of limitations, Section 516.105(2) RSMo, not upon a finding of standard of care. It is not required of defendants herein to establish standard of care as it applies to the application of Dr. Zubres' judgment, but only to establish that the results of the tests were in fact provided to Appellant. Appellant's attempt to interject a standard of care issue relating to the application of judgment in this case must fail because this is, in essence, an argument that Dr. Zubres applied the wrong standard of care in interpreting the results of the bone scan. As pointed out by the Circuit Court below, and in the Southern District Court of Appeals, this argument is one of misdiagnosis, clearly governed by the two year statute of limitations. See, e.g., Davidson v. Lazcano, ____ S.W.3d _____, 206 WL 2128697 (Mo.App ED 2006) ("By its plain language, the "failure to inform" exception of Section 516.105(2) applies to toll the statute of limitations in those situations where a healthcare provider has negligently failed to inform the patient of the results of medical tests. Where tests results have, in fact, been communicated, regardless of their accuracy, the exception in Section 516.105 has no application").

Appellant cites only one case in support of his argument. Doss v United States, 476 F.Supp. 630, 633 (Mo. ED. 1979). Doss, however, does not support Appellant's

argument. The Doss case found that the physicians negligently failed to perform tests which would have allowed them to make a diagnosis, and therefore failed to properly examine the plaintiff to make a diagnosis. *Id*. This holding in no way alters the fact that the only evidence in this case is that a radiologist, in order to arrive at the **results** of a bone scan, must apply his or her judgment to determine the results. If Appellant argues that the application of the radiologist's judgment is in error, Appellant is, despite his protestations to the contrary, arguing a misdiagnosis or misinterpretation of the test results, which is governed by the two year statute of limitations.

CONCLUSION

The exceptions to statutes of limitations are narrowly construed, not broadly. The plain and ordinary meaning of the language used by the legislature in subsection 2 of Section 516.105 RSMo, limits its application to situations where the results of tests are not communicated. In this case, there is no doubt that the results of the tests were communicated to Mr. White. Mr. White himself admits this, and there is no evidence to the contrary. Appellant attempts to avoid this obvious fact by arguing that the results, as interpreted by Dr. Zubres are not really the results. Presumably plaintiff would take away the physician's judgment interpreting bone scans, x-rays, etc. to arrive at a test result. The effect of this would be that the exception to the statute of limitations would consume the statute in the majority of cases. Such an illogical conclusion is not supported by the statutory rules of construction, is not supported by the plain an ordinary meaning of the words used by the legislature, and is not supported by the case law of this state. For these reasons, Appellant's claim of error and prejudice must fail and the Judgment herein must be affirmed.

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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.	)	

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the following document(s) were served upon all interested counsel on the 2nd day of November, 2006:

1. Respondents' Mark Zubres, D.O. and Zubres Radiology, Inc.'s Substitute Brief; and

2. Floppy Disk of Substitute Brief in Microsoft Word format.

VIA:

_____ Personal Service (Hand Delivered)

___X__ First Class Mail, Postage Prepaid

_____ Facsimile Transmission and Contemporaneous Mailing

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	)	
Defendants/Respondents.	)	

CERTIFICATION OF ATTORNEY OF RESPONDENT PURSUANT TO RULE 84.06(c)

COMES NOW, the attorney for Respondent, pursuant to Supreme Court Rule 84.06(c), and states to the Court as follows:

1. Respondent's brief complies with the limitations contained in Supreme Court Rule 84.06(b);

2. Respondent's brief contains 6,102 words as indicated by the word-processing system used to prepare said brief;

3. 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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