

IN THE MISSOURI SUPREME COURT

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

APPELLANT’S SUBSTITUTE REPLY BRIEF

ORAL ARGUMENT REQUESTED

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

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TABLE OF AUTHORITIES

Cases

Weiss v. Rojanasathit, 975 S.W.2d 113 (Mo. 1998). 6

Statutes and Rules

Mo. Rev. Stat. § 516.105(2) 4, 5, 6

ARGUMENT

A. Respondent Putnam Misrepresents Appellant's Claim As One Involving Negligent Interpretation Of The Bone Scan.

In his Substitute Brief, Respondent Putnam wrongly states that the negligent act of which Appellant complains is the *interpretation* of the bone scan as normal. Respondent Dr. Putnam's, Substitute Brief., pgs. 7, 9. This is a blatant misrepresentation of Appellant's case as pleaded in the Sixth Amended Petition and the briefing on this appeal. Respondent twice cites page 135, Vol. I, of the Legal File to support his mischaracterization of the operative act of negligence, but nowhere on that page is there even a hint that Appellant is alleging negligent interpretation. In fact, nowhere in either the Sixth Amended Petition or the briefing on appeal has Appellant suggested, either expressly or implicitly, that Dr. Zubres negligently interpreted the bone scan. To the contrary, Appellant has contended all along that Dr. Zubres correctly "observed and diagnosed increased uptake in the area of [Appellant's] right knee, but negligently failed to inform [Appellant] of this result." L.F. Vol. I, pg. 136; *see also*, Appellant's Substitute Brief, pg. 20. Rather than confronting Appellant's argument on the merits, Respondent desperately attempts to reframe Appellant's allegation in the hopes of misdirecting this Court away from the important

fact that Dr. Zubres correctly diagnosed disparate uptake in the knees but failed to report it. This is not a case about misinterpretation of tests results, it is about a failure to report test results.

B. Dr. Zubres' Alleged Use Of Medical Judgment Is Irrelevant If The Failure To Report Disparate Increased Uptake In A Bone Scan Is Negligent.

Respondents repeatedly cite “medical judgment” as the reason for Respondent Zubres’ failure to report the increased uptake he observed in Appellant’s bone scan, as though that phrase were an antidote for all acts of medical negligence. Whether Respondent Zubres used medical judgment does not resolve the statute of limitations issue if such judgment fell below the standard of care for a radiologist. The plain language of section 516.105(2) states that the “negligent failure to inform the patient of the results of a medical test” tolls the state of limitations for two years after the date of discovery. RSMo. § 516.105(2). Such language, when applied in its plain and ordinary sense, embraces a situation where a radiologist sees a potentially life threatening condition in a bone scan but fails report it because of an error in judgment, clerical mistake, or otherwise. So long as the radiologist’s failure to report what he observed is negligent, the patient’s action is tolled until such negligence is discovered. Any different

interpretation would largely eviscerate the exception of section 516.105(2) because a radiologist could always explain his failure to report test results as being the product of medical judgment. Respondent's offered no evidence that Dr. Zubres' medical judgment was within the standard of care. Absent such evidence, summary judgment should not have been granted.

Respondent Zubres also places emphasis on Appellant's physical complaints of abdominal and rib pain as part of the reason why increased uptake in the knees may not have been reported. Respondents' Mark Zubres, D.O. and Zubres Radiology Inc.'s Substitute Brief, pg. 18. This point is immaterial in that the bone scan in question was a whole body bone scan and Dr. Zubres admitted that Appellant was entitled to have the entire bone scan read and interpreted. L.F. Vol. II, pg. 246. It is possible that Respondent Zubres was focusing his attention largely on the rib and abdominal area when preparing his report, and, consequently, forgot to mention the increased uptake in the knee, but such a scenario still falls within the exception of section 516.105(2).

Respondent Zubres suggests that there are only two possible scenarios for analyzing this case: either (1) Dr. Zubres misdiagnosed increased uptake, or (2) Dr. Zubres saw increased uptake and exercised his medical judgment in assuming it was benign. Respondents' Mark Zubres, D.O. and Zubres

Radiology Inc.’s Substitute Brief, pg. 18. This analysis is short sighted and overlooks the obvious, third scenario that Appellant is advancing and which the evidence supports – *that Dr. Zubres saw and diagnosed increased uptake but failed to report it*. This is the scenario that falls squarely within the exception of § 516.105(2).

Respondents go to great lengths to argue that statutes of limitation are favorites of the law and must be strictly applied, even where, as here, strict application results in a hardship. It is not a hardship per se that Appellant is seeking to avoid in this case, but the same result that the Supreme Court found “distasteful” in *Weiss* and the Legislature sought to correct by enacting the “negligent failure to inform” exception of § 516.105(2). That exception clearly applies to the facts and circumstances of this case and the circuit court therefore erred in entering summary judgment in Respondents’ favor.

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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A copy of Appellant's Reply Brief and a disk containing the brief
were mailed on November 16, 2006, to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Reply 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 866.

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.
