

IN THE
MISSOURI SUPREME COURT

APPEAL NO. SC83890

CARLOS DUPREE, et al.
Plaintiffs/Appellants

vs.

BLAKE LAMBOURNE, et al.
Defendants/Respondents

Appeal from the Circuit Court of the City of St. Louis, Missouri
Case No. 972-08371
Honorable Robert H. Dierker, Jr., Circuit Judge
Upon Direct Transfer from the Eastern District
Court of Appeals

SUBSTITUTE BRIEF OF PLAINTIFFS/APPELLANTS
CARLOS DUPREE, et al.

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JURISDICTIONAL STATEMENT

This is an appeal from the Trial Court's Judgment and Order granting Defendant/Respondent Zenith Goldline Pharmaceuticals, Inc.'s Motion to Dismiss Plaintiffs/Appellants' cause of action against Defendant/Respondent, entered in the Circuit Court of the City of St. Louis by the Honorable Robert H. Dierker, Jr. This case fell within the general appellate jurisdiction of the Missouri Court of Appeals, Eastern District, as set forth in Article V, Section 3 of the Missouri Constitution. The Trial Court certified its judgment for immediate appeal. The Missouri Court of Appeals directly transferred this Appeal to the Missouri Supreme Court pursuant to Rule 83.02 MRCP.

STATEMENT OF FACTS

Plaintiffs/Appellants are the surviving minor children, mother and spouse of Debra Pankins, as well as the biological father of the twins Debra Pankins was carrying at the time of her death (LF 112-129). Debra Pankins and her twin fetuses died in April, 1996 (LF 112-129). Plaintiffs/Appellants filed their original Petition against Dr. Blake Lambourne and two hospitals in July, 1997 alleging that the deaths were the result of the failure to monitor and treat liver damage caused by the administration of the anti-hypertension drug Aldomet (generic name: Methyldopa). (LF 112-129).

At the time of the filing of the original Petition, the standard source for information for prescription drugs Physicians Desk Reference (PDR) listed only five (5) companies that manufactured this drug, Merck & Co., Inc., Lederle Standard, Mylan, Endo and Novapharm (LF 50-53). During discovery, a reference was found that indicated the Methyldopa taken by Debra Pankins was manufactured by a company known as "Zenith". At the time there was no drug manufacturer named "Zenith" or any permutation thereof listed in the PDR or similar sources (LF 50-53). The Missouri Secretary of State lists fifty-seven (57) companies with registered agents in the State of Missouri named "Zenith". None of which were drug manufacturers (LF 50-53).

Plaintiffs/Appellants, during discovery, were having difficulty locating Dr. Blake Lambourne, the prescribing physician. The hospital Defendants refused to provide Dr. Lambourne's address until finally ordered to do so on June 16, 1999 (LF 56). Plaintiffs/Appellants then scheduled the deposition of Dr. Lambourne in Sacramento,

California for September 15, 1999. In conversations with Dr. Lambourne at the time of his deposition, he disclosed that the manufacturer of the drug Methyldopa that he prescribed for Debra Pankins was Zenith-Goldline Pharmaceuticals, Inc.

Plaintiffs/Appellants, on October 13, 1999, moved for and received from the Trial Court an Order granting leave to add Zenith-Goldline Pharmaceuticals, Inc. as an additional Defendant (LF 57). The Plaintiffs/Appellants= Amended Petition, adding Zenith as a Defendant, was then filed on October 21, 1999 (LF 87-103).

Defendant/Respondent Zenith-Goldline Pharmaceuticals, Inc. is a Florida Corporation that has never had a registered agent in the State of Missouri (LF 33).

Plaintiffs/Appellants attempted to serve Defendant/Respondent Zenith-Goldline Pharmaceuticals, Inc. by mail in February, 2000 but Defendant/Respondent refused to accept service of process by mail (LF 83).

The Dade County Florida Sheriff served the summons and Amended Petition on Defendant/Respondent on March 31, 2000 (LF 84-85).

Defendant/Respondent did not file any responsive pleadings within 30 days of March 31, 2000. On May 2, 2000, Plaintiffs/Appellants filed a Motion for Default and Inquiry against Defendant/Respondent (LF 81-85). The Trial Court did not rule on the Motion for Default and Inquiry.

On May 5, 2000, Defendant/Respondent filed an Answer (without leave) to Plaintiffs/Appellants= Amended Petition (LF 70). In this Answer, Defendant stated "Plaintiff's claims are barred in whole or in part by the applicable statutes of limitations" (LF 74). On May 26, 2000, Defendant/Respondent filed its Motion to Dismiss alleging

that the wrongful death statute of limitations under “Section 508.100 RSMo.” barred Plaintiffs/Appellants= cause of action against Defendant/Respondent. Section 508.100 RSMo. is not a Statute of Limitations. The Hon. Robert H. Dierker, Jr., on August 8, 2000, entered an Order sustaining Defendant/Respondent=s Motion to Dismiss and dismissed Plaintiffs/Appellants= cause of action against only Defendant/Respondent Zenith-Goldline (LF 33-35). It is this Order from which Plaintiffs/Appellants appeal. The Trial Court certified its Order of Dismissal as final and appealable as there was no just cause of delay (LF 35). Plaintiffs/Appellants= cause of action against Dr. Blake Lambourne and the two hospitals is pending.

The Missouri Court of Appeals for the Eastern District transferred this Appeal to the Missouri Supreme Court pursuant to Rule 83.02 MRCP, because of the general interest and importance of this issue.

POINTS ON APPEAL

I

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS/
APPELLANTS= CAUSE OF ACTION AGAINST DEFENDANT/
RESPONDENT AS BEING BARRED BY THE WRONGFUL DEATH
STATUTE OF LIMITATIONS IN THAT AS DEFENDANT/RESPON-
DENT HAD NO AGENT FOR SERVICE OF PROCESS IN THE
STATE OF MISSOURI, THE WRONGFUL DEATH STATUTE OF
LIMITATIONS WAS TOLLED BECAUSE PERSONAL SERVICE
COULD NOT BE HAD UPON DEFENDANT/RESPONDENT "IN
THE STATE".

II

THAT THE TRIAL COURT ERRED IN DISMISSING
PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION AGAINST
DEFENDANT/RESPONDENT AS BEING BARRED BY THE
WRONGFUL DEATH STATUTE OF LIMITATIONS IN THAT
DEFENDANT/RESPONDENT WAIVED THE PROTECTION OF
THE STATUTE OF LIMITATIONS.

III

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION AGAINST DEFENDANT/RESPONDENT IN THAT A THE TOLLING PROVISIONS OF THE MISSOURI WRONGFUL DEATH STATUTE OF LIMITATIONS DO NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

IV

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION AGAINST DEFENDANT/RESPONDENT IN THAT IF THE TOLLING PROVISIONS OF SECTION 537.100 VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION THEN THE ENTIRE SECTION MUST BE DECLARED VOID, RESULTING IN THE APPLICABLE FIVE YEAR STATUTE OF LIMITATIONS CONTAINED IN SECTION 516.120.

ARGUMENT I

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS/APPELLANTS= CAUSE OF ACTION AGAINST DEFENDANT/RESPONDENT AS BEING BARRED BY THE WRONGFUL DEATH STATUTE OF LIMITATIONS IN THAT AS DEFENDANT/RESPONDENT HAD NO AGENT FOR SERVICE OF PROCESS IN THE STATE OF MISSOURI, THE WRONGFUL DEATH STATUTE OF LIMITATIONS WAS TOLLED BECAUSE PERSONAL SERVICE COULD NOT BE HAD UPON DEFENDANT/RESPONDENT "IN THE STATE".

The controlling Statute of Limitations for wrongful death claims in Missouri is Section 537.100 which provides:

"Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent

from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him in the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation".

Defendant Zenith Goldline Pharmaceuticals, Inc. is and has been a Florida corporation that has never had an agent for service process in the State of Missouri and therefore the Statute of Limitations has never begun to run against this Defendant.

Section 537.100 is clear and unequivocal. It states that the Statute of Limitations does not begin to run "if any defendant, whether a resident or non-resident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state so that personal service cannot be had upon such defendant in the state ...". Defendant Zenith Goldline Pharmaceuticals, Inc. was clearly a non-resident at

the time the cause of action accrued and clearly could not be served "in the state". Therefore, the Statute of Limitations has never begun to run against Defendant/Respondent Zenith Goldline Pharmaceuticals, Inc.

The Trial Court entered its Order based in large part upon an incorrect reading of Haver v. Bassett, 287 SW2d 342 (Mo.App. 1956). In the Haver supra decision, the Court ruled that the Statute of Limitations in a wrongful death action against a non-resident motorist was not tolled. The Haver decision, however, is readily distinguishable from the present case. Haver was a wrongful death case involving a non-resident motorist who was amenable to service in the State of Missouri pursuant to the non-resident motorist Statute, Sections 506.210 et seq. RSMo. Under this Statute, a non-resident motorist automatically appoints the Secretary of State as his agent for service of process, so then the motorist may be served "in this state". The Haver Court emphasized that it was basing its decision upon the fact that the non-resident motorist Statute allowed service on the Secretary of State, and therefore the defendant in the Haver case was subject to service "in the State of Missouri". Rather than supporting the Trial Court's Order, the Haver decision, could easily be read to support Plaintiff's contention that the wrongful death Statute of Limitations does not begin to run until the defendant is subject to service "in the state". The Haver court cited Peterson v. Kansas City, 23 SW2d 1045, for the proposition that "service on an agent authorized to accept such service constitutes personal service upon the principal of that agent". The Haver Court then placed a great deal of emphasis upon the fact that under the statutory scheme, service upon a non-

resident motorist was made upon their agent (The Secretary of State) "in the State of Missouri".

It is important to remember that, unlike the situation in Haver, there is no Missouri Statute authorizing service on Defendant/Respondent Zenith Goldline Pharmaceuticals, Inc. "in the State of Missouri", nor a statute appointing anyone "in the State of Missouri" to accept service upon Defendant/Respondent. The phrase "in the State of Missouri" cannot be ignored. Each word of a statute should be given meaning. In re Fabius River Drainage District, 35 S.W.3d 473 (Mo. App. E.D. 2000). It must be presumed that every word of a statute have effect. St. Louis County v. BAP, 25 S.W.3d 624 (Mo. App. E.D. 2000).

Nor should the phrase "in the State of Missouri: be interpreted to apply to service anywhere but "in the State of Missouri." Where the language of a statute is clear and unambiguous, there is no room for construction. PAC-ONE v. Daly, 37 S.W.3d 278 (Mo. App. E.D. 2000). In interpretation of statutes courts are to give words their plain and ordinary meaning. J. S. v. Beaird, 28 S.W.3d 875 (Mo. 2000).

Defendant/Respondent would have this Court interpret this section so as to ignore the phrase "in the state". Defendant/Respondent argues that as the long-arm statute, Section 506.510 RSMo. provides that service outside the state "shall have the same force and effect as though the process has been served within this state", then service under the long-arm statute equates to service "in the state" for the purpose of Section 537.100. This argument is flawed in two ways. First, Section 506.510 RSMo. merely grants authenticity to personal service performed outside the state upon an

individual or the managing director or registered agent of a corporation, once that service actually occurs. This section was not designed to modify or limit Section 537.100 in any manner.

Second, inasmuch as Section 506.510 applies to long-arm service upon both individual and corporate Defendants, then Defendant/Respondent's argument would have this Court find that all Defendants, anywhere, at any time, were subject to service "in this state". Such a finding would annul the tolling provisions of both the wrongful death Statute of Limitation as well as the general tolling statute.

A statute must not be interpreted narrowly if such an interpretation would defeat the purpose of the statute. LC Development Co. v. Lincoln Co., 26 SW3d 336 (Mo. App. E.D. 2000).

To interpret this statute so as to void tolling against those defendants subject to long-arm service would cause the tolling provisions of the statute to be a meaningless act. The Courts should not presume that the legislature intended to create a meaningless act. Murray v. Missouri Highway & Transportation Commission, 37 SW3d 228 (Mo. 2001). The presumption is that the legislature did not intend for any part of a statute to be without meaning or effect but intended its act to have applicability and effect. Stiffelman v. Abrams, 655 SW2d 522 (Mo. 1983).

Defendant/Respondent places a great deal of emphasis upon the phrase "so that" in the tolling provisions of Section 537.100. Defendant/Respondent asks this Court to interpret the phrase "so that" as requiring some malicious behavior on the part of the Defendant in hiding its existence or location. If the Legislature had intended to create

such a requirement in the tolling provisions it could have done so openly and obviously and not have hidden this intent in such a way that it takes a strained interpretation of the statute to achieve this result.

Instead, Plaintiffs/Appellants suggest that the Legislature, by using the phrase “so that personal service cannot be had upon such Defendant in this State” intended to allow personal service upon an agent for service of process or upon the Secretary of State as an authorized agent. Such an interpretation would allow all sections of the statute to have purpose without conflicting with any other section. The Legislature wanted to avoid the situation faced by states such as North Dakota, where the Court had interpreted the absence of such a phrase, as meaning the statute should be tolled, even when the foreign corporation has a registered agent for service of process actually in the state. eg., Loken v. Magrum, 380 NW2d 336 (N.D. 1986).

There are very few decisions in this state interpreting the tolling provisions of the wrongful death statute. Some insight has been provided, however, by the Courts in their interpretation of the tolling provisions of the non-death Statute of Limitations. This Section 516.200 RSMo. reads as follows:

"If at any time when any cause of action herein specified accrues against any person who is a resident of this state, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of

his absence shall not be deemed or taken as any part of the time limited for the commencement of such action (R.S. 1939, Section 1023)".

This non-death tolling provision only applies when a defendant was first a resident of the state and then vacates the state. It clearly does not apply to a defendant who never was a resident of this state. The non-death tolling Statute also does not have the requirement contained in the death tolling Statute that the defendant must be amenable to personal service "in the state". The tolling provisions in the wrongful death Statute of Limitations, in contrast, clearly applies to a defendant who was never a resident of the State of Missouri and provides that the Statute is tolled until the non-resident defendant is subject to service "in the state".

The Eastern District Court of Appeals in Williams v. Malone, 590 SW2d 879 (Mo.App. 1980), held that in the context of a non-death tolling Statute, the Statute of Limitations was not tolled against a defendant who vacated the state but whose location was clearly known by plaintiff. The Williams Court specifically distinguished their decision from a wrongful death tolling issue by saying such a situation "might be distinguished because the latter Statute (the death Statute) did provide the period of limitations would be tolled when the defendant was absent so personal service cannot be had upon such a defendant in the state" Id. at 881.

In Bethke v. Bethke, 676 SW2d 46 (Mo.App. 1984), the Eastern District Court of Appeals merely upheld its previous holding in Williams.

The Missouri Supreme Court then in Poling v. Morita, 717 SW2d 520 (Mo.Banc. 1986) specifically rejected the holdings of Williams and Bethke and held that the non-death tolling provisions were clear and unambiguous in tolling the Statute of Limitations for the period in which a defendant is out of the state. The Supreme Court then stated that the Williams Court had engaged in "judicial legislation" and should not have created an exception where one did not exist but should rather have accepted the Statute at face value. The Poling Court then stated that whether the defendant's location is known or whether he is amenable to service outside the state is irrelevant to the issue of the Statute of Limitations being tolled.

In the present case, the Trial Court used exactly the same basis for its Order that was disapproved by the Supreme Court in Poling. As the Poling Court stated, "if the legislature intended to make the [tolling provisions] (sic) of the statute impotent in cases where an absent defendant can be sued via the long arm statute, it could have expressly done so. For the Court to so construe Section 516.200 would be plain judicial legislation" Id. At 522.

The Poling Court then recognized the purpose behind tolling the time period in which a defendant is out of state by saying:

Practical concerns also justify a literal interpretation of Section 516.200. Obtaining non-defective service under a long-arm statute is difficult, both with respect to finding the out-of-state defendant and in getting the authorities to serve the defendant when he is found. The Williams decision recognized these

problems and suggested the trial court might grant relief on pleadings and proof. The General Assembly, though, may have very well considered such difficulties of out-of-state service itself at the time it enacted the long-arm statute and would justifiable determined that it would be inequitable to amend Section 516.200 to require a plaintiff to chase the defendant into another state in order to avoid the bar of the statute of limitations. Thus, the General Assembly may have intended that enactment of the long-arm statute should not disturb the literal application of Section 516.200.

The concerns expressed by the Poling Court occurred in the present case where the Plaintiffs had difficulty in locating and serving this subsidiary of a multi-national corporation located thousands of miles from Missouri. It should also be noted that the Poling decision came 30 years after the Haver decision.

The Court of Appeals for the Eastern District as well as the Defendant attempt to distinguish Poling because it refers to Section 516.200, the non-death tolling statute, rather than the wrongful death tolling statute.

The issue determined by the Poling Court did not hinge upon whether the defendant was ever a resident or whether the cause of action sounded in tort or wrongful death. Rather, the issue determined by the Poling Court was that an exception for long-

arm service should not be judicially added to the tolling provisions when the State Legislature had chosen to not add such an exception.

In O=Grady v. Brown, 645 SW2d 904 (Mo.Banc. 1983), the Missouri Supreme Court held that the Statute of Limitations contained within the wrongful death statute should not be construed so as to defeat the purpose of the statute. The O=Grady Court then said the three purposes of the wrongful death statute are "(1) to provide compensation to bereaved plaintiffs for their loss; (2) to ensure that tortfeasors pay the consequences of their actions; and (3) generally to deter harmful conduct which might lead to death".

In 1992, the Western District Court of Appeals in Howell v. Murphy, 844 SW2d 42 (Mo.App. 1992) reiterated the O=Grady holding and overturned the dismissal of a wrongful death action filed more than three years after the death. In so doing, the Howell Court ruled that the Statute of Limitations "was tolled until the plaintiffs could, by reasonable diligence, ascertain that they had an action" Id. at 47. Plaintiffs/Appellants recognize that the Howell decision involved the concealment of a murder but suggest that the principal of allowing the tolling of the wrongful death Statute of Limitations to accomplish the purposes of the statute is a global principal.

The Eastern District Court of Appeals implied that Defendants subject to long-arm service are subject to service "in the State of Missouri" and actions against them are not tolled due to their absence from the state. Such a holding would defeat the purpose of the tolling statute and render the tolling statute void. The only purpose for such a strained interpretation is an ineffective attempt to avoid a constitutional challenge

to Section 537.100. In doing so, however, the Court of Appeals kills the very statute it would try to protect. In Rademeyer v. Farris, U. S. District Court, E.D. Mo., 4:99CV1770 SNL, Judge Limbaugh held that the Missouri Courts could not incorporate the long-arm service statute into the tolling provisions of the Statute of Limitations. Judge Limbaugh held that “The court does not have the authority to rewrite the statute, and that is essentially what it would be doing.” He further stated “If the court chose to incorporate the long-arm statute into its interpretation of ' 516.200 it would be overreaching its authority.” While Plaintiff/Appellant disagrees with Judge Limbaugh’s holding that the tolling provisions are unconstitutional, his statutory interpretation is sound. The Rademeyer decision is currently on appeal before the Eighth Circuit Court of Appeals.

It may be felt that the results of the tolling provision create an undue hardship on Defendant. Plaintiffs/Appellants suggest, however, that the tolling provisions in our Statute of Limitations are a reasonable attempt by the State Legislature to equitably balance the interests of all parties. As the Poling supra Court noted, it is often difficult to identify, locate and serve a non-resident tortfeasor.

Numerous tolling provisions in Missouri’s Statute of Limitations toll the application of the statutes for a considerable length of time. Section 516.170 provides for tolling of twenty-one years plus the limitations period in the case of infancy. The same section provides for tolling for a Plaintiff who is mentally incapacitated for whatever length of time the Plaintiff is incapacitated. This tolling even applies if a guardian has

been appointed for the incompetent Plaintiff. Mason v. Ford Motor Co., 755 F2d 120 (8th Cir. 1984).

The prior tolling available to an imprisoned Plaintiff was held to be available during the entire period of imprisonment, with the limitations period beginning on the first day of parole. Jepson v. Stubbs, 555 SW2d 307 (Mo. 1977).

While the literal construction of the tolling provision could extend the Statute of Limitations for a lengthy time, a literal construction of the same Wrongful Death Statute of Limitations has caused harsh results to Plaintiffs. In Bregant v. Frank, 724 SW2d 336 (Mo. App. 1987), this Court literally construed this statute and upheld the dismissal of an infant's wrongful death claim on the basis that the Wrongful Death Statute of Limitations does not specifically toll its provisions for infancy. The Bregant court then stated "the Courts of this State have long recognized that where there is a special statutorily created Statute of Limitations, the Courts cannot create judicial exception." Likewise, this Court should not create a judicial exception to the tolling provisions of the same statute.

It must also be remembered that if Debra Renee Pankins and the twin fetuses had not died but merely had been injured, then Defendant Zenith Goldline Pharmaceuticals, Inc. would be subject to a five (5) year Statute of Limitations tolled by the infancy of two of the Plaintiffs.

ARGUMENT II

**THAT THE TRIAL COURT ERRED IN DISMISSING
PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION
AGAINST DEFENDANT/RESPONDENT AS BEING
BARRED BY THE WRONGFUL DEATH STATUTE OF
LIMITATIONS IN THAT DEFENDANT/RESPONDENT
WAIVED THE PROTECTION OF THE STATUTE OF
LIMITATIONS.**

A petition and summons was mailed to the Defendant in February 2000 (LF 83). Personal Service was effected on Defendant by the Dade County Sheriff's Office on March 31, 2000 (LF 84-85).

Defendant's Answer containing its Affirmative Defenses of the Statute of Limitations was first filed on May 5, 2000 (LF 70-78). Defendant neither asked for nor received leave to file its Answer out of time. On May 2, 2000, Plaintiffs/Appellants filed a Motion for Default and Inquiry against Defendant/Respondent (LF 81-85). The Trial Court did not rule on the Motion for Default and Inquiry. The affirmative defense raised in the Answer was "Plaintiff's claims are barred in whole or in part by the applicable statute of limitations" (LF 74).

The statute of limitations is an affirmative defense that must be timely raised or it is waived. Adams v. Inman, 892 SW2d 651 (Mo. App. W.D. 1994). Storage Masters-Chesterfield, LLC v. City of Chesterfield, 27 SW3d 862 (Mo. App. E.D. 2000).

Both Rule 55.27 MRCP and Section 509.090 RSMo. require that all affirmative defenses be filed within 30 days of service.

Even if the Defendant/Respondent's assertion of the limitations defense in its Answer had been timely, such a defense would have been waived as not specifically pled. The defense raised by Defendant/Respondent was "Plaintiff's claims are barred in whole or in part by the applicable statutes of limitations."

In Rebel v. Big Tarkio Drainage District, 602 SW2d 787 (Mo. App. 1980), the court held that the failure to specifically plead which statute of limitations Defendant is relying upon waives the defense. The court in Heintz v. Swimmer, 922 SW2d 772 (Mo. App. E.D. 1996) reversed a dismissal by holding that the affirmative defense of "barred by the applicable statutes of limitations" did not plead the limitation defense with sufficient specificity and thus waived the defense. The Heintz court relied upon several prior decisions including Livingston v. Webster County Bank, 868 SW2d 154 (Mo. App. 1994).

Defendant/Respondent did, on May 26, 2000, file a Motion to Dismiss specifying Section 508.100 as the statute of limitations barring Plaintiff's action (LF 59). Section 508.100 is not a statute of limitations but is rather a statute disqualifying judges due to a conflict of interest.

Therefore, Defendant/Respondent has waived the defense of the Statute of Limitations for two reasons. First, neither the Answer nor the Motion to Dismiss raised the defense in the first thirty days after service and there was no leave granted to raise the defense out of time. Secondly, Defendant/Respondent in both its Answer and its Motion

to Dismiss failed to specifically cite Section 537.100 RSMo. as the Statute of Limitations upon which it was relying.

ARGUMENT III

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION AGAINST DEFENDANT/RESPONDENT IN THAT A THE TOLLING PROVISIONS OF THE MISSOURI WRONGFUL DEATH STATUTE OF LIMITATIONS DO NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Defendant/Respondent argues that the tolling provisions of 537.100 is unconstitutional as it places a greater burden upon non-residents than it does upon residents.

Defendant/Respondent cites Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F2d. 1064 (8th Cir. 1992) in support of its argument that the tolling provisions of 537.100 RSMo. violate the commerce clause of the U.S. Constitution. The Bottineau supra Court held that a North Dakota tolling statute violated the commerce clause of the United States Constitution as it imposed an unreasonable condition that placed a greater burden upon non-residents than upon residents.

The North Dakota statute at issue, N.D. CENT. Code Section 28-01-32 provided as follows:

If any person shall be out of this state at the time a cause of action accrues against him [or her], an action on such cause of action may be commenced in this state at any time within the term limited in this chapter for the bringing of an action on such cause of action after the return of such person into this state. If any person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more after a cause of actions hall have accrued against him [or her], the time of his [or her] absence shall not be taken as any part of the time limited for the commencement of an action on such cause of action.

The Defendant's reliance upon Bottineau is misplaced. The North Dakota tolling statute provided for absolute tolling. There were no exceptions for service upon an in-state agent for service of process, or the Secretary of State. The North Dakota Courts had constantly interpreted this tolling provisions as not containing an exception for service upon an appointed agent for service of process that actually resided in the State of North Dakota. Loken v. Magrum, 380 NW2d. 336 (N.D. 1986). The Defendant corporation in Bettineau had actually appointed an agent for service of process in the State of North Dakota. "WCC argues the tolling statute does not apply because it had designated a local agent for service of process...." Id. at 1070. It was this burden of requiring the Defendant's actual presence in the State, rather than substitute presence, that bothered the Bettineau Court. The Bettineau Court concluded that the North Dakota requirement of actual presence in the State was an unconstitutional burden and then stated "we think the state's legitimate interest could adequately be protected by a

narrower statute that would toll the running of the statute of limitations” Id. at 1074.

It was the extreme burden placed upon interstate commerce by the North Dakota statute’s requirement of actual presence in the state that caused the Bottineau Court to find that the extreme burden on interstate commerce outweighed the state’s legitimate interest.

The Missouri statute places a much smaller burden by excepting service upon a Missouri based agent for service of process. This exception is contained in the language “so that personal service cannot be had upon such Defendant in the State....” The creation of this exception, if service is made upon a Missouri based agent for service of process (or the Secretary of State), is the purpose behind this language. The appointment of an agent for service of process is an inexpensive and simple procedure when compared to the requirement of actual presence in the State. Many corporations retain the services of businesses such as CT Corporation who provide, for a nominal fee, registered agents in every state. This nominal expense does not rise to the level of an “undue” burden when compared to the State’s interest.

The Eastern District Court of Appeals in the opinion below held that Bendix Autolite Corp. v. Midwestern Enterprises, Inc., 486 US 888 (1988) stands for the proposition that the requirement of appointing an agent for service of process, in order to toll a statute of limitations, is an unreasonable burden on interstate commerce. The Bendix supra Decision, however, can be distinguished. In Bendix, the Defendant corporation would, under Ohio law, have subjected itself to general jurisdiction in the State of Ohio, simply by the act of appointing an agent for service of process in that state. In Missouri, the registration with a state agency does not automatically grant general

jurisdiction over the foreign corporation, as there must also be minimum contacts with the State of Missouri. Anderson Trucking Service v. Ryan, 746 SW2d. 647 (Mo. App. 1988). As the 8th Circuit recognized in Knowlton v. Allied Van Lines, 900 F2d. 1196 (8th Cir. 1990), the determination as to whether the act of appointing a registered agent confers jurisdiction over the foreign corporation is a question of state law. The Fifth Circuit in Wenche Siemer v. LearJet Acquisition Corp., 966 F2d. 179 (5th Cir. 1992), held that the mere act of appointing a registered agent was not sufficient to confer jurisdiction over a foreign corporation. The Missouri Court of Appeals for the Eastern District in State ex rel. K-Mart v. Hollinger, 1998 WL 327185 (reversed on other grounds) 986 SW2d. 165 (Mo. 1999), held that the Wenche supra analysis applied to Missouri and that the mere act of appointing an agent for service of process does not grant the State of Missouri jurisdiction over a foreign corporation.

Thus, the concern expressed by the Bendix Court is not present in the State of Missouri. The minimal burden of the appointment of a registered agent, whose appointment does not grant general jurisdiction, is far outweighed by the state's interest in allowing its residents sufficient opportunities to locate and identify foreign corporations or residents, who are more difficult to identify and locate, than are Missouri residents. Nor would this concern apply to Defendant Zenith Goldline as this Defendant has admitted that it "regularly conducts business in the State of Missouri" (LF 70) and would thus be subject to the jurisdiction of the Missouri Courts under the Missouri Long-Arm Statute.

Appellants/Plaintiffs also suggest that Defendant/Respondent Zenith Goldline has waived the issue of the constitutionality of the tolling provisions of 537.100 RSMo. Defendant /Respondent first raised the issue of the constitutionality of the tolling provision in a supplemental memorandum to his Motion to Dismiss filed July 28, 2000, some four months after service and over two months after the filing of its answer. Defendant/Respondent was also in default at the time of the filing of the Answer. Defendant/Respondent's Answer is completely silent as to any allegation that the tolling provisions of Section 537.100 violate the United States Constitution in any manner (LF 70-78). Both Rule 55.27 MRCP and Section 509.090 RSMo. require that all affirmative defenses be filed within 30 days of service. More importantly, however, is the fact that the Order of Dismissal is silent as to the constitutionality of the tolling provisions (LF 33-35). Plaintiffs/Appellants suggest that in order to preserve this issue for appeal, Defendant/Respondent had a duty to file a cross appeal of Judge Dierker's Order of Dismissal.

Recently, Judge Limbaugh in Rademeyer v. Farris, United States District Court E.D. Mo., 4:99CV17700 SNL, held that the tolling provisions in the non-death Statute of Limitations violated the commerce clause of the United States Constitution. This decision is currently on appeal before the Eighth Circuit Court of Appeals. Judge Limbaugh, in the Rademeyer decision did not conduct an independent analysis of the Missouri Statutes but merely applied the Bendix holding as a blanket holding. The Rademeyer opinion fails to recognize that it was the automatic granting of General Jurisdiction by the registering of an agent for service that was the "undue burden on

interstate commerce” that worried the Bendix Court. This issue was not discussed in the Rademeyer opinion.

Even the Bendix Court did not intend its decision to apply as a blanket prohibition of all tolling statutes but only in “the particular case before us.” 486 U.S. at 894, 109 S. Ct. at 2222. The Bendix Court was concerned with tolling provisions that create an undue burden upon interstate commerce which “exceeds any local interest that the state might advance.” Id. at 488 U.S. 888, 108 S. Ct. at 2221. It was the Ohio statutory scheme of not tolling unless there was a registered agent and then declaring that appointment of a registered agent was a grant of general jurisdiction over the Defendant, even in the absence of minimum contacts, that concerned the Bendix Court. The Court felt that it was this “end run” around the minimum contacts due process requirement that created the undue burden. Id. at 486 U.S. 892-893, 108S. Ct. at 2221. It was this “Hobson’s Choice” of conceding to general jurisdiction versus tolling of the Statute of Limitations, faced by foreign corporations, that the Bendix Court found to be an undue burden on interstate commerce.

Even the post-Bendix Ohio Courts have declined to apply Bendix as a blanket ban on tolling provisions. In Wise v. Morrison, 2000 Ohio App. LEXIS 3500 (Ohio 2000). The Court held the Ohio tolling statute did not unreasonably burden interstate commerce when it extends Statute of Limitations for a “reasonable period of time.” Other Ohio Courts have continued to toll the Statute of Limitations for the time a Defendant spent out of state without applying Bendix in a blanket manner. See Lovejoy v. Malek, 122 Ohio

App. 3d 558, 702 NE2d. 457 (Ohio App. 1997). Tesar v. Hallas, 738 F. Supp. 240 (N.D. Ohio 1990).

The commerce clause does not automatically invalidate all state restrictions on commerce. States retain the authority to regulate matters of legitimate local concern which in some way may affect or even regulate interstate commerce. Kassel v. Consolidated Freightways, 450 U.S. 662, 101 S. Ct. 1309 (1981).

The commerce clause only bars state statutes in two situations. First, where the law directly regulates or discriminates against interstate commerce taking place wholly outside its borders. Healy v. Beer Inst., 491 U.S. 324, 109 S. Ct. 2491 (1989). The wrongful death tolling statute applies equally to all entities whether they were, at the time of the accrual of the cause of action, residents or non-residents of the state.

The second bar is where the regulation operates in an even-handed non-discriminating manner to effectuate a legitimate state interest “and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, 397 U.S. 137, 90 S. Ct. 844 (1970).

The U.S. Supreme Court in Exxon Corp. v. Maryland, 437 U.S. 117, 98 S. Ct. 2207 (1978) stated “the fact that the burden of a state regulation falls on some interstate companies does not by itself establish a claim of discrimination against interstate commerce.” 437 U.S. at 126, 98 S. Ct. at 2214. The burden is upon the party challenging the statute to prove that the burden upon interstate commerce is “clearly excessive compared to the local benefit.”

Defendant/Respondent has not shown that the trivial burden of appointing a registered agent is “clearly excessive compared to the local benefit.”

ARGUMENT IV

THAT THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS'/APPELLANTS' CAUSE OF ACTION AGAINST DEFENDANT/RESPONDENT IN THAT IF THE TOLLING PROVISIONS OF SECTION 537.100 VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION THEN THE ENTIRE SECTION MUST BE DECLARED VOID, RESULTING IN THE APPLICABLE FIVE YEAR STATUTE OF LIMITATIONS CONTAINED IN SECTION 516.120.

If the Court were to find that the tolling provisions of Section 537.100 are constitutionally deficient, then Plaintiffs/Appellants suggest that the entire statute should be declared void.

Section 537.100 contains 226 words. The tolling provisions of the statute constitute over 200 of the 226 words. Clearly, the State legislature when enacting this special Statute of Limitations was concerned with the need for tolling of the statute if the Defendant left the state and was thus more difficult to locate and identify. Eighty-seven of the words in Section 537.100 relate solely to tolling the statute for any period of time during which the Defendant was out of the state.

This Court in City of Charleston ex. rel Brady v. McCutcheon, 227 SW2d. 736 (Mo. 1950) held that if the invalid portion of a statute is so connected with the residue as

to furnish consideration for enactment of the residue, and as to warrant belief that the invalid portion and residue were intended as a whole, and that legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire statute must fall.

The legislative history for Section 537.100 indicates that the tolling provisions have existed in this Statute since at least 1909 (Section 5429). This Section has been amended several times since 1909. Some amendments have been technical corrections, others have extended the time of the Statute of Limitations. All such amendments, however, have left the tolling provisions for non-residency intact. The Missouri Legislature has not, in at least the last ninety years, enacted a statute of limitations without a tolling provision. It is clear that the State Legislature would not have enacted this Statute of Limitations without a tolling provision to balance out the interests of the parties.

In Millsap v. Quinn, 785 SW2d 82 (Mo. 1990), this Court stated that the test for upholding balance of provisions after excision of invalid portion depends on whether remainder is in all respects complete and susceptible of Constitutional enforcement and one which people would have nevertheless adopted had they known excluded portion was invalid.

The test is not merely one of whether the remaining portion is complete and enforceable. The Courts have recognized that the legislative process is one of negotiation and balance. Therefore, the Missouri Courts have held “If invalid portion of a statute is so connected with residue of statute as to furnish consideration for enactment

of the residue, and as to warrant belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then entire act must fall.” State ex. rel Transport Mfg. v. Bates, 224 SW2d. 996 (Mo. 1949).

This test applying the intent of the Legislature has been used to invalidate entire statutes in numerous situations. State ex rel. McNary v. Stussie, 518 SW2d. 630 (Mo. 1974). (Age of Majority) Petitt v. Field, 341 SW2d. 106 (Mo. 1960) (exclusory provision of sale of checks laws) State ex inf Hales v. MoPAC, 19 SW2d. 879 (Mo. 1929) (equipment of caboose cars).

The opinion in Petitt v. Field, supra. is of particular assistance in this analysis. The Petitt Court after an excellent examination of the general issue held that, if by their exclusion of a Section of a Statute, individuals could be licensed, who the legislature had intended to not be licensed, then the entire licensing Statute must be voided. The issue at bar is analogous. If this Court were to determine the tolling provisions of Section 537.100 are invalid, then numerous wrongful death claims would be barred that were not intended by the Legislature to be barred. The legislative intent of the totality of Section 537.100 would then be corrupted. This is especially true as the most recent amendments to Section 537.100 have served to extend the filing period. Obviously, it is the legislative intent to expand the opportunity for wrongful death claimants to assert their claims.

If Section 537.100 were to be voided in its entirety, then Plaintiffs/Appellants suggest that the five year Statute of Limitations contained in Section 516.120 would then be the applicable Statute of Limitations.

CONCLUSION

In conclusion, Plaintiffs/Appellants respectfully suggest that the Trial Court's Order of Dismissal of their cause of action against Defendant/Respondent Zenith-Goldline Pharmaceuticals, Inc. should be reversed.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of September, 2001, a copy of the foregoing was mailed, postage prepaid, to: G. Keith Phoenix, Esq., Sandberg, Phoenix & Von Gontard, Attorneys for Defendant Zenith Goldline Pharmaceuticals, Inc., One City Center, 515 North Sixth Street, 15th Floor, St. Louis, Missouri 63101; Ann Verrett, Esq., Armstrong, Teasdale, L.L.P., Attorneys for SSM Health Care Central Region d/b/a St. Mary's Health Center, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740; and Melanie Tamsky, Esq., Brown & James, P.C., Attorneys for Defendant Dr. Blake Lambourne, 705 Olive Street, 11th Floor, St. Louis, Missouri 63101.

CERTIFICATE OF COMPLIANCE

Comes now Richard G. Byrd, Attorney for Plaintiffs/Appellants, and hereby certifies as follows:

1. That this brief complies with Rule 55.07 MRCP;
2. That this brief complies with the limitations in Rule 86.06(b) MRCP;
3. That this brief contains 732 lines of text;
4. That the floppy disk containing this brief is prepared in Word format and is free of any known virus.

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