

**IN THE MISSOURI SUPREME COURT**

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**No. SC88456**

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**RAYMOND BLOOMQUIST, D.O.,  
Relator,**

**vs.**

**HONORABLE NANCY L. SCHNEIDER,  
JUDGE OF THE CIRCUIT COURT OF  
ST. CHARLES COUNTY, MISSOURI,  
Respondent.**

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**PETITION FOR EXTRAORDINARY WRIT  
FROM THE CIRCUIT COURT  
OF ST. CHARLES COUNTY, MISSOURI**

**THE HONORABLE NANCY L. SCHNEIDER**

**CASE NO. 0611-CV06189**

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**REPLY BRIEF OF RELATOR  
RAYMOND BLOOMQUIST, D.O.**

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## **RESPONSE TO RESPONDENT’S ADDITIONAL FACTS**

Although respondent alleges in her statement of facts that “Dr. Bloomquist treated Popoalii between March 19, 2004, and July 2, 2004,” the reference to plaintiff’s underlying First Amended Petition only includes allegations that Dr. Bloomquist (and several other health care providers) provided treatment to Ms. Popoalii between March 19, 2004, and April 8, 2004. **Appendix, pp. A-27 to A-28.**<sup>1</sup> The underlying plaintiff’s allegations in her First Amended Petition further state specifically that she “screamed uncontrollably,” suffered from “severe headaches,” and other alleged symptoms between March 19, 2004, and April 8, 2004. *Id.* The underlying plaintiff alleges that on or about April 8, 2004, she was transferred to outside medical centers where she received proper treatment. **Appendix, pp. A-28 to A-29.**

Respondent, in her Statement of Facts, also asserts that Relator “was not engaged in interstate commerce in his medical profession . . . .” **Respondent’s Brief, p. 4.** This assertion is not a statement of fact and is unsupported by any citation or reference to the record.

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<sup>1</sup> In fact, discovery in plaintiff’s previously-filed and pending federal court action has revealed that relator provided care to plaintiff only on two occasions – March 22, 2004, and March 26, 2004. Health care provided by other named, but now dismissed, defendants extended only through July 2, 2004, the date plaintiff was released from the correctional system.

## ARGUMENT

**I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM REINSTATING PLAINTIFF’S CAUSE OF ACTION AGAINST RELATOR BECAUSE THE FACE OF PLAINTIFF’S FIRST AMENDED PETITION DEMONSTRATES THAT PLAINTIFF’S CAUSE OF ACTION IS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS OF SECTION 516.105, RSMO. (2000), AND RESPONDENT’S ORDER DETERMINING THAT PLAINTIFF’S CAUSE OF ACTION IS TOLLED UNDER SECTION 516.200, RSMO. (2000), ON THE BASIS OF RELATOR CHANGING HIS PRINCIPAL RESIDENCE TO THE STATE OF KANSAS, IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION.**

The issue in this proceeding is whether relator, Raymond Bloomquist, D.O., is entitled to extraordinary relief protecting him from plaintiff’s prosecution of a medical malpractice case filed after expiration of the two-year statute of limitations. Plaintiff’s pleading, on its face, demonstrates that relator last provided health care to plaintiff more than two years prior to plaintiff’s first filing of the petition. **Appendix, pp. A-1 to A-13.** Respondent asserts that the filing was timely under the Missouri tolling statute because relator moved to the State of Kansas prior to expiration of the limitations period. Relator responds that the Missouri tolling statute, as applied by respondent below, is

unconstitutional in that it creates an impermissible burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution.

In her Reply Brief, respondent does not contest that extraordinary relief is an appropriate remedy given the procedural posture of this case. Rather, respondent opposes extraordinary relief primarily on three grounds: 1) Dr. Bloomquist was not engaged in interstate commerce when he provided healthcare to plaintiff (Respondent's Brief, Point Relied On I); 2) the United States Supreme Court's decision in *Bendix Auto Lite v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), is factually distinguishable because Relator was a Missouri resident at the time of the act of alleged negligence (Respondent's Brief, Point Relied On I and II); and 3) any finding that the Missouri tolling statute is unconstitutional should have prospective application only (Respondent's Brief, Point Relied On I). In this Reply Brief, relator will demonstrate his entitlement to extraordinary relief because: 1) the proper focus is not whether the healthcare provided or not provided affected interstate commerce but, rather, whether application of the Missouri tolling statute is discriminatory on its face or impermissibly burdens interstate commerce; 2) respondent's factual distinction is a difference that is immaterial; and 3) good cause exists for application of the holding in this case to the parties herein.

**1. The Missouri Tolling Statute Is Discriminatory on its Face and Impermissibly Burdens Interstate Commerce.**

**a. The Missouri Tolling Statute Affects Interstate Commerce.**

Respondent, relying on the United States Supreme Court's holding in *Gibbons v. Ogden*, 22 U.S. 1, 20 and 67 (1824), states in her brief that the facts in this case do not

“rise to the ‘importance and elevation, as to be deemed commercial regulations,’” as “state regulations pertaining to the public health do not ‘partake of the character of regulations of the Commerce of the United States.’” **Respondent’s Brief, p. 7.**

According to respondent, the logical extension of that reasoning is that this Court must first determine whether the facts pertaining to the medical malpractice alleged in the underlying plaintiff’s Petition and First Amended Petition involve interstate commerce by a non-resident defendant. *Id.* Because defendant Dr. Bloomquist was a resident of Missouri at the time of the medical care provided as alleged below, respondent asserts there is “no impact upon interstate commerce which would cause the application of the Commerce Clause analysis described in *Bendix*.” *Id.* Respondent then claims that when a Missouri physician treats a Missouri patient in Missouri, there is no impact on interstate commerce. *Id.*

Respondent’s “interstate commerce” argument is unpersuasive, over-simplifies the constitutional analysis, ignores decades of case law expanding the scope of federal jurisdiction under the Commerce Clause, and misstates the United States Supreme Court’s decision in *Bendix*. If the determinative issue was merely whether the health care relationship between relator and plaintiff had an “impact on interstate commerce” as respondent asserts, then the relevant facts might be fewer and the analysis arguably simpler, as respondent suggests. That is not the case, however.

While state regulation of public health in 1824 may not have affected interstate commerce, one would be hard pressed to assert in 2007 the same about a state law which, in effect, requires a Missouri health care provider to choose, on the one hand, to either

remain in Missouri for at least two and as long as twenty years after last providing health care to any patient,<sup>2</sup> or to subject himself or herself to the general jurisdiction of the Missouri courts by designating an agent for service of process, or, alternatively, to remain subject to suit for medical negligence in perpetuity, which both impermissibly discriminates against former residents on its face and unconstitutionally discourages such provider from relocating his or her profession to another state. The truth is that if the focus of the analysis was solely micro-level, looking only at the individual transaction forming the factual basis for the suit, it is hard to envision any one, individual case materially affecting interstate commerce. Providing health care services is clearly a commercial activity and was a commercial activity in the present case. This Court should determine as a matter of law that relator's provision of health care to plaintiff was a commercial transaction by its very nature. If this Court determines, however, that the appropriate analysis is whether relator's provision of health care to plaintiff significantly impacted interstate commerce, then this Court should remand the case to respondent for an evidentiary hearing on such issue.<sup>3</sup>

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<sup>2</sup> In Missouri, claims on behalf of minors for medical negligence must be brought within two years of the minor reaching the age of eighteen. *Section 516.105(3), RSMo. (2006 Supp.)*.

<sup>3</sup> Plaintiff, for example, is aware from her deposition of Relator in her pending federal action that relator provided care to plaintiff under contract with a Georgia *locum tenens* placement agency that also contracted to provide temporary doctors for Correctional

The fact is, however, that regardless of whether Dr. Bloomquist was engaged in interstate commerce at the point that he provided medical care to plaintiff in the underlying action, application of the Missouri Tolling Statute under the circumstances of this case burdens interstate commerce for the same reasons cited in *Bendix*. The Court in *Bendix* actually held that “Where a State denies ordinary legal defenses or like privileges to out-of-state *persons* or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce.” *Bendix*, 486 U.S. at 893 (emphasis added). Where, as here, Dr. Bloomquist is now located outside of the state of Missouri, he in fact fits within the category of persons referred to in *Bendix*. In *Bendix*, the Court found the Ohio tolling statute invalid under the Commerce Clause because the statute imposed more of a burden on those non-resident defendants than it did on resident defendants, thereby subjecting them to “inconsistent regulations.” *Id.* at 894. In this case, the discrimination arising from the Missouri tolling statute is even more narrowly directed and less justifiable than it was in Ohio in the *Bendix* case because those tortfeasors who never resided in Missouri are not subject to the tolling statute. *Ahearn v. Lafayette Pharmaceutical, Inc.*, 729 S.W.2d 501, 503-504 (Mo. App. 1987). The court in *Ahearn* determined that the tolling statute does not apply to a defendant who is not a resident of the state at the time the cause of action accrues. *Id.* As a consequence, the

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Medical Services, the business entity providing medical services to Missouri inmates for the Missouri Department of Corrections.

Missouri tolling statute discriminates only against former residents. Thus, the Missouri tolling statute is actually more discriminatory on its face than was the Ohio statute at issue in *Bendix* to the extent it deprives only those persons who were residents of Missouri at the time the cause of action accrued of the benefit of limitations statutes. If the public benefit of the tolling statute is to facilitate the filing of suit by Missouri residents against non-residents, then it makes no sense to limit the applicability of the statute to former residents only.

Respondent also tries to distinguish those cases, including *Edwards v. California*, 314 U.S. 160, 172-73 (1941), where courts have held that the Commerce Clause invalidates state restrictions affecting a person's right to travel or relocate. **Respondent's Brief, pp. 8-9.** While respondent's contention that the statutes at issue in *Edwards* and in the present case are different is true, that does not negate the validity of the analysis. The United States Supreme Court has observed that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. And, it is clear that the freedom to travel includes the freedom to enter and abide in any State in the Union." *Attorney General of New York v. Soto-Lopez, et al.*, 476 U.S. 898, 901-902 (1986) (internal citations omitted). In that case, the Court noted that "the textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration ... has proved elusive," having been attributed in different cases to the Privileges and Immunities Clauses of Articles IV and XIV, respectively, as well as to the Commerce Clause. *Id.* at 902. Ultimately, regardless of the origin, "the right to migrate is firmly established and has been repeatedly recognized by our cases." *Id.* at 903. The

right to travel essentially consists of three components, the first of which is that “[i]t protects the right of a citizen of one State to enter and to leave another State.” *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Furthermore, “[a] state law implicates the right to travel when it actually deters such travel ... or when it uses any classification which serves to penalize the exercise of that right.” *Attorney General of New York*, 476 U.S. at 903 (internal citations omitted). Because the Missouri tolling statute both discriminates facially against former residents of this state and deprives former residents of the benefits of limitations defenses in perpetuity, it impermissibly burdens interstate commerce and is invalid.

Respondent attempts to distinguish *Edwards v. California* on the basis that the California statute at issue had the express purpose of impacting interstate commerce. **Respondent’s Brief, p. 9.** She argues that Relator’s ability to relocate his residence was neither restricted nor inhibited by the Missouri tolling statute. **Id.** Respondent’s argument is unpersuasive. The issue in the present case is not whether the Missouri tolling statute physically restricts or inhibits former Missouri residents from relocating to another state. Rather, the constitutional issue is that the Missouri tolling statute impermissibly burdens interstate commerce because it discriminates against former residents in terms of depriving them of the benefit of the limitations defense available to residents and those who never resided in the state and because such statute compels a defendant to choose whether to forfeit the benefit of the limitations defense by relocating out of state or to either remain in this state until the statute expires or subject themselves to the general jurisdiction of the Missouri courts.

An Ohio appellate court relied on *Edwards* and *Bendix* in finding that “Following *Bendix*’s holding that requiring foreign corporations to submit to the general jurisdiction of Ohio courts is an unreasonable burden on commerce, it seems plainly unreasonable for persons who have committed acts they know might be considered tortious to be held hostage until the applicable limitations period expires.” *Tesar v. Hallas*, 738 F.Supp. 240, 242 (N.D. Ohio 1990).

The Northern District Court of Texas recently decided a case involving facts similar to those at issue here in *Cadles of Grassy Meadows II, L.L.C. v. Goldner*, 2007 US Dist. Lexis 42515 (2007). The defendants in that case moved out of state shortly after incurring a debt, residing thereafter in New York. *Id.* at p. 4. The *Cadles* court explicitly rejected the argument that the focus is solely on the facts of the underlying dispute, noting that “The economic interests at stake in this case, however, are not only the debt incurred by the Defendants, but also the interstate movement of the Defendants themselves.” *Id.* at 23. The *Cadles* Court, held, therefore, that the reasoning in *Tesar* applied similarly to the defendants in that case, stating that said defendants should not be forced to make the “draconian” choice between staying in the state, or waiving the statute of limitations and being subject to suit forever. *Id.* at 30.

**b. This Court Should Reject as Unpersuasive and Inapplicable the California Appellate Court Decisions Relied Upon by Plaintiff.**

In the nearly twenty years since it was first decided, the United States Supreme Court’s holding in *Bendix* has been applied and interpreted by many courts, both state and federal, in determining the constitutionality of various state tolling statutes. See

**Relator’s Brief, pp. 30-33.** Respondent relies heavily on two cases decided by lower appellate courts in California for the proposition that actions between individuals not alleging interstate commerce are outside the scope of the Commerce Clause.

**Respondent’s Brief, pp. 12-13, citing *Pratali v. Gates*, 4 Cal. App. 4th 632, 643 (Cal. Ct. App. 1992); *Kohan v. Cohan*, 204 Cal. App. 3d 915, 924 (Cal. Ct. App. 1988).**

Those decisions represent, at best, a minority view, and the courts in those cases failed to address a determinative issue in *Bendix*—whether a tolling statute that creates a disincentive for a person or entity to relocate from the state impermissibly burdens interstate commerce. *Bendix*, 486 U.S. at 893 (holding that an impermissible burden on interstate commerce exists where a state denies ordinary legal defenses to out of state persons or corporations). In *Pratali*, the appellate court expressly acknowledged that the tolling statute may violate the commerce clause where the defendant engaged in interstate commerce. *Pratali*, 4 Cal. App. 4th at 643. The Court merely found that because the underlying transaction was a personal loan between friends, it was not a commercial transaction involving interstate commerce. *Id.* Similarly, in *Kohan*, the dispute concerned business transactions in Iran among Iranian nationals which the Court found not to constitute interstate commerce as a matter of law. *Kohan*, 204 Cal. App. 3d at 924. Neither California case is persuasive authority for the present case in that the health care at issue here clearly arose out of a commercial relationship—the provision of medical services—occurring within the United States.

**c. Even Assuming that Relator Could Have Designated an Agent for Service of Process, the Missouri Tolling Statute Remains Unconstitutional.**

Respondent asserts that the “statutory authority to appoint an agent for service of process protects [Section] 516.200 from a finding of unconstitutionality.” **Respondent’s Brief, p. 16.** Respondent also claims that the United States Supreme Court invalidated the Ohio tolling statute, in part, because “there was no ‘statutory support’ for the suggestion that the corporation could appoint an agent for service of process.” **Id.**

Respondent cites Section 506.150, RSMo. (2000), for the proposition that Relator may appoint an agent for service of process. **Id.** As was pointed out previously in Appellant’s Brief, however, respondent has still provided no statutory support for the proposition that, nor is there any statutory mechanism by which, an individual may appoint or designate an agent for service of process. **See Respondent’s Brief, p. 17, Appellant’s Brief, pp. 25-26.** Respondent cited to *Garth v. Robards* in support of her contention that appointment of an agent is authorized under Missouri law. **Respondent’s Brief, p. 8, citing *Garth v. Robards*, 20 Mo. 523 (Mo. 1855).** That case, however, simply states that if a party has left the state without the intention of changing his residence, his domicile does not change and the statute of limitations is not tolled. *Garth*, 20 Mo. at 525. Respondent also cites a Washington statute and court decision. **Respondent’s Brief, p. 18; *Smith v. Forty Million*, 395 P.2d 201 (Wash. 1964).** While it may be true that in Washington state in 1964 the appointment of an agent for service of process would have precluded tolling of the statute of limitations, and that state’s statute may have

provided for such appointment, neither that decision nor that statute establish any statutory authority or a mechanism in the Missouri statutes for the appointment of such an agent.

Finally, respondent is simply incorrect in her assertion that in *Bendix* the Ohio tolling statute was deemed unconstitutional, in part, because Ohio lacked a statute permitting a defendant to designate or appoint an agent for service of process.

**Respondent’s Brief, p. 18.** In fact, the United States Supreme Court in *Bendix* expressly acknowledged that Ohio had such a statute. *Bendix*, 486 U.S. at 889-90, 902-03, n. 1 (*citing Ohio Rev. Code Ann.* Section 1302.98 (1979)). The *Bendix* court noted that:

[t]o gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts .... The designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts.... The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Requiring a foreign corporation to appoint an agent for services in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

*Bendix*, 486 U.S. at 892-93. In fact, according to that Court, requiring the appointment of an agent for service of process by a foreign corporation in order to avoid the tolling of the statute of limitations is an “unreasonable burden on commerce.” *Id.* at 895.

**d. Application of Missouri’s Long-Arm Statute Alleviates any Harm that Might Otherwise be Asserted by Plaintiff in the Underlying Action.**

The reasoning set forth by the *Bendix* court further controls in examining Respondent’s contention that Missouri has a legitimate interest in protecting its citizens. **Respondent’s Brief, pp. 18-19.** Whether Missouri has a legitimate interest in providing such protection for its residents, that interest is outweighed by the fact that the tolling statute imposes greater burdens on out-of-state companies and individuals. Those burdens cause the statute to violate the Commerce Clause where it would have otherwise been possible to obtain service on the said defendant under the long-arm statute. *Bendix*, 486 U.S. at 894. Certainly, in this case, the plaintiff in the underlying action could have, and ultimately did, obtain service on Relator under the Missouri Long-Arm Statute. Respondent has pointed in her brief to cases in which courts have dealt with defendants who fled the state to avoid service of process, none of which cases are applicable here. **Respondent’s Brief, p. 19.**<sup>4</sup>

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<sup>4</sup> Plaintiff in the underlying action is well aware of the reasons for Dr. Bloomquist’s departure from the state of Missouri to the state of Kansas. Plaintiff’s counsel traveled to that state for a deposition in the case plaintiff had previously filed against him, at which time plaintiff’s counsel was informed that his reason for leaving was tied to his wife’s development of cancer and need for treatment in Wichita.

**2. This Court's Ruling Should be Applied Retroactively Rather than Merely Prospectively.**

Respondent in her Answer filed in response to relator's Writ, and again in her brief, has requested that if this Court rules in favor of relator that any such ruling be applied only prospectively and not to the parties herein. **Respondent's Answer, p. 15; Respondent's Brief, pp. 20-23.** She makes two arguments. First, she asserts that because any ruling in relator's favor would relate to a statute of limitations issue, it would be a procedural change in law rather than substantive, and procedural changes should have prospective affect only. **Respondent's Brief, pp. 20-21.** Second, she argues that prospective only application is appropriate because she relied on the tolling statute and *Poling* in delaying filing suit against relator until after expiration of the statute of limitations. **Id.**

Relator and respondent generally agree as to the law applicable for determining retroactive versus prospective only application of a ruling in relator's favor. *See Respondent's Brief, p. 20; Relator's Brief, pp. 37-38.* Generally, a change in law applies retroactively, including to the parties before the court. *Summers v. Summers*, 701 S.W.2d 720, 722-23 (Mo. banc 1985); *State v. Cassaretto*, 818 S.W.2d 313, 316 (Mo. App. 1991). Although a decision in relator's favor herein arguably would not be a change in the law given that *Bendix* was decided in 1988 (**See Relator's Brief, pp. 39-40**), a change in interpretation of a procedural law, such as a statute of limitations, can be given prospective effect only where a party relied on the state of the decisional law as it existed prior to the change. *Summers*, 701 S.W.2d at 723. Respondent asserts such

reliance by plaintiff in arguing against application of a ruling in relator’s favor to the parties now before this Court. **Respondent’s Brief, pp. 20-21.**

Respondent cites no case authority for prospective-only application of a determination that a state tolling statute is unconstitutional under *Bendix*. As previously noted by relator, every court that has applied *Bendix* to hold such tolling statutes unconstitutional has applied such rulings to the parties before the court. **Relator’s Brief, pp. 45-46.** This Court’s decision in *Poling*, however, is perhaps the best authority for applying any ruling in relator’s favor to the parties now before the Court. That decision involved the precise issue now before this Court—whether a change in decisional law should apply to the parties then before the court. *Poling*, 717 S.W.2d 520, 522-23 (Mo. banc 1986). This Court overturned prior case law to the effect that the Missouri tolling statute did not operate to toll the underlying statute of limitations where the former resident defendant could be served under the Missouri long-arm statute. *Id.* Relator suggests that this Court should follow this Court’s own precedent in *Poling* and apply any ruling in relator’s favor to the parties herein.

If this Court determines that it must look at plaintiff’s claimed reliance on *Poling* and balance the interests of the parties now before the Court, relator respectfully suggests that plaintiff’s claim of reliance is unpersuasive and no injustice would occur from a finding that plaintiff’s claim against relator is barred as a matter of law.

Respondent argues that plaintiff “affirmatively relied upon” the provisions of Section 516.200, RSMo. (2000), “in prosecuting her cause of action.” **Respondent’s Brief, p. 21.** Respondent, for example, states that “Plaintiff alleged facts which invoked

the tolling provisions of the statute, thus making her cause of action timely, and also dismissed other parties in reliance upon *Poling*.” *Id.* at pp. 21-22. In making this argument, Respondent neglects to mention that when this action was initially brought against this defendant, it was also brought against 11 other defendants. **Appendix, p. A-1.** Of the twelve defendants initially named in the underlying Petition, the only defendant remaining in this action is Dr. Bloomquist. **Answer, ¶ 3.** Only one of the other defendants was dismissed by plaintiff, and the remaining named defendants were dismissed by Respondent in response to Motions to Dismiss filed by them in the court below. **Appendix, p. A-42, Answer ¶ 3.** Those dismissals were, in fact, based on the same statute of limitations defense that Dr. Bloomquist now asserts. **Appendix, p. A-42.** The reality in this case is that because Dr. Bloomquist is the only defendant who has had reason to move out of the state of Missouri, he is the only defendant remaining in this case that was not timely filed against him or any other defendant even though plaintiff clearly knew of her cause of action long before the date on which the statute of limitations lapsed given the action that still remains pending in the federal district court based on the same alleged actions by this defendant and others.

In sum, respondent’s claim of plaintiff’s reliance on *Poling* rings hollow. It defies logic to assume, as respondent argues, that plaintiff deferred filing her state law medical malpractice claim against eleven other Missouri-resident, health care defendants because she knew she could defer filing indefinitely against relator due to his move out of the state.

Respondent also argues that this Court's holding in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), is controlling and compels a decision in Respondent's favor on the prospective-only application issue. **Respondent's Brief, pp. 21-22.** This argument is unpersuasive because, as stated above, *Poling* actually resulted in retroactive application of a decisional change in law concerning the very tolling statute at issue in this case. Additionally, this Court's decision on this issue is not simply a matter of comparing *Poling* and the holding of the Eighth Circuit Court of Appeals in *Rademeyer v. Farris*, 284 F.3d 833 (8<sup>th</sup> Cir. 2002). Rather, as was actually stated in relator's brief, the United States Supreme Court's holding in *Bendix* must be applied to the facts in this case (as the 8<sup>th</sup> Circuit did in *Rademeyer*). *See Appellant's Brief, p. 36, citing United States Constitution, Article VI; Cooper, et al. v. Aaron, et al.*, 358 U.S. 1 (1958); *Kraus v. Board of Education of the City of Jennings*, 492 S.W.2d 783, 784 (Mo. 1973).

Respondent also asserts that any ruling in relator's favor should have prospective application only because this Court previously mentioned the tolling statute in one of this Court's more recent decisions. **Respondent's Brief, p. 22** (*citing Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220 (Mo. banc 2002)). Although this Court's opinion mentioned the tolling statute, there was no constitutional issue, nor was the interpretation of this particular statute before this Court, and that decision in no way implicitly upheld the constitutionality of the tolling statute as Respondent now suggests. The fact is that this Court has not examined the issue of the constitutionality of Section 516.200, RSMo. (2000), since its decision in *Poling* in 1986, two years prior to the United States Supreme Court's decision in *Bendix*.

Respondent finally contends that plaintiff would “suffer substantial hardship by being denied her ability to litigate the medical malpractice case against Dr. Bloomquist.” **Respondent’s Brief, p. 23.** In contrast, according to Respondent, relator would suffer no hardship as it would “simply allow him the opportunity to defend the cause of action.”

*Id.*

Respondent’s claim of hardship is unpersuasive. In truth, plaintiff suffers no more hardship than any other plaintiff who fails to timely file an action. Missouri courts consistently apply limitations statutes strictly, even where the statute was missed by fewer days than plaintiff herein and under much more compelling circumstances. *See, e.g., Fuller v. Lynch*, 896 S.W.2d 764, 765 (Mo. App. 1995)(holding medical malpractice action barred for paraplegic plaintiff who filed action six days late after prior voluntary dismissal even though the re-filing occurred within one year from date of court order acknowledging dismissal).

The procedural context of this case precludes consideration of all facts that are material to a balancing of hardships. One fact that is of record is that plaintiff previously filed a claim in federal court arising out of the same facts against relator and all of the health care defendants she attempted to sue below. **Appendix, pp. A-29 to A-30.**

Docket sheets for that case, *Popoalii v. Correctional Medical Services, et al.*, Case No.

5-CV-0410, disclose that it was filed against relator and others long before expiration of the two-year statute of limitations for a state law medical malpractice claim.<sup>5</sup>

In sum, good cause exists for this Court to apply any ruling in relator's favor to the parties now before this Court. This Court previously applied retroactively its decision in *Poling* to the parties then before the Court in a case that reversed prior case law interpreting applicability of the Missouri tolling statute. All courts in other jurisdictions that have overturned similar state tolling statutes on constitutionality grounds have applied the decision to the parties then before the court. Plaintiff in the underlying action cannot credibly assert reliance on *Poling* in deferring filing the suit against relator and other health care defendants. Plaintiff suffers no more hardship than any other plaintiff whose action is barred by the statute of limitations. If this Court rules in relator's favor, this Court should prohibit Respondent from taking any action with respect to relator other than ordering relator's dismissal with prejudice.

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<sup>5</sup> Although not of record herein, plaintiff sought leave to add state law medical negligence claims against Relator and the other health care defendants in her federal court action. Leave was first sought after the close of discovery. The federal judge informed plaintiff that she would permit an amended complaint adding such claims on the condition that plaintiff accept as a sanction the obligation to reimburse the defendants' attorneys fees and costs for any discovery that would have to be duplicated because of such new claims. Plaintiff declined this offer and opted, instead, to file this action in the Circuit Court of St. Charles County, Missouri.

## CONCLUSION

Plaintiff's First Amended Petition demonstrates on its face that it was filed more than two years after the health care at issue and, therefore, is barred by the statute of limitations in Section 516.105. Respondent dismissed plaintiff's claims with prejudice against all other health care defendants who were served on this basis. Respondent would have dismissed plaintiff's claims against Dr. Bloomquist with prejudice on this basis, but for the fact that Respondent believed she was compelled by this Court's 1986 holding in *Poling v. Moitra* to vacate her dismissal of Dr. Bloomquist because he moved to the State of Kansas during the limitations period. In 1988, the United States Supreme Court held unconstitutional an Ohio tolling statute substantively identical to the Missouri tolling statute because such statute impermissibly required a defendant to choose between remaining liable in perpetuity or subjecting himself or herself generally to the jurisdiction of the state of his or her former residence or presence. Dr. Bloomquist faced the same choice and this is an unconstitutional burden on interstate commerce. Relator's physician/patient relationship with plaintiff, by its very nature, was a commercial relationship. Application of the Missouri tolling statute to relator is discriminatory and a burden on interstate commerce. This Court should follow the decision in *Bendix* and declare the tolling statute invalid under the Commerce Clause of the United States Constitution. This Court should determine that such holding applies to the parties now before this Court by issuing a permanent writ in prohibition prohibiting Respondent from vacating her prior dismissal with prejudice of Dr. Bloomquist and further prohibiting her

from taking any other action affecting Dr. Bloomquist other than dismissal with prejudice at plaintiff's cost.

For the reasons stated above, relator Dr. Bloomquist respectfully requests that this Court make its preliminary writ of prohibition permanent, and award such other relief as this Court deems fair and just.

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## CERTIFICATION

The undersigned hereby certifies that:

1. This brief complies with Rule 55.03 of Missouri Rules of Civil Procedure.
2. This brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure.
3. This brief was prepared with Microsoft Word 2002 and contains 5,693 words.
4. The diskette submitted herewith containing this brief has been scanned for viruses and is virus free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Reply Brief of Relator Raymond Bloomquist, D.O., and one copy on diskette were sent on this 22<sup>nd</sup> day of August, 2007, via FedEx to:

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