

IN THE MISSOURI SUPREME COURT

No. SC88456

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

vs.

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

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

THE HONORABLE NANCY L. SCHNEIDER

CASE NO. 0611-CV06189

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

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JURISDICTIONAL STATEMENT

Relator challenges by petition for writ of prohibition or mandamus the propriety of an Order entered March 16, 2007. Respondent, The Honorable Nancy L. Schneider, Circuit Judge of St. Charles County, Missouri, reinstated Respondent's medical malpractice claims against defendant Raymond Bloomquist, D.O., based on the tolling provisions of Section 516.200 RSMo. (2000)**Error! Bookmark not defined.** This action involves the question of whether this statute, which purports to toll the underlying statute of limitations during the period of time a defendant resides out of state, as applied to Relator, violates the Commerce Clause in Article I, Section 8 of the United States Constitution. After Relator was denied a preliminary writ of prohibition and/or mandamus in the Missouri Court of Appeals for the Eastern District, this Court issued its preliminary writ of prohibition directed to Judge Schneider, Circuit Judge of St. Charles County, Missouri. This court has jurisdiction to determine original remedial writs pursuant to Article V, Section 4 of the Missouri Constitution.

POINTS RELIED ON

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.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988)

Rademeyer v. Farris, 284 F.3d 833, 839 (8th Cir. 2002)

Poling v. Moitra, 717 S.W.2d 520 (Mo. banc 1986)

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Section 351.594, RSMo. (2000)

Section 506.500, RSMo. (2000)

Section 516.105, RSMo. (2000)

Section 516.150, RSMo. (2000)

Section 516.200, RSMo. (2000)

Article 1, Section 8 of the United States Constitution

Article VI of the United States Constitution

STATEMENT OF FACTS

On July 31, 2006, plaintiff Leiloni Popoalii (hereinafter, “Plaintiff”) filed a petition seeking damages for personal injury against eleven health care provider defendants, including Relator, Raymond Bloomquist, D.O. (hereinafter, “Relator”), and two corrections officers. **Appendix, p. A-1.** Plaintiff alleged generally that the health care defendants negligently failed to timely diagnose and treat her cryptococcal meningitis. **Appendix, pp. A-5 to A-9.** Plaintiff claimed that all of the health care at issue in the Petition occurred on or before April 8, 2004, more than two years before the filing of her petition. **Appendix, pp. A-6 to A-7.**

The health care defendants, including Relator, sought dismissal on several grounds, including the fact that plaintiff’s petition, on its face, demonstrated that plaintiff’s claims were barred by the two-year statute of limitations in Section 516.105. **Appendix, pp. A-16 to A-22.** Plaintiff responded by filing her First Amended Petition on October 24, 2006. **Appendix, p. A-23.** The First Amended Petition clarified plaintiff’s allegation against Dr. Bloomquist asserting that Relator had relocated his domicile to the State of Kansas in February, 2006.¹ **Appendix, p. A-24.** The health care

¹ In paragraph 30 of her First Amended Petition, plaintiff acknowledges that she has a federal civil rights action pending in the United States District Court for the Western District of Missouri, *Popoalii v. Correctional Medical Services, et al.*, Case No. 05-CV-04120. **Appendix, A-29-A30.** The federal case alleges similar facts seeking damages from Relator relating to the same health care at issue in this state court action. Summary

defendants, including Relator, renewed their motions to dismiss, again asserting that the amended pleading demonstrated on its face that plaintiff's action was barred against them under Section 516.105. **Appendix, pp. A-36 to A-41.** Relator further asserted that plaintiff's claims against him were not tolled under Section 516.200 because application of this tolling statute was unconstitutional and violated the Commerce Clause of the United States Constitution. **Appendix, pp. A-36 to A-41.**

By an Order/Judgment dated November 29, 2006, the Honorable Nancy Schneider, Circuit Judge, among other things, sustained the health care defendants' motions to dismiss filed by the health care defendants who had been served and not previously dismissed, including Relator's motion to dismiss. **Appendix, p. A-42.** The Court expressly found that the statute of limitations was not tolled because Relator could have been served under Missouri's long-arm statute. **Appendix, p. A-42.** Plaintiff moved to vacate Relator's dismissal on December 29, 2006. **Appendix, p. A-43.** By order dated March 16, 2007, Respondent granted plaintiff's motion and vacated the dismissal order for Relator. **Appendix, p. A-56.** Relator filed an application for writ with the Missouri Court of Appeals for the Eastern District of Missouri on March 27, 2007, which was denied April 10, 2007. **Appendix, p. A-57.** Relator then filed his application for extraordinary writ with this Court on April 14, 2007, and this Court issued its preliminary writ on May 28, 2007.

judgment in Relator's favor is now the subject of an appeal pending in the Eighth Circuit Court of Appeals.

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 the Missouri statute that purports to toll the underlying statute of limitations during the time period when a defendant resides out of state violates the Commerce Clause in Article I, Section 8 of the United States Constitution, as that tolling statute was applied by the Circuit Court of St. Charles County, Missouri in denying Relator's motion to dismiss Plaintiff's medical malpractice claim against Relator, a health care provider.

Plaintiff's First Amended Petition demonstrates on its face that the health care at issue occurred more than two years before plaintiff filed her original petition in the Circuit Court of St. Charles County, Missouri on July 31, 2006. **Appendix, pp. A-26 to A-29.** All of plaintiff's claims against the served health care defendants other than

Relator have been dismissed as barred by the two-year statute of limitations for actions against health care providers under Section 516.105. **Appendix, A-42.** Plaintiff asserts, however, that Relator is not entitled to dismissal on limitations grounds because he changed his domicile to the state of Kansas in February, 2006, thereby suspending the running of the statute of limitations under Section 516.200. **Appendix, pp. A-43 to A-44.** Plaintiff relies on this Court's 1986 decision in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), as support for the propriety of Respondent's Order of March 16, 2007. **Appendix, p. A-56.** Relator, however, asserts that this Court's decision in *Poling* was, in effect, overruled in 1988 by the United States Supreme Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), which held that a virtually identical Ohio tolling statute unconstitutionally burdened interstate commerce in violation of Article I, Section 8 of the United States Constitution. On this basis, Relator seeks a writ from this Court prohibiting Respondent from granting Plaintiff's motion to vacate a prior order of dismissal in Relator's favor or taking any action affecting Relator other than to dismiss with prejudice the First Amended Petition as against him or, alternatively, mandating that Respondent enter a judgment of dismissal in Relator's favor on statute of limitations grounds.

A. Standard of Review.

In deciding whether to grant extraordinary relief, this Court construes a petition for a writ liberally, accepting all properly pleaded allegations as true. *State ex rel. Missouri Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 184 (Mo. 1985).

B. Prohibition and Mandamus.

In this case, Relator seeks a writ of prohibition prohibiting Respondent from vacating her prior order of dismissal of Plaintiff's action against Relator and from taking any further action with respect to Relator other than entry of a dismissal with prejudice in Relator's favor on the basis that the face of Plaintiff's First Amended Petition demonstrates that Plaintiff's cause of action against Relator is barred by the two-year statute of limitations of Section 516.105. Alternatively, Relator seeks a writ of mandamus ordering Respondent to enter a dismissal of Plaintiff's First Amended Petition against Relator.

A writ of prohibition usually involves an order preventing a person from taking a specified action and is granted against a trial court under one of three circumstances: 1) where the court lacks either subject matter or personal jurisdiction; 2) to remedy a clear excess of jurisdiction or abuse of discretion; or 3) where the party requesting the writ can establish that an appeal is not an adequate remedy because, among other things, such party may suffer considerable hardship and expense as a consequence of an erroneous decision. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994); *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-863 (Mo. banc 1986).

Mandamus is a discretionary writ and a writ of mandamus will issue only where there is a clear, unequivocal, and specific right. *State ex rel. Chassaing*, 887 S.W.2d at 576. Mandamus is an appropriate extraordinary remedy to enforce a constitutional right. *State ex rel. Casey's General Stores, Inc. v. City Council of Salem*, 699 S.W.2d 775,

777 (Mo. App. 1985)(court issued writ of mandamus declaring city ordinance void for vagueness, which is a constitutional due process issue).

Although Missouri’s courts are generally “reluctant” to grant writs for purposes of correcting “trial court error,” *see, e.g., State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. 1985), Missouri courts recognize that “prohibition is essentially a means to prevent usurpation of judicial power, confine inferior courts and agencies to their proper jurisdiction and prevent them from acting without or in excess of their jurisdiction.” *State ex rel. Lohman v. The Personnel Advisory Board*, 948 S.W.2d 701, 703 (Mo. App. 1997); *see also State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 78 (Mo. banc 1974).

This Court has discretion to grant a writ in prohibition to “stop a circuit court from proceeding on a claim asserted against a party where the claim is clearly barred and proceeding on the claim will produce useless and unwarranted litigation.” *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 96 (Mo. App. 2001), *citing State ex rel. Simmerock v. Brackmann*, 714 S.W.2d 938, 939 (Mo. App. 1986). This Court, for example, granted a writ in favor of a defendant with an absolute defense of sovereign immunity, holding that “the profligacy in taking time and money for the ritual of trial and appeal in such case is therefore apparent. Under the circumstances of this case in which appeal fails to afford adequate relief, prohibition is the appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience, and waste of time and talent.” *State ex rel. New Liberty Hospital District v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985). Similarly, the court in *O’Blennis* granted a writ in favor of a defendant who had been denied summary

judgment, holding that “Forcing upon a defendant the expense and burdens of trial when the claim is *clearly* barred is unjust and should be prevented. Prohibition is generally the appropriate remedy to forestall unwarranted and useless litigation.” *State ex rel. O’Blennis*, 691 S.W.2d at 500 (internal citations omitted) (emphasis in original). Likewise, the *Brandon* court granted a writ where the trial court had refused the defendant’s motion to dismiss on statute of limitations grounds. *State ex rel. Brandon*, 46 S.W.3d at 99.

In this case, mandamus also would be appropriate in that Relator is entitled to a dismissal with prejudice on statute of limitations grounds and because it would be unconstitutional for Respondent to permit Plaintiff to prosecute her claims against Relator on the basis of the tolling provisions of Section 516.200. Respondent does not have discretion to permit Plaintiff to prosecute her medical malpractice claims against Relator where such claims are barred as a matter of law as demonstrated by the facts pled on the face of Plaintiff’s First Amended Petition.

Writs of prohibition and mandamus have been issued to address the same legal issue. *See, e.g., State ex rel. Landstar Ranger, Inc. v. Dean*, 62 S.W.3d 405 (Mo. banc 2001)(granting mandamus to enforce venue rule); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856 (Mo. banc 2001)(granting prohibition on venue issue). Missouri courts have discretion to treat a petition for mandamus as a petition for prohibition and vice versa. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d at 577; *State ex rel. Haley v. Groose*, 873 S.W.2d 221, 223 (Mo. banc 1994)(petition for writ of habeas corpus treated as petition for writ of mandamus).

In the present case, Respondent was without jurisdiction to issue the order reinstating plaintiff's claims against Relator. First, because the bar of the statute of limitations was clear from facts alleged on the face of Plaintiff's First Amended Petition, Respondent had the duty to dismiss Relator on that basis. *Beck v. Fleming*, 165 S.W.3d 156, 158 (Mo. banc 2005); *Young v. Medrano*, 713 S.W.2d 553, 553-554 (Mo. App. 1986). Although Respondent felt compelled to follow this Court's holding in *Poling v. Moitra*, that case has effectively been overruled for nearly twenty years by the United States Supreme Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). An appeal is not an adequate remedy in that Relator would be forced to defend through jury trial a medical malpractice case involving discovery and expert testimony before he could otherwise raise the constitutionality of the tolling statute. All remaining health care defendants who were served in this action have been dismissed with prejudice previously on statute of limitations grounds. **Appendix, p. A-42.** Neither Plaintiff, Relator, nor the Circuit Court of St. Charles County should be forced to incur the time and expense of a jury trial under circumstances where any possible verdict in Plaintiff's favor will be reversed on appeal on the basis of the late filing of the action. *See, e.g., State ex rel. Chassaing*, 887 S.W.2d at 577; *State ex rel. Noranda Aluminum*, 706 S.W.2d at 862-63; *State ex rel. Brandon*, 46 S.W.3d at 99. In the present case, there is no disputed fact issue concerning the statute of limitations defense. But for the tolling provisions of Section 516.200, Respondent would have dismissed Plaintiff's cause of action against Relator with prejudice as Respondent so ordered with respect to the other health care defendants who were served in this action.

Appendix, pp. A-42 and A-56. Good cause exists for this Court to make its preliminary order in prohibition permanent for the reasons discussed below.

C. Application of the tolling provision of Section 516.200 RSMo. (2000), to deprive Relator of the benefit of the bar of the two-year statute of limitations in Section 516.105 violates Relator’s constitutional rights under Article I, Section 8 of the United States Constitution by impermissibly burdening interstate commerce.

1. Applicable Missouri statutes.

There are four Missouri statutes that are potentially relevant to a determination of Relator’s entitlement to a permanent writ as requested: 1) the statute of limitations for actions against health care providers; 2) the statute that provides for tolling of the underlying statute of limitations where a defendant departs from and resides out of the state of Missouri; 3) Missouri’s long-arm statute; and 4) the Missouri statute that authorizes service of summons and process on an individual by service on an agent authorized by appointment or required by law to receive service of process.

a. Statute of Limitations for Actions Involving Health Care Providers.

Plaintiff’s claim asserted against Relator is one for alleged medical malpractice. **Appendix, pp. A-30 to A-33.** Plaintiff alleges (and Relator admits) that Relator is a physician who provided health care to Plaintiff while Plaintiff was incarcerated at Women’s Eastern Reception, Diagnostic, and Correctional Center (“WERDCC”) from March 19 to July 2, 2004. **Appendix, pp. A-27 to A-28.** Section 516.105, RSMo.

provides, in part, that “all actions against physicians ... for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of” This includes all actions that are, in substance, based on a claim for some “improper or negligent act by a health-care provider while caring for a patient.” *Robinson v. Health Midwest Development Group*, 58 S.W.3d 519, 522 (Mo. banc 2001). Dismissals of petitions alleging medical malpractice in which the facts alleged by the plaintiff demonstrate that the action was not timely filed have been upheld. *See, e.g., Young v. Medrano*, 713 S.W.2d 553, 553-54 (Mo. App. 1986). Plaintiff admits that Section 516.105 is the applicable statute of limitations and further admits that all health care provided by Relator was provided more than two years prior to the date Plaintiff filed her original petition in the court below.

Plaintiff’s Answer to Petition for Writ (hereinafter the “Answer”), ¶¶ 4 & 5.

b. Missouri Statute Providing for Tolling of Statutes of Limitations Where Defendant Departs From Missouri and Resides in Another State.

Plaintiff’s First Amended Petition alleges that, “In February, 2006, Defendant Bloomquist left the state of Missouri and changed his domicile to the State of Kansas.” **Appendix, p. A-24.** Plaintiff relies wholly on this allegation to avoid the bar of the two-year statute of limitations of Section 516.105, asserting that because such limitations period is tolled during the time that Relator resides in another state, her action against Relator was timely. **Answer, ¶ 6.**

Section 516.200 provides for tolling of all Chapter 516 statutes of limitations where a defendant, among other things, departs from and resides out of Missouri.

Section 516.200 states:

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.

Plaintiff in the underlying action is contending, in reliance on Section 516.200, that because Dr. Bloomquist changed his residence from Missouri to Kansas prior to the date on which the two-year statute of limitations applicable to him expired, the statute of limitations applicable to him was tolled. **Appendix, pp. A-43 to A-46.** Plaintiff therefore contends that her action against Dr. Bloomquist was timely filed even though it would not otherwise be. **Appendix, pp. A-43 to A-46.** Plaintiff relies on this Court's holding in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986). This Court, in *Poling v. Moitra*, in a "literal interpretation" of Section 516.200, determined that the medical malpractice statute of limitations would be tolled indefinitely where the defendant moves from the state. *Id.*

c. The Missouri “Long Arm” Statute.

As discussed below, after this Court’s decision in *Poling v. Moitra*, the United States Supreme Court held unconstitutional an Ohio tolling statute virtually identical to Section 516.200 in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). In *Bendix*, the fact that service of process on the out-of-state defendant could have been obtained within the limitations period under the Ohio long arm statute was an important consideration in determining that the state of Ohio’s interest in subjecting out-of-state entities to requirements more onerous than those imposed on Ohio residents was outweighed by the greater burden on interstate commerce. *Id.* at 893-895.

Missouri’s long arm statute is Section 506.500, RSMo. (2000). Section 506.500.1 provides, in relevant part, that:

Any person . . . whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section thereby submits such person, firm, firm, or corporation . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

. . .

(3) the commission of a tortious act within this state

In this case, service was issued for Relator in the state of Kansas pursuant to Section 506.500. **Appendix, p. A-14.** Because service of process could have been obtained on Relator within the limitations period under Section 506.500, this Court should determine that the Missouri tolling statute as applied to Relator is unconstitutional for the same

reasons the United States Supreme Court held the Ohio tolling statute unconstitutional—it is an impermissible burden on interstate commerce which is not outweighed by any interest of the state of Missouri in protecting Missouri residents from persons who become liable for acts done within Missouri but who later move from Missouri. *Bendix*, 486 U.S. at 893-95.

d. The Missouri Statute that Provides for Service on an Individual by Service on an Agent Authorized by Appointment or Required by Law to Receive Service of Process.

Plaintiff asserts that the Missouri tolling statute is not unconstitutional under *Bendix* because Section 506.150 “permits a defendant who chooses to move out of state to appoint an agent for service of process and avoid the tolling provisions of Section 516.200.” **Appendix, p. 53**. It is interesting to note that the only case cited to by plaintiff in support of this contention was decided by the Washington Supreme Court in 1964, twenty-four years prior to *Bendix*. Section 506.150.1 provides, in relevant part:

Service shall be made as follows:

(1) Upon an individual . . . by delivering a copy of the summons and of the petition to him personally . . . or by delivering a copy of the summons and of the petition to an agent authorized by appointment or required by law to receive service of process.

Missouri Rule of Civil Procedure 54.13(b)(1) contains identical language. *Mo.R.Civ.P. 54.13(b)(1)*. Neither the statute nor the rule defines “agent authorized by appointment” to

accept service of process on behalf of an individual defendant. *Cook v. Poleneni*, 967 S.W.2d 687, 691 (Mo. App. 1998). Plaintiff does not cite any Missouri statute that authorizes an individual to appoint an agent for service of process similar to the statute that provides for appointment of a registered agent to permit service of process on a foreign corporation. *Section 351.594, RSMo. (2000)*. In any event, Plaintiff's reliance on Section 516.150 is misplaced, as discussed below in connection with the *Bendix* decision, because even if an individual can avoid the tolling provisions of Section 516.200 by appointing an agent in Missouri for service of process, there would still be an impermissible burden on interstate commerce.

2. The Missouri Supreme Court's 1986 Decision in *Poling v. Moitra*.

Approximately two years before the United States Supreme Court handed down its decision in *Bendix*, this Court examined the Missouri tolling statute in a medical malpractice case. *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986). In that case, the plaintiff filed suit more than two years after the medical care at issue had been provided. *Id.* at 521. The plaintiff argued that because the defendant moved to Pennsylvania after the care at issue but before expiration of the limitations period, the limitations bar was tolled under Section 516.200. *Id.* The trial court entered judgment in the defendant's favor on the basis that the action was barred under the two-year statute of limitations in Section 516.105, and the appellate court affirmed. *Id.* This Court reversed and remanded the case on the basis that a literal application of Section 516.200 to the facts mandated that the statute of limitations was tolled under Section 516.200. *Id.* at 522-23. In so

holding, this Court reversed prior appellate court interpretations of Section 516.200, in which those courts had held Section 516.200 was not applicable where the defendant could be served under Missouri's long-arm statute, Section 506.150. *Id.*

No issue was raised or decided in *Poling* regarding the constitutionality of the tolling statute. *Id.* Since *Poling*, no Missouri state appellate decision has addressed whether Section 516.200 is constitutional. The Eastern District Court of Appeals expressly followed *Poling* without addressing the constitutionality of the statute when the court reversed a summary judgment on statute of limitations grounds in favor of a physician defendant on the basis that Section 516.200 literally applied because the physician was a resident of Missouri at the time the cause of action accrued. *Genrich v. Williams*, 869 S.W.2d 209, 212 (Mo. App. 1993).

It is important to note, however, that Missouri appellate courts have held that the tolling statute, by its terms, does not apply where the defendant was a non-resident of the state at the time the cause of action accrued. *See, e.g., Ahearn v. Lafayette Pharmaceutical, Inc.*, 729 S.W.2d 501, 503-504 (Mo. App. 1987). For defendants who were non-resident defendants at the time the cause of action accrued, the underlying statute of limitations continues to run from the moment that the cause of action accrues. *Id.* Thus, Missouri treats former residents of this state more harshly than either residents or those defendants who were non-residents at the time the cause of action accrued, which is an impermissible burden on interstate commerce in violation of Article I,

Section 8 of the United States Constitution as discussed below. *Bendix*, 486 U.S. at 894-95.²

3. The United States Supreme Court 1988 Holding in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The United States Supreme Court examined the Ohio tolling statute in 1988 in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, finding that the statute violated the Commerce Clause of the United States Constitution. *Bendix*, 486 U.S. at 895. In *Bendix*, a Delaware corporate plaintiff with its principal place of business in Ohio brought a breach of contract, diversity action against an Illinois corporate defendant in an Ohio federal district court. *Id.* at 889-90. The Illinois defendant asserted a statute of limitations defense and the plaintiff asserted that the limitations period had not elapsed because under the Ohio tolling statute the limitations period did not run against the

² Although not specifically raised in Relator's application for writ, the Missouri tolling statute as interpreted by this Court in *Poling*, to the extent that it treats former residents differently than both residents and those defendants who were non-residents at the time the cause of action accrued, may violate the Due Process and Equal Protection clauses of the United States and Missouri Constitutions. *Bendix*, 488 U.S. at 894-95 (discussing that states rationally may curtail limitations protections for absent foreign corporations without violating the equal protection clause, but not addressing whether states can rationally discriminate between former state residents and those defendants who were non-residents at the time the cause of action accrued, as Missouri's tolling scheme does).

Illinois defendant because that defendant was neither present in Ohio nor had the defendant designated an agent for service of process. *Id.* at 890-91. Ohio's tolling statute (which in substance is essentially identical to the Missouri tolling statute as discussed below), provides that:

[W]hen a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitations for the commencement of the action ... does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Ohio Rev. Code Ann. § 2305.09 (1981). Ohio also had a statute that permitted a foreign corporation to maintain an agent in Ohio upon whom process could be served in that state. *Bendix*, 486 U.S. at 892-893; *Ohio Rev. Code Ann. § 1703.04.1 (1985)*. The Supreme Court noted that Ohio's statutory scheme forced a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts by maintaining an agent for service of process in the state or remaining subject to suit in Ohio in perpetuity. *Id.* at 894-95. Consequently, the Supreme Court held that this scheme was a significant burden on interstate commerce. *Id.* The Supreme Court stated specifically 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 interstate commerce.

Id. at 893. Noting, but not deciding, the issue of whether the Ohio statutory scheme was discriminatory on its face, the Supreme Court chose to weigh the burden on interstate commerce against the purported state interest in facilitating Ohio residents pursuing claims against non-resident defendants. *Id.* at 891. Holding the Ohio tolling statute unconstitutional, the Supreme Court observed:

Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction, for it is conceded by all parties that the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations. The Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of the Ohio courts. In this manner, the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations.

Id. at 894.

4. Eighth Circuit Court of Appeals Holds Missouri Tolling Statute Unconstitutional under *Bendix*.

While not binding precedent in this Court, in 2002, the Eighth Circuit Court of Appeals held that the Missouri tolling statute was unconstitutional as applied.

Rademeyer v. Farris, 284 F.3d 833, 839 (8th Cir. 2002). In *Rademeyer*, the district court granted the defendant summary judgment on statute of limitations' grounds finding, among other things, that the plaintiffs' cause of action was not tolled under Section

516.200 when the individual defendant moved from the state of Missouri to the state of Florida after the cause of action accrued. *Id.* at 836. The Eighth Circuit noted that the Missouri Supreme Court in *Poling* broadly interpreted Section 516.200 to apply to all out-of-state defendants, even those subject to the state's long-arm jurisdiction. *Id.* at 839. Noting that such a broad interpretation of Section 516.200 would impermissibly burden interstate commerce, the Eighth Circuit held that the district court correctly concluded that Missouri's tolling statute violated the Commerce Clause of the United States Constitution under *Bendix*. *Id.*

The Eighth Circuit also noted that it previously had held unconstitutional a similar North Dakota tolling statute which impermissibly burdened interstate commerce because it forced a non-resident defendant to choose between being physically present in the state for the limitations period or forfeiting the statute of limitations defense. *Id.* at 838-39; citing *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1074 (8th Cir. 1992). The Eighth Circuit noted that North Dakota's interest in aiding its residents' efforts against non-resident defendants did not justify denying non-residents the protections of the statute of limitations, particularly when long-arm service of process was available. *Rademeyer*, 284 F.3d at 839; *Bottineau Farmers Elevator*, 963 F.2d at 1074.

5. Application of *Bendix* holding to tolling statutes in other states.

Since the United States Supreme Court issued its decision in *Bendix*, several courts in other states have addressed the constitutionality of their similar tolling statutes. A federal district court in Ohio, for example, determined that the Ohio tolling statute was

unconstitutional not only as it applied to a corporation, but also as it applied to an individual defendant. *Tesar v. Hallas*, 738 F.Supp. 240 (N.D. Ohio 1990). The *Tesar* court determined that where the defendant had lived and worked in Cleveland, and then moved to Pennsylvania where he started a new job, the Ohio tolling statute was unconstitutional in its application to him, as the law is well settled that “the movement of persons falls within the Commerce Clause.” *Id.* at 242. That court found it to be unjustified that persons who have committed acts they know might be considered tortious to be held hostage until the applicable limitations period expires. *Id.* at 242-243.

The Ninth Circuit Court of Appeals applied *Bendix* similarly in determining that the California tolling statute (which is nearly identical to the Missouri tolling statute) was unconstitutional. *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990). The court there found specifically that “[l]ike the defendant in *Bendix*, the California long arm statute would have permitted service on Brownstein throughout the limitations period.” *Id.* at 393.

As discussed above, North Dakota’s tolling statute similarly has been held to be unconstitutional by both the Eighth Circuit Court of Appeals and the North Dakota Supreme Court. *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1074 (8th Cir. 1992); *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (N.D. 1992). According to the *Bottineau* court, applying *Bendix* to North Dakota’s statute, North Dakota’s interest in “assisting its residents in litigating against non-resident defendants, when long-arm service of process is available, cannot justify the imposition of a greater burden on non-residents than residents.” *Bottineau*, 963 F.2d at 1074.

Consequently, where a statute “forces a non-resident defendant to choose between being physically present in the state for the limitations period or forfeiting the statute of limitations defense,” that violated the United States Constitution. *Id.* at 1074-1075.

One appellate court has noted, “[e]very time that a court has considered a tolling statute similar to the one found unconstitutional by the Supreme Court in *Bendix*, the court has struck down the statute as unconstitutional under the Commerce Clause, whether the nonresident defendant be a corporation or an individual, and whether the statute is on its face discriminatory or neutral.” *Cadles of Grassy Meadows II, L.L.C. v. Goldner*, 2007 U.S. Dist. LEXIS 42515, 20-21 (D. Tex. 2007). The court in *Cadles* went on to note that “the only cases in which courts have chosen not to extend *Bendix* or have distinguished it in some way have been when the state legislatures or courts have limited the tolling statute to apply only if the plaintiff is unable to effectuate service under a long-arm statute.” *Id.* at 21-22 The Court in *Blyth v. Marcus*, for example, found that since the South Carolina Supreme Court had previously limited the scope of its tolling statute such that the statute did “not toll the statute of limitations when the nonresident defendant is amenable to personal service and the defendant can be brought within the personal jurisdiction of [the] courts,” the South Carolina tolling statute was not unconstitutional as applied. *Blyth v. Marcus*, 517 S.E.2d 433, 435 (S.C. 1999). Similarly, where the four states at issue in *Hunt v. Enzo Biochem, Inc.* (California, Florida, Massachusetts, and South Carolina) had prohibited use of their tolling statute where the absent defendant was still subject to personal jurisdiction during the applicable time period, the holding in *Bendix* was distinguished. *Hunt v. Enzo Biochem, Inc.*, 471 F.Supp.2d 390, 404-405

(S.D.N.Y. 2006). Taking into account all of the above, as well as the application of the tolling statute, the *Cadles* court determined that the Texas tolling statute is unconstitutional. *Cadles*, 2007 U.S. Dist. LEXIS 42515.

6. Analysis of this Court's Previous Interpretation of the Missouri Tolling Statute in Light of *Bendix*.

a. *Bendix* is binding precedent in Missouri.

This Court has not decided any cases since 1986 contrary to its holding in *Poling*, in which Section 516.200 was held to toll the statute of limitations where a defendant moved from the state of Missouri after the cause of action accrued. *Poling*, 717 S.W.2d 520. In fact, this Court has not addressed the Missouri tolling statute since *Poling*. Further, no appellate court in this state has addressed the constitutionality issue raised in this proceeding. Moreover, even if the courts of this state previously had upheld the constitutionality of Section 516.200, Missouri's lower courts are bound to apply precedent of the Missouri Supreme Court only when such precedent does not conflict with, and has not been impliedly overruled by, constitutional doctrine as announced by the United States Supreme Court. *Trimble v. State*, 693 S.W.2d 267, 276 (Mo. App. 1985). The United States Supreme Court's interpretation of the United States Constitution is binding on state courts under the Supremacy Clause of the United States Constitution. *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).

This Court has interpreted and applied Missouri’s tolling statute broadly – finding that the statute applied to all out-of-state defendants, regardless of whether the state’s long-arm jurisdiction applied. *Poling v. Moitra*, 717 S.W.2d at 522. This broad interpretation of a tolling statute was declared unconstitutional in *Bendix*. Since that time, every other appellate court that has addressed the constitutionality of a similarly broadly interpreted tolling statute has followed *Bendix* and held such statutes unconstitutional to the extent that they force a non-resident defendant to choose whether to remain in the state until the limitations period runs or submit themselves to the general jurisdiction of that state’s courts. *See discussion in Point 5, supra*.

b. Under *Bendix*, the Missouri Tolling Statute is Unconstitutional.

The Missouri tolling statute, as interpreted by this Court in *Poling*, impermissibly burdens interstate commerce in violation of Article I, Section 8 of the United States Constitution for the same reasons that the United States Supreme Court held unconstitutional a similar Ohio tolling statute in *Bendix*. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988); *Poling v. Moitra*, 717 S.W.2d 520 at 522.

First, the Missouri and Ohio tolling statutes, although worded slightly differently, are identical in effect. *Compare Mo. Rev. Stat. § 516.200 (2000) with Ohio Rev. Code Ann. § 2305.09 (1981)*. Both statutes purport to toll the underlying statute of limitations where a resident defendant moves from the state after the cause of action accrues. *Id.* Second, both Missouri and Ohio have long-arm statutes that permit plaintiffs to serve

non-resident defendants within the applicable limitations period. *Compare Mo. Rev. Stat. Section 506.500 (2000) with Ohio Rev. Code Ann. § 2307.38.2 (1981); Bendix*, 488 U.S. at 894 (noting that there was no dispute that the defendant could have been served under the Ohio long arm statute). Third, both Missouri and Ohio statutes permit foreign defendants to designate agents for service of process in their respective states. *Mo. Rev. Stat. §§ 351.594, 506.150.1(2000); Mo.R.Civ.P. 54.13(b)(1); Ohio Rev. Code Ann. § 1703.04.1 (1985)*. Fourth, the present case and *Bendix* both involve non-resident defendants who resided or had contacts in Missouri and Ohio, respectively, at the time the causes of action accrued, but who later were non-residents of the particular state at the time plaintiff's action was filed. **Appendix, p. A-24; Bendix**, 488 U.S. at 889-890.

Importantly, Relator in the present case was faced with the same choice that defendant Midwesco faced in *Bendix*—exposure to the general jurisdiction of the state's courts by having an agent for service of process or remaining subject to suit in perpetuity. *Bendix*, 488 U.S. at 892-893. This choice presents a significant burden on interstate commerce. *Id.* This burden exceeds any local interest that Missouri may advance for aiding residents in obtaining service on former residents. *Id.* For that reason, the Missouri tolling statute as interpreted in *Poling* violates the Commerce Clause of Article I, Section 8 of the United States Constitution and is invalid.³

³ Had this Court, when it decided *Poling*, chosen to follow *Williams v. Malone*, 592 S.W.2d 879, 882 (Mo. App. 1980), and interpreted Section 516.200 not to apply where a

Plaintiff, in her Answer to the writ application, asserts that *Bendix* is distinguishable because that case involved a foreign corporation, not an individual. **Answer, ¶ 12.** Presumably, plaintiff will argue that, because Relator is an individual, the burden on interstate commerce of the Missouri tolling statute is not sufficient to justify a finding of constitutional invalidity in the present case. Plaintiff ignores, however, long-standing precedent of the United States Supreme Court that to the extent state law restricts the free movement of individuals among states, there is a substantial burden on interstate commerce. *Edwards v. California*, 314 U.S. 160, 172-173 (1941).

In sum, this Court has an obligation under the Supremacy Clause in the United States Constitution to find that the Missouri tolling statute, Section 516.200, impermissibly burdens interstate commerce and is invalid insofar as it purports to toll the statute of limitations in Section 516.105 on the basis that Relator moved to the state of Kansas after Plaintiff's cause of action accrued. *Bendix*, 488 U.S. at 894-895; *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). This Court should issue its order prohibiting Respondent from vacating her prior dismissal of Relator with prejudice and from permitting or taking any other action regarding Relator in this proceeding other than ordering Relator's dismissal with prejudice at Plaintiff's cost.

defendant could be served under Missouri's long-arm statute, then Section 516.200 likely would not violate the Commerce Clause.

7. This Court’s ruling should be applied retroactively rather than merely prospectively.

If this Court determines that its prior decision in *Poling* should be reversed and Section 516.200 should be declared unconstitutional as applied to Relator by Respondent below, then this Court must address Plaintiff’s assertion that any such determination should have prospective effect only. **Answer, ¶ 15.** The plaintiff in *Bendix* made a similar request. *Bendix*, 488 U.S. at 895. The United States Supreme Court refused to consider the issue because it was not raised in the lower courts. *Id.* In this case, Plaintiff first raised the prospective application argument in her answer to Relator’s writ application in this Court. **Answer, ¶ 15.** Although this Court could follow the United States Supreme Court’s lead in *Bendix* and find that Plaintiff has waived this issue by not asserting this argument below, a review of the applicable law demonstrates that any finding in Relator’s favor in this proceeding should apply retroactively to the parties herein and to similarly-situated defendants.

This Court has recognized that generally judicial decisions have both prospective and retroactive effect. *Sumners v. Sumners*, 701 S.W.2d 720, 722 (Mo. banc 1985) (noting that under common law there was “no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to ‘pronounce a new law, but to maintain and expound the old one’”) *citing Linkletter v. Walker*, 381 U.S. 618, 622-623 (1965). Consequently, a change in the law resulting from judicial decisions would be applied to the parties in the case before the court as well as to others situated similarly. *Sumners*, 701 S.W.2d at 722. In *Sumners*,

this Court acknowledged its prior decision in *Keltner v. Keltner*, wherein this Court noted that whether a decision should be applied prospectively only ought to be determined “based on the merits of each individual case.” *Id.* at 723; citing *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. banc 1979).

In the present case, as discussed below, there are a number of reasons this Court should apply any determination in Relator’s favor to the parties herein and others situated similarly. First, any determination in Relator’s favor would not be a change in the law because the constitutionality of Missouri’s tolling statute is an issue of first impression and the validity of *Poling* has been very doubtful since the 1988 decision in *Bendix*. Second, assuming but not conceding, that a decision in Relator’s favor herein is a change in Missouri law, this Court should find that such decision should apply to the parties herein and retroactively to similarly-situated parties because such decision would not overturn clearly-established precedent, retrospective effect would further the public purpose of relieving an impermissible burden on interstate commerce, and because the hardship of denying relief to Relator outweighs the self-inflicted hardship to plaintiff. Third, courts in other jurisdictions which have examined similar tolling statutes in light of the binding precedent of *Bendix* uniformly have applied the constitutional invalidity holdings to the parties before the courts. Finally, the Eighth Circuit Court of Appeals has held that federal law regarding retrospective versus prospective application applies and that under federal law, the invalidity of the tolling statute should have retroactive application.

a. **Application of *Bendix* to Section 516.200, RSMo., is not a new interpretation of law.**

Before this Court must make a determination whether this case should be applied prospectively or retroactively based on the analysis in *Sumners*, this Court should first look to whether in fact a decision in Relator's favor constitutes a change in the law. Although this Court's most recent decision interpreting Section 516.200 was in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), this Court did not address whether Section 516.200 violates the Commerce Clause of the United States Constitution. *Poling*, 717 S.W.2d 520. In fact, to this day, this Court has not addressed the constitutionality of Missouri's tolling statute under the Commerce Clause. The Missouri tolling statute's constitutionality was first placed in substantial doubt when the United States Supreme Court held a nearly identical Ohio statute unconstitutional in *Bendix. Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888. Then, in 2002, when the Eighth Circuit Court of Appeals was asked to apply *Bendix* to Section 516.200, that court held that Section 516.200, as interpreted by this Court in *Poling*, violates the Commerce Clause in the United States Constitution. *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002).

The fact is, a ruling in Relator's favor would not change the law in Missouri. Rather, this Court would be applying United States Supreme Court precedent that has not changed in nearly twenty years. Moreover, Plaintiff cannot credibly claim surprise given that two of the first three cases cited in Vernon's Annotated Missouri Statutes Section 516.200 are *Bendix*, and *Rademeyer*, with *Rademeyer* (which cites back to *Bendix*) being cited as to "Validity." *V.A.M.S.*, Vol. 34A, p. 370.

Not even Plaintiff claims she allowed the statute of limitations to lapse in reliance on the tolling provisions in Section 516.200. Prior to bringing this action, and well before the time the statute of limitations set forth in Section 516.105 expired, plaintiff filed a civil rights action (in the United States District Court, Western District of Missouri, Case No. 05-CV-04120) against this defendant and others based on the same facts at issue in this case. **Appendix, pp. A-29 to A-30, A-39.** Thereafter, Plaintiff brought this action against Dr. Bloomquist and eleven other defendants in the court below. **Appendix, p. A-1.** After briefing and argument on Motions to Dismiss filed by all of the served defendants (all unserved defendants were to be dismissed if not served by February 1, 2007), all of which motions were based in whole or in part on the statute of limitations set out in Section 516.105, Respondent dismissed all of the defendants. **Appendix, A-42.** Plaintiff only requested that Respondent reconsider the dismissal of Dr. Bloomquist – not the dismissal of the other five health care defendants dismissed on the basis of the limitations bar of Section 516.105. **Appendix, A-43 to A-46.** This dismissal evidences Plaintiff’s tacit acknowledgement that her cause of action is time-barred based on the facts alleged in her pleadings. Plaintiff’s acquiescence in the dismissal of the other health care defendants undermines the credibility of any claim of reliance on *Poling*.

b. Application of *Sumners* does not mandate prospective application.

The general rule is that civil statutes of limitations are procedural, and as procedural laws, they may be applied retroactively. *State v. Casaretto*, 818 S.W.2d 313,

316 (Mo. App. 1991). In contrast, where this Court changes its interpretation regarding a procedural law (which for the sake of argument only, will be assumed here, even though not conceded), the presumption is that the change in interpretation should be applied prospectively only. *Sumners*, 701 S.W.2d at 723. The decision, however, should still be made “on the merits of each individual case.” *Keltner*, 589 S.W.2d at 239.

In determining whether a case should be applied retroactively or prospectively, this Court has employed a three-part analysis:

- (1) whether the decision “establishes a new principle of law ... by overruling clear past precedent.” *Sumners*, 701 S.W.2d at 724, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971);
- (2) “whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation.” *Id.* at 722; and
- (3) “balanc[ing] the interest of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retroactive operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.” *Id.*

Applying this analysis to the facts of the present case demonstrates that any determination in Relator’s favor should have retrospective effect in this case.

(1) This Court is not changing the law if it finds Section 516.200 unconstitutional.

As previously discussed, Relator contends that, in fact, this Court is not “changing” the law if it finds that Section 516.200 is unconstitutional under *Bendix*.

The Court found in *Sumners*, for example, that although arguably the prior decision of the court could be deemed to satisfy the “threshold requirement” for prospective application set forth in (1) above, “the showing is less forceful than might be ... inasmuch as the superseded decisions are not those of the court of last resort.” *Sumners*, 701 S.W.2d at 724. Similarly, in *Thurston v. Ballinger*, the appellate court determined that its decisions should be applied retroactively because MAI standards already had been changed consistent with the court’s decision. *Thurston v. Ballinger*, 884 S.W.2d 22, 25 (Mo. App. 1994). Similarly, in the limited set of circumstances present here--where the issue is the appropriate application of the United States Constitution to a statute--this Court is not the court of last resort. Moreover, where the United Supreme Court’s determination in *Bendix* has not only been referred to in *V.A.M.S.*, but has been applied by the Eighth Circuit in *Rademeyer* to find Section 516.200 unconstitutional, a finding here that Section 516.200 is unconstitutional is not a “bolt from the blue.” *Thurston*, 884 S.W.2d at 25.

(2) Retrospective application of a finding that Section 516.200 is unconstitutional will enhance the purpose and effect of such a decision.

If this Court finds that Section 516.200 is unconstitutional as Respondent has applied it here, and as this Court applied it in *Poling*, one purpose or effect of such decision would be to provide the same protections to defendants who have moved out of the state as are available to residents who have remained in the state and to non-residents who never have resided in Missouri. That purpose cannot be accomplished completely if this Court only applies its decision here prospectively. It is nearly 20 years too late to

accomplish that purpose by prospective-only application of such a decision. Much as the court decided in *Prayson v. Kansas City Power & Light Company* that “retroactive application corrects the distortion of the workers’ compensation law created by the application of the exception” at issue in that case, retroactive application of the court’s decision here will correct the error that has at least arguably been present in Missouri law since June of 1988. *Prayson v. Kansas City Power & Light Company*, 847 S.W.2d 852, 857 (Mo. App. 1992). Under the circumstances here, prospective application only of a ruling that Section 516.200 is unconstitutional would be inequitable in its application to Dr. Bloomquist in a number of ways. It subjects Dr. Bloomquist to greater liability in this case than exists for other health care defendants who have been dismissed on limitations’ grounds. Denying retroactive application of a ruling in Relator’s favor effectively rewards Plaintiff for filing her action after the limitations period in Section 516.105 had run, even though Plaintiff had the ability to obtain service under the long-arm statute long before the statute of limitations expired.

(3) *Balancing of the interests of the parties in the underlying action weighs in favor of retroactive application of this Court’s ruling.*

As previously discussed, when the interests of the plaintiff and Dr. Bloomquist, the sole remaining defendant in the underlying action are balanced, the weight is in favor of retroactive application if this Court deems Section 516.200 unconstitutional. The Court, in deciding this part of its analysis, considers specifically “the degree to which parties may have relied on the old rule and weigh the hardships that could result from applying the new rule against the possible hardships to those parties who would be denied

the benefit of the new rule.” *Id.* at 858. Moreover, the reliance at issue in *Sumners* is the “party’s reliance upon *settled* law in governing his or her conduct *before* an incident which gives rise to litigation occurs, not in deciding whether to pursue litigation after the incident.” *Id.* (emphasis included in original).

Plaintiff in the underlying action here certainly was not relying upon Section 516.200 in her decision to obtain medical care from Dr. Bloomquist rather than from some other provider (in fact, she obtained care from numerous other providers). Moreover, even if this Court were to look for good faith reliance by plaintiff in determining the timeframe for filing suit in the court below, it would be difficult to find such reliance upon Section 516.200, given the fact that this action was filed not only against Dr. Bloomquist, but against 11 other defendants, all of whom plaintiff admits have since been dismissed – one voluntarily, five for plaintiff’s failure to obtain service, and five for her failure to comply with the statute of limitations set out in Section 516.105. **Appendix, p. A-42; Answer, ¶ 3.** In this case, it is also important to note that “an unconstitutional statute is no law and confers no right from the date of its enactment, and not merely from the date of the decision branding it unconstitutional, except to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held to be unconstitutional.” *Nike IHM, Inc. v. Zimmerman*, 122 S.W.3d 615, 621 (Mo. App. 2003) (internal citations omitted).

c. **Application of *Bendix* in other jurisdictions has been retroactive rather than prospective.**

As discussed previously, several other state and federal courts have applied the holding in *Bendix* to tolling statutes in other jurisdictions, finding that all tolling statutes interpreted and applied in the manner that this Court decided *Poling* are unconstitutional. See Subsection C.5, *infra*. In the majority of these cases, apparently no issue has been raised regarding retroactive versus prospective application only, and the underlying actions simply have been dismissed on statute of limitations grounds. See, e.g., *Tesar*, 738 F.Supp. 240; *Abramson*, 897 F.2d 389. There are a couple of cases, however, in which the courts were asked to decide whether the holdings should be applied prospectively. The Eighth Circuit Court of Appeals examined this issue in *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 960 F.2d at 1064. In holding that the ruling should apply to the parties in that case, the *Bottineau* court determined that retroactive applicability is a matter of federal law, because the constitutional question is a federal question. *Id.* at 1074-1075. The court then applied the test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (upon which the *Sumners* test, set out before, was based), as limited by the United States Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1990) (holding that once retroactivity has been determined to apply to the parties in any case, retroactivity should apply to all future litigants of that same issue), and *Lampf, Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson*, 501 U.S. 350 (1991) (holding that new statute of limitations interpretation should apply to the parties to the case). *Bottineau*, 963 F.2d at 1074-1075. Given the

Supreme Court's holding in *Beam*, and supplemented by *Lampf*, the *Bottineau* court determined that the *Bendix* holding, which had been applied to the litigants in that case, mandates that future cases on this issue should also be applied retroactively. *Bottineau*, 963 F.2d at 1074-1075. The North Dakota Supreme Court has held similarly. *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1, 6 (N.D. 1992).

For all of the above reasons, this Court should apply retroactively any determination in Relator's favor on the constitutionality issue.

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 themselves generally to the jurisdiction of the state of their former residence or presence. Dr. Bloomquist faced the same choice and this is an unconstitutional burden on interstate commerce. This Court must 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 2003 and contains 10,664 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 Brief of Relator Raymond Bloomquist, D.O., and Appendix and one copy on diskette were sent on this 26th day of July, 2007,

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