IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

NO. WD80470

ROBERT CASEY (DECEASED) and DELORES MURPHY, ET AL,

Appellants, Respondents

Vs.

E. J. CODY COMPANY, INC.

Appellant, Co-Respondent and

ACCIDENT FUND INSURANCE COMPANY OF AMERICA, INSURER

Appellant-Co-Respondent

LETTER BRIEF OF E. J. CODY COMPANY, INC.

In response to the Court's Order of October 16, 2017, Appellant, Co-Respondent E. J. Cody Co. Inc. ("Cody Co.") tenders the following supplemental arguments to further address the issue of whether the Missouri Supreme Court has exclusive appellate jurisdiction in light of the assertion that this case involves the issue of the validity of a Missouri state statute, particularly in light of the fact that *Section 287.200.4* states that the statute is to be applied to "all claims filed on or after January 1, 2014." The Court then directed the parties to address:

A. Whether Appellant Accident Fund has adequately preserved the stated constitutional challenges, an issue ruled upon in *Duncan v. Missouri Bd. for Architects*, 744 S.W. 2d. 524, 531 (Mo. App. E.D. 1988) (cited by the Court in the Order); and,

B. Whether the constitutional argument invokes the Supreme Court's exclusive appellate jurisdiction even though the appeal might be resolved without the need to address the constitutional issue, a question addressed in *Boeving v. Kander*, 496 S.W. 3d 498, 503-4 (Mo. banc 2016) (also cited in the Court's Order).

Although in the Court's Order, reference is made to Accident Fund only, Cody Co. believes that Cody Co. should consider the Order as applying equally to them given the circumstances of the appeal and since Cody Co. is arguing that if the constitutional issue has been preserved by Cody Co., that is has been preserved for all purposes.

As Cody Co. argued in Cody Co.'s Reply Brief, Cody Co. believes that Cody Co. has done all that is necessary to raise and preserve the constitutional issues from Cody Co.'s Answer to the Claim for Compensation, to the hearing before the Administrative Law Judge, who listed constitutionality as an issue in his Award, and acknowledged in the Award that he lacked jurisdiction to rule on that issue. Cody Co. also expressed their intent to preserve the constitutional issues in their Application for Review (on page 3, listed as Issue 4 – pages 3 and 4 of that Application were erroneously excluded from the Commission's Certificate on Appeal), briefed the constitutional issue to the Commission, as evidenced by the Commission's recognition of the issue, the Commission's footnote acknowledging the Commissions' lack of jurisdiction, and the Commission's statement indicating that the issue has been preserved for further review.

The language from the *Duncan* case which the Court noted in the Order, to wit: "We see no logical reason to require that a constitutional challenge to the validity of a statute be raised before an administrative body in order to preserve the issue for appellate review", *Duncan*, Supra at 531, which can be seen as a "useless and futile act" (citing *State Savings Assoc. of St. Louis* v. *Kellogg*, 52 Mo. 583 (1973) l. c. 591) supports the Appellants' position. Although *Schierding v. Missouri Dental Board*, 705 S.W. 484, 486 Mo. App. E.D. 1985), noted that parties "may, indeed should" raise their constitutional challenge before the lower body, here Cody Co. preserved that issue by pleadings and briefing the issue before the Division of Workers' Compensation and the Commission. Clearly, Cody Co. satisfied the Administrative Law Judge's and the Commission's administrative needs and to be required to go yet further would be the "commitment of administrative resources unsupported by any administrative or judicial interest" which the Court condemned. *Shierding*, Id. at 486.

The second question which the Court has asked the parties to address is whether Accident Fund's constitutional argument (which Cody Co. assumes applies equally to them) invokes the Supreme Court's exclusive jurisdiction even though it may be possible to resolve the appeal without the constitutional issues being addressed, citing *Boeving v. Kander*, 496 S.W. 3d 498, 503-04 (Mo. banc 2016).

The question then is: can this court resolve this appeal in such a manner that a decision for the Appellants or a decision for the Respondents will not require the Court to address the constitutional issues?

Cody Co. has filed an appeal disputing the finding of liability, that is, disputing that the record contains sufficient competent evidence to support the decisions of the ALJ and the Commission that Casey contracted an occupational disease arising out of and in the course of his employment and that his employment by Cody Co. was the last employment in which he was exposed to hazard of asbestos, including the hazard of contrating mesothelioma. If this court would reverse this finding of liability then there would no basis for an award of any compensation and the 2013 workers' compensation occupational disease law amendments would not be triggered under any theory of recovery. So it would not be necessary then to determine whether Accident Fund is responsible for the enhanced mesothelioma benefit under the insurance policy in force on the date that Casey's disease was diagnosed.[1] The liability issue then is an issue which this court could resolve and which is clearly not within the Supreme Court's exclusive jurisdiction.

However, if this court affirms the Commission's decision on the liability issue then it must address whether the 2013 amendments, specifically Section 287.200.4(3), is valid and can be applied in a case: 1) in which the last exposure alleged took place in 1990, twenty-three years before the statute was adopted; and, 2) which affixes liability to an insurer which did not insure Cody Co. at that time of the claimed last exposure.

[1] The date of diagnosis is considered the "date of injury" for workers' compensation purposes.

There can be no doubt that to subject a past employer or insurer[2] to the extraordinary liability which was created by the passage of *Section 287.200.4*, particularly *287.200.4(3)(a),* in 2013 would be to create a new obligation which did not exist when Cody Co. last employed Casey, a result with would violate *Article I. Section 13* of the Missouri Constitution. Cody Co. believes that it is clear that the use of the language by the General Assembly indicating that the law shall be applied to "all claims filed on or after January 1, 2014" does not answer the constitutional challenge since the expression of a legislative intent to have a statute applied retrospectively does not allow the legislature to seek to apply a law which is substantive in nature and which clearly imposes an unprecedented obligation to a transaction which took place 23 years in the past. As the court stated in *Missouri Real Estate Comm'n v. Rayford*, 307 S.W. 3d 686, 697 (Mo. App. 2010) neither case cited by that appellant: " . . . stands for the proposition that legislative intent alone can be independently dispositive of a statute's permissible retroactive application, without regard to compliance with Article I. section 13 of the Missouri Constitution."

Thus, this court, if the finding that Cody Co. is liable under the last exposure rule is affirmed cannot but address the constitutional issue, whether the liability is found to be that of Accident Fund or the "historic" insurer.[3]

Counsel for Cody Co. has noted that Accident Fund's position over the course of this litigation has gone from defending based up the policy language and a constitutional

[2] "Past" being used to describe the last employer under the last exposure rule, and its then insurer.
[3] Which Cody Co. must again point out is in liquidation/liquidated.

challenge to adding the additional argument that if only the last exposure rule is followed as in the past, that all will be well with *Section 287.200.4* since the new liability which it creates will fall on the party liable based only upon the date of last exposure, with no liability to be attached based upon the date of diagnosis. The problem with that argument is if that interpretation is adopted, then an existing, ongoing employer can accept mesothelioma liability thereby creating extraordinary liability for its historic insurer which the employer's historic insurer couldn't have foreseen, much less underwritten. Moreover, by purchasing the mesothelioma endorsement the viable employer will receive little benefit from the mesothelioma coverage unless a mesothelioma claim is filed where the last exposure had taken place during that current policy period.[4]

In summation, it is Cody Co.'s position that *Section 287.200.4* in unconstitutional if applied to any mesothelioma case where the last exposure took place prior to January 1, 2014; but if it is constitutional then the insurer which added a mesothelioma endorsement to their policy post-January 1, 2014 should be liable for the enhanced mesothelioma benefit put in place by virtue of the 2013 amendments to *C. 287.010, et seq.*

[4] The occurrence is very unlikely since the latency period for mesothelioma can be as long as 50 or more years.

Respectfully submitted:

s/s James B. Kennedy

James B. Kennedy,
MBE # 20928
Evans & Dixon, L.L.C.
201 N. Broadway, Ste. 2500
St. Louis, MO 63105
314-552-4040 (Ph.)
314-884-4420 (Fax.)
jkennedy@evans-dixon.com
Counsel for Co-Appellant/Co-Respondent E. J. Cody Co., Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Letter Brief was filed on this 30th day of October, 2017 by use of the Missouri Electronic Filing System which will send a notice of electronic filing to:

Mr. Scott Mach
Attorney at Law
712 Broadway, Ste. 100
Kansas City, MO 64105
smach@pophamlaw.com
Counsel for Appellants/Respondents Delores Murphy, et al.

And

Mr. John Fox,
Attorney at Law
8301 State Line Rd., Ste. 105
Kansas City, MO 64111
JF@fglglaw.com
Co-counsel for Co-Appellant/Co-Respondent Accident Fund of America

And

Mr. Jeffery McPherson
Attorney at Law
7700 Forsyth Blvd., Ste. 1800
Clayton, MO 63105
jmcpherson@armstrongteasdale.com
Co-Counsel for Co-Appellant/Co-Respondent, Accident Fund

/s/ James B. Kennedy
Counsel for E. J. Cody Co., Inc.

CERTIFICATE OF COMPLIANCE

This Letter Brief complies with Rule 84.06(b) and contains less than 2,000 words all inclusive. To the best of my knowledge and belief, the copy of the Letter Brief (and Appendix) forwarded to the Clerk of the Court, via electronic mail, in lieu of a floppy disk or CD, has been scanned for viruses, and is virus-free.

/s/ James B. Kennedy
James B. Kennedy

Copy to: ssonnenberg@courts.mo.gov

3727133