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IN THE SUPREME COURT OF MISSOURI

Appeal Number SC97361

NEAL DESAI and HETA DESAI,
Plaintiffs/Respondents,

v.

GARCIA EMPIRE, LLC d/b/a ROXY'S,
Defendant,

SENECA SPECIALTY INSURANCE COMPANY,
Intervenor/Appellant.

BRIEF OF *AMICUS CURIAE*
MISSOURI ORGANIZATION OF DEFENSE LAWYERS
IN SUPPORT OF INTERVENOR/APPELLANT

FILED BY CONSENT

Appeal from the Circuit Court of Jackson County, Missouri
Honorable James F. Kanatzart
Cause Number 1716-CV05305

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II. For purposes of applying the amendments to RSMo § 537.065 to a pending cause of action, the key date in determining whether the amendments apply is the date on which judgment was entered, not the date on which the action was filed or the date on which the 537.065 contract was executed; as the amendments apply only prospectively to judgments entered after the amendment's effective date of August 28, 2017, the constitutional prohibition against retrospective laws is not implicated. 21

III. The requirements that the insurer be given written notice of the RSMo § 537.065 contract and an opportunity to intervene in the underlying action are procedural only, do not involve or invoke substantive rights, and therefore may apply retroactively to "any pending lawsuit involving the claim for damages" before judgment is entered in said lawsuit. 22

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INTEREST OF *AMICUS CURIAE*

The Missouri Organization of Defense Lawyers ("MODL") is a private, voluntary association of Missouri attorneys dedicated to promoting improvements to the administration of justice and optimizing the quality of the services the legal profession renders to society. To that end, MODL members work to advance and exchange legal information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing individual, municipal, and corporate defendants in civil litigation. As an organization composed entirely of Missouri attorneys, MODL promotes the establishment of fair and predictable laws affecting tort litigation that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

In this case, MODL supports the position of Intervenor/Appellant Seneca Specialty Insurance Company ("Seneca") that the amendments to RSMo § 537.065 that went into effect on August 28, 2017, requiring that the tortfeasor's insurer be given notice and an opportunity to intervene in a lawsuit against the tortfeasor before judgment is entered on a contract between the tortfeasor and the person making the claim for damages against the tortfeasor, applied to the underlying lawsuit, in that (1) judgment had not yet been entered in the underlying action as of the effective date of the statutory amendments, and (2) the amendments were procedural, rather than substantive, in nature,

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and therefore applied retroactively to the pending action despite said action having been commenced prior to the effective date of the amendments.

MODL further asserts its broader position that the Missouri legislature intended the amendments to RSMo § 537.065 to apply immediately to lawsuits pending at the time the amendments went into effect on August 28, 2017, that is, to lawsuits in which judgment had not yet been entered; and that the amendments to RSMo § 537.065 were procedural only, and did not affect or alter the substantive rights of any parties.

In this amicus brief, MODL seeks to present to this Court a short history of Missouri decisions interpreting the pertinent provisions of RSMo § 537.065 so as to explain why the Missouri legislature amended the statute to grant insurers the right to notice of any agreement entered into between the claimant and the insured tortfeasor, and the right to intervene in any pending lawsuit filed by the claimant against the insured tortfeasor.

CONSENT OF PARTIES

MODL has received consent from counsel for Seneca and counsel for Plaintiffs/Respondents Neal Desai and Heta Desai ("the Desais") to file this amicus brief, in compliance with Missouri Supreme Court Rule 84.05(f)(2).

JURISDICTIONAL STATEMENT

MODL hereby adopts the Jurisdictional Statement set forth in Seneca's substitute brief to this Court.

STATEMENT OF FACTS

MODL hereby adopts the Statement of Facts set forth in Seneca's substitute brief to this Court.

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POINTS RELIED ON

I. In amending RSMo § 537.065 to provide insurers the right to written notice of any contract entered into between the claimant and the insured tortfeasor under RSMo § 537.065.1, and the right to intervene as a matter of right upon receipt of said notice, the Missouri legislature clearly intended to correct a statute that had become distorted from its original purpose.

Farmers Mut. Auto Ins. Co v. Drane, 383 S.W.2d 714 (Mo. 1964)

Sherman v. Kaplan, 522 S.W.2d 318 (Mo.App.W.D. 2017)

Schmitz v. Great American Assur. Co., 337 S.W.3d 700 (Mo.banc 2011)

RSMo § 537.065

II. For purposes of applying the amendments to RSMo § 537.065 to a pending cause of action, the key date in determining whether the amendments apply is the date on which judgment was entered, not the date on which the action was filed or on which the 537.065 contract was executed; as the amendments apply only prospectively to judgments entered after the amendment's effective date of August 28, 2017, the constitutional prohibition against retrospective laws is not implicated.

RSMo § 537.065

III. The requirements that the insurer be given written notice of the RSMo § 537.065 contract and an opportunity to intervene in the underlying action are procedural only, do not involve or invoke substantive rights, and therefore may be applied retroactively to "any pending lawsuit involving the claim for damages" before judgment is entered in said lawsuit.

RSMo § 537.065

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ARGUMENT

I. In amending RSMo § 537.065 to provide insurers the right to written notice of any contract entered into between the claimant and the insured tortfeasor under RSMo § 537.065.1, and the right to intervene as a matter of right upon receipt of said notice, the Missouri legislature clearly intended to correct a statute that had become distorted from its original purpose.

A. RSMo § 537.065 and its amendments

RSMo § 537.065, originally enacted in 1959, allowed a person with an unliquidated claim for bodily injuries against a tortfeasor to enter into a contract with that tortfeasor whereby, in consideration of payment of a specified amount, the claimant would agree that, in the event of a judgment being entered against the tortfeasor, he or she would not execute on the judgment except against the insurer who insured the legal liability of the tortfeasor. Over half a century later, the Missouri legislature enacted amendments to RSMo § 537.065 which went into effect on August 28, 2017 and which added the following provision:

> 2. Before a judgment may be entered against any tort-feasor after such tort-feasor has entered into a contract under this section, the insurer or insurers shall be provided with written notice of the execution of the contract and shall have thirty days after receipt of such notice to intervene as a matter of right in any pending lawsuit involving the claim for damages.

Accordingly, under the revised statute, an insurer who has declined coverage or agreed to defend the insured under a reservation of rights is entitled to 30 days' notice of

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any 537.065 contract entered into between the claimant and its insured, and has the right to intervene in the action against its insured before any judgment may be entered.

In the nearly 60 years that RSMo § 537.065 has been law, up until the enactment of the foregoing amendments, the courts' interpretation of the statute had become increasingly divorced from the statute's original purpose.

B. *Farmers Mut. Auto Ins. Co v. Drane*

When the original § 537.065 was first passed in 1959, this Court gave full and immediate effect to an agreement reached in reference to the then-brand new statute, which had been enacted just 12 days earlier, in a matter where the accident, insurance policies, and lawsuit all pre-existed the statute itself. *See Farmers Mut. Auto Ins. Co v. Drane*, 383 S.W.2d 714 (Mo. 1964). In ruling on the very first 537.065 agreement entered into within Missouri, this Court held that the statute was intended to provide a means for a tortfeasor to limit the enforceability of a judgment of liability in a case involving other co-defendants. *Id.* at 719-720. It should be noted that *Drane* pre-dated this Court's adoption of comparative fault in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983).

C. *Butters v. City of Independence*

Ten years later, in *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974), this Court held that RSMo § 537.065 did not deprive an insurer of its right to a trial on the questions of policy coverage or collusiveness of the parties to the 537.065 agreement. *Id.* at 426. However, this Court further held in *Butters* that where the insurer offered to defend under a reservation of rights for non-coverage, the insured was not obligated to

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accept the defense on such terms. *Id.* at 425. This Court agreed with the trial court that the acts of the insurer were equivalent to a refusal of a defense, and that the insured was likewise released from the policy prohibition against incurring expenses and negotiating and settling claims. *Id.*

D. *Whitehead v. Lakeside Hosp. Ass'n*

Nearly 20 years later, in *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475 (MoApp.W.D. 1992), the Western District held that an insurer who had denied coverage on a medical malpractice claim as being outside the policy period had no right, under Rule 52.12(a), to intervene in the underlying claim. The plaintiffs had entered into a 537.065 agreement with the insured hospital, pursuant to which the plaintiffs agreed to limit the collection of any judgment to the assets of any insurer of the legal liability of the hospital, and the hospital consented to a separate trial on the issues of liability and damages and to waive a jury. *Id.* at 477. The hospital also agreed not to defend the suit, present evidence or cross-examine any witnesses at trial, or to appeal any judgment entered against it, and in the event of an excess judgment, to assign to the plaintiffs its right to any cause of action against the insurer for bad faith. *Id.* After judgment was entered for the plaintiffs for $8.5 million, the insurer sought to intervene for purposes of moving to vacate the judgment, but the trial court denied intervention. *Id.*

On appeal, the Western District affirmed, holding that the insurer's status as a potential indemnitor of the judgment debtor did not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action; an insurer "does not have an interest that implicates the rule until the insurer is called upon to make indemnity

as to the judgment." *Id.* at 479. Citing *Butters*, the Western District held that an insurer may not reserve the right to disclaim coverage and at the same time insist upon controlling the defense; moreover, the insurer's "unjustified" refusal to defend upon the ground that the claim is not covered by the policy relieves the insured from the contractual obligation not to settle so that the insured is free to go its own way, and to make a reasonable settlement or compromise without the loss of the right to recover on the policy. *Id.* at 480. The plaintiffs' and the insured's choice to accommodate their settlement under § 537.065 was "a method of settlement that is valid if free of collusion or fraud." *Id.* (citing *Cologna v. Farmers & Merchants Ins. Co.,* 785 S.W.2d, 701 (Mo.App.S.D. 1990).

The Western District then held that the insurer's argument that the insured's agreement to present no evidence, to refrain from cross-examining witnesses at trial, and to waive the right to appeal any judgment constituted "collusion" was subject to redress by a petition for declaratory judgment, or in the proceedings to enforce the indemnity obligation to the insured. *Id.* at 480-481.

E. *State ex rel. Rimco, Inc. v. Dowd*

A year later, in *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307 (Mo.App.E.D. 1993), the Eastern District issued a writ of prohibition against the trial judge who had stayed the underlying personal injury action in response to a request by the insurer, who sought to prevent finalization of a 537.065 settlement agreement and entry of judgment pursuant to that agreement. *Id.* at 308. The insurer had offered to defend with a reservation of rights and the insured had refused the offer. *Id.* The Eastern District held

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that the trial judge's stay of the underlying action circumvented the statutory settlement procedure of RSMo § 537.065 that was intended by the Missouri legislature, to wit, to allow an insured defendant "to buy his peace." *Id.*

The Eastern District also expressed skepticism that an insurer was entitled to intervene in the underlying action, particularly where the parties in the tort litigation utilized the provisions of § 537.065:

> Insurers must make hard decisions in determining whether to defend a tort action when some issue of coverage is present. We see no fairness, however, in removing the risk of such decisions from the insurer and transferring it to the insured or imposing the hardship of delay on the plaintiff. The insurer has the opportunity to control the litigation by accepting the defense without reservation. If it elects some other course it forfeits its right to participate in the litigation and to control the lawsuit. If its decision concerning coverage is wrong it should be bound by the decision it has made.

Id. at 309. *See also Lodigensky v. American States Preferred Ins. Co.*, 898 S.W.2d 661, 666 (Mo.App.W.D. 1995) (citing *Rimco* with approval).

F. *Schmitz v. Great American Assur. Co.*

Approximately 20 years later, this Court held in *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700 (Mo.banc 2011), that the test of reasonableness of a 537.065 settlement set forth in *Gulf Insurance Co. v. Noble Broadcast*, 936 S.W.2d 810, 816 (Mo.banc 1997) (what "a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff's claim"), did ***not*** apply to judgments

entered after a bench trial. *Id.* at 708-709. This was so even in "trials" where the insured does not present a defense. *Id.* If the insured's agreement does not admit liability or damages, but simply limits collection of any judgment to the insurance policies, the judgment is not subject to *Gulf Insurance*'s reasonableness test. *See id.* at 709.

G. *Sherman v. Kaplan*

Finally, in *Sherman v. Kaplan*, 522 S.W.2d 318 (Mo.App.W.D. 2017), handed down shortly before § 537.065 was amended in 2017, the Western District reversed the trial court's judgment granting the insurer's motions to intervene and to set aside the judgment entered in the underlying medical malpractice lawsuit against the insured physician. *Id.* at 326. The procedural history of the underlying action was complicated and somewhat convoluted:

> The plaintiff sued the insured doctor, his wife (as the doctor's assistant) and the doctor's practice, alleging general negligence against the wife and the doctor's practice, and malpractice against the doctor;
>
> The insurer retained counsel who entered on behalf of both the doctor and his wife;
>
> The trial court granted motions to dismiss, without prejudice, the doctor and his practice due to the plaintiff's failure to file the health care affidavit required under RSMo § 538.225, but denied the motions as to the doctor's wife, ultimately leaving only the one claim of general negligence against the wife;
>
> The insurer sent the doctor a letter denying coverage for the doctor's wife due to her not being an "insured person" under the policy, and advising that it

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would provide no further defense to the claim against the wife;

The plaintiff sought leave to amend her petition to add a claim of fraud under the Missouri Merchandising Practices Act ("the MMPA");

The insurer sent the doctor another letter denying coverage for the claims contained in the proposed first amended petition;

Personal counsel for the doctor and his wife sent the insurer a demand letter, and in response, the insurer sent another letter stating that there was no coverage for the claims against the doctor's wife or for the MMPA claims;

The plaintiff, the doctor, and the doctor's wife entered into a proposed settlement agreement under § 537.065, pursuant to which the plaintiff agreed to dismiss all claims against the wife, the doctor consented to the filing of a medical malpractice claim against him and expressly waived the affidavit requirement of RSMo § 538.225, and the doctor agreed to stipulate to judgment in the plaintiff's favor up to the full $500,000 policy limit;

At the subsequent hearing, at which the doctor and his wife were present and represented by their own counsel but did not offer any evidence, the plaintiff testified to her injuries and damages and offered a consent judgment for the full policy amount of $500,000, which the trial court accepted and entered on that same date;

Thirty-one days after the date of entry of the judgment, the plaintiff filed a separate garnishment action against the insurer;

The insurer thereafter filed a motion in the underlying malpractice action,

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seeking leave to intervene as of right per Rule 52.12(a) and to set aside the underlying judgment as void under Rule 74.06(b);

After two separate hearings held six months apart, the trial court entered an order granting the insurer leave to intervene and setting aside the underlying judgment as void.

Id. at 320-323.

On appeal by the plaintiff, the Western District reversed the trial court and reinstated the judgment. The court held that the insurer's motion to intervene was untimely, in that it was not filed within the 30-day period during which the trial court retained control over the judgment per Rule 75.01. *Id.* at 324-325. Also, as the underlying judgment had become final after the 30 days had expired, the trial court was therefore divested of jurisdiction over the judgment. *Id.* at 325.

The Western District further held that the insurer had no right to intervene in the underlying action because the liability of the insurer as potential indemnitor of the judgment debtor did not constitute a direct interest in such a judgment so as to implicate intervention as of right. *Id.* at 326 (*citing Whitehead*). The insurer had no right to intervene in litigation between its insured and the third party asserting liability; the insurer could participate in such litigation only pursuant to its contractual obligation to defend the policyholder. *Id.* "If either party to the insurance contract breaches in such a way that results in the insurer not providing a defense to the insured during the underlying lawsuit, that matter may be raised only in the proper forum, *i.e.*, a declaratory judgment action or a subsequent garnishment action." *Id.*

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Unlike the immediate case, this Court denied the insurer's application for transfer in *Sherman v. Kaplan*. *Id.* at 318. This denial was handed down literally weeks before the enactment of the amendments to § 537.065 at issue. One key difference – perhaps ***the*** key difference -- between *Sherman* and the immediate case is the existence of said amendments.

H. Trend of Missouri decisions

The trend in the case history detailed above is clear. The recent decisions of Missouri courts regarding RSMo § 537.065 stray far afield from the relatively restrained and limited decisions handed down shortly after the statute's enactment. The more recent decisions attempt to usurp the legislature's ability to determine the procedures available to insurers to protect their interests.

For example, by 2017 an insurer who offered to defend pursuant to a reservation of rights could be effectively be prohibited from defending the merits of the claim against its insured and, in fact, could be deprived of any opportunity to participate in the defense of its insured at all. Moreover, insurers now must defend against judgments entered after uncontested "trials" in which the insured offers no defenses, and which often include detailed findings of fact and conclusions of law. Further, judgments entered after such "trials" are not even subject to a requirement that they be "reasonable." Finally, insurers were barred from intervening in the underlying action to protect their interests.

I. Enactment of amendments to RSMo § 537.065

It was to specifically redress these inequities that the Missouri legislature passed, and the Missouri governor signed, the bill amending RSMo § 537.065 to provide insurers

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with some measure of protection from inequitable 537.065 contracts. The Missouri legislature introduced procedural changes to allow insurance companies "to have their day in court," and to prevent the entry of judgments "requiring insurance companies to pay when the insured is not covered for an act and they don't have an opportunity to have the courts hear their side." *See* HB0339C Bill Summary, (https://house.mo.gov/billtracking/bills171/sumpdf/HB0339C.pdf) (last visited July 18, 2018).

The purpose of these amendments is to give insurers access to the courts and the opportunity to protect their interests as to any 537.065 judgments entered against their insureds. As such, the amendments were intended to apply – immediately -- to "any pending lawsuit involving the claim for damages[,]" that is, any lawsuit in which judgment has not yet been entered. The amendments to § 537.065 merely afford insurers notice of 537.065 agreements between the claimant and the insured, and the opportunity to review and, if necessary, contest such agreements. As such, the amendments are a necessary corrective to a trend of Missouri decisions that have increasingly deprived insurers of their due process rights.

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II. For purposes of applying the amendments to RSMo § 537.065 to a pending cause of action, the key date in determining whether the amendments apply is the date on which judgment was entered, not the date on which the action was filed or on which the 537.065 contract was executed; as the amendments apply only prospectively to judgments entered after the amendment's effective date of August 28, 2017, the constitutional prohibition against retrospective laws is not implicated.

MODL refers to and relies on the well-reasoned arguments contained in Seneca's substitute brief to this Court.

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III. The requirements that the insurer be given written notice of the RSMo § 537.065 contract and an opportunity to intervene in the underlying action are procedural only, do not involve or invoke substantive rights, and therefore may be applied retroactively to "any pending lawsuit involving the claim for damages" before judgment is entered in said lawsuit.

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CONCLUSION

For the foregoing reasons, Amicus Curiae Missouri Organization of Defense Lawyers respectfully suggests that the Court reverse the judgment of the trial court and remand the cause with instructions to set aside the judgment and grant Seneca's motion to intervene.

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06, the undersigned certifies that the foregoing Brief of *Amicus Curiae* Missouri Organization of Defense Lawyers includes the information required by Rule 55.03; complies with the limitations contained in Rule 84.06(b); and was prepared using Microsoft Word in 13-point font, is proportionately spaced, and contains 5,759 words.

/s/ Stephen J. Barber
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by means of this Court's electronic filing system this January 23, 2019 on the following persons:

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