THE SUPREME COURT OF MISSOURI

NEIL DESAI AND HETA DESAI
Respondents/Plaintiffs,

vs.

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

SENECA SPECIALTY INSURANCE COMPANY
Appellant/Intervenor.

APPEAL NO. SC97361

Appeal from the Circuit Court of the County of Jackson
The Honorable James Francis Kanatzar, Judge

APPELLANT'S SUBSTITUTE BRIEF

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INTRODUCTION

This appeal concerns the Legislature and the Governor's clear and deliberate effort to change a statute that had become distorted from its original purpose. Specifically, an amendment to R.S.Mo. §537.065 was enacted to remedy a perceived flaw in the statute that required immediate correction from the standpoint of Missouri's elected representatives. Effective August 28, 2017, "[b]efore 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 [§537.065] 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." (Emphasis added).[1]

Here, it is undisputed that an insured tort defendant entered into a contract under §537.065 and that on October 2, 2017, after the amended §537.065 went into effect, the trial court entered judgment ("Judgment") in the pending lawsuit relevant to that contract, despite the fact that Intervenor-Appellant Seneca Specialty Insurance Company ("Seneca") had not received either the notification or the opportunity to intervene as required by the

[1] The Legislature recognized that an amendment to §537.065 was "needed to allow insurance companies to have their day in court" and that, without the amendment, "there are judgments awarded 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 January 22, 2019) (App. 31).

amended statute. Despite this clear failure to comply with the freshly codified requirements of §537.065, the trial court denied Seneca's Motion to Intervene and Motion for Relief from Judgment, thereby ignoring the will of two branches of Missouri government.

The plain language of the amended §537.065 clearly prescribes only what must occur "before a judgment may be entered" in "any pending lawsuit" where the defendant "has entered" into an agreement with a plaintiff pursuant to §537.065. Consequently, the only relevant date for analyzing the proper application of the statute is the date that the Judgment was entered, in this case October 2, 2017. Because the amended §537.065 was in effect before the Judgment was entered, Seneca was required to receive notice and entitled to have an opportunity to intervene, and entry of the Judgment without satisfaction of these clear requirements mandates that the Judgment be vacated.

In the context of the plain language of the amended statute, a retrospective analysis is not necessary in this case. Even if such an analysis were appropriate, however, the amended §537.065's notice requirement simply modifies the procedures in place for obtaining a judgment that is the result of a §537.065 agreement and, therefore, applies retroactively. Additionally, the intervention requirement of amended §537.065 neither creates nor abridges any substantive right. Rather, it merely describes a procedural event and, like the notice requirement, applies retroactively.

In sum, Missouri law in effect on the date the Judgment was entered clearly prohibited entry of any such judgment. Moreover, the amendment to §537.065 did not change Missouri substantive law. No new cause of action was created. No substantive

right was adversely affected. Consequently, the trial court's entry of the Judgment was inconsistent with the clear will of the Legislature regarding how §537.065 judgments were to be entered and is, therefore, invalid, null, and void as a matter of law.

JURISDICTIONAL STATEMENT

On November 9, 2017, Seneca timely appealed the Order denying intervention and relief from judgment incorporated into the Judgment. (LF 206-209). The Missouri Court of Appeals for the Western District affirmed the trial court's Order. Seneca timely filed its Application for Transfer on July 18, 2018, which the Western District denied on July 31, 2018. Seneca then timely filed an Application for Transfer with this Court, and on December 18, 2018, this Court sustained Seneca's Application for Transfer. Article V, section 10 of the Missouri Constitution provides that "[c]ases pending in the court of appeals may be transferred to the supreme court…by order of the supreme court…after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to a supreme court rule." Because this Court ordered this case to be transferred on December 18, 2018, this Court has jurisdiction to hear the present appeal.

STATEMENT OF FACTS

A. Introduction.

Plaintiffs-Respondents Neil Desai, M.D. ("Dr. Desai") and Heta Desai (together the "Desais") sued Seneca's insured, Defendant Garcia Empire, LLC d/b/a Roxy's ("Garcia Empire"), for damages because of an injury that allegedly occurred on October 2, 2014 when a bouncer employed by Garcia Empire grabbed and twisted Dr. Desai's arm while

ejecting him from a nightclub operated by Garcia Empire (the "Underlying Action"). (LF 4-9). Seneca issued a commercial general liability policy to Garcia Empire that was in effect on the date of the incident (the "Seneca Policy") (LF 73-152). After Garcia Empire rejected Seneca's offer to provide a defense in the Underlying Action subject to a reservation of rights, Seneca commenced an action in the United States District Court for the Western District of Missouri, seeking a declaration confirming that no coverage exists for the Desais' claim under the Seneca Policy due to an exclusion which precludes coverage for claims for damages such as those asserted by the Desais (the "Declaratory Judgment Action") (Seneca Specialty Ins. Co. v. Garcia Empire d/b/a Roxy's et al., (2:17-cv-04119-NKL)). The Declaratory Judgment Action was dismissed without prejudice subsequent to an equitable garnishment action filed by Plaintiffs, which is currently pending in the Circuit Court of Jackson County.

B. The Desais and Garcia Empire Enter into a §537.065 Consent Agreement.

Unbeknownst to Seneca, in or about November 2016, the Desais and Garcia Empire entered into an agreement under R.S.Mo. §537.065. (LF 183). To this day, Seneca has not been shown the agreement and it has not been made a part of the legal file. Despite having engaged in numerous discussions with Garcia Empire's counsel regarding the Declaratory Judgment Action, during which no mention of a §537.065 agreement or entry of judgment was made, Seneca learned from the public docket that, on October 2, 2017, the Circuit Court of the County of Jackson entered the Judgment in favor of the Desais totaling $6,932,831 in the Underlying Action which was predicated on the Desais' and Garcia Empire's §537.065 agreement. (LF 16-38; App. 1-23).

C. Before Entry of the Judgment, An Amendment To R.S.Mo. §537.065 Took Effect Requiring That Before Any Judgment Can Be Entered Subsequent To An Agreement Pursuant To §537.065, Written Notice Of The Agreement And The Opportunity To Intervene Must Be Provided To The Relevant Insurer.

On August 28, 2017, before the Judgment was entered, an amendment to R.S.Mo. §537.065 went into effect which required that Seneca be put on notice of any §537.065 agreement between its insured and any tort plaintiff and be entitled to intervene in "any pending lawsuit" where such an agreement has been reached ***before*** any judgment could be entered. Specifically, effective August 28, 2017 (i.e., in effect on October 2, 2017 when the trial court entered the Judgment), §537.065 expressly provides:

> ***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.***

(Emphasis added).

On October 31, 2017, Seneca filed a timely Motion to Intervene and a Motion for Relief from Judgment. (LF 39-41). Seneca argued that the Judgment must be deemed void and set aside pursuant to Mo. Sup. Ct. R. 74.06(b)(3)-(4) due to lack of notice as required under the language of §537.065.2 RSMo. Supp. (2018), which was in effect on the date that the Judgment was entered. (LF 51-61). Seneca also argued that it is entitled to

intervene because the revised §537.065 confers an unconditional right to intervene. (Id.) At a telephonic hearing that was then held on an emergency basis, the Desais and Garcia Empire did not, and could not, argue that they satisfied the requirements of §537.065.[2] Rather, they argued that the revision to §537.065, which was passed by the Legislature on April 26, 2017 and signed by the Governor on July 5, 2017, and took effect on August 28, 2017, did not apply to *this case* because the case was commenced prior to the effective date of the amendment (which contains no language prescribing the amendment's effect). (LF 181-184; 186-205).

Subsequent to that hearing, Seneca submitted a supplemental memorandum of law addressing this argument and explaining that even if the date that the Underlying Action commenced was assumed to be relevant to this dispute, the amendment to §537.065 applies to this matter because the revisions are procedural/remedial, and not substantive because they do not relate to the rights and duties giving rise to any cause of action. Rather, they impose requirements that relate only to a method of enforcing rights or obtaining redress. (LF 177-180).

On November 1, 2017, the trial court denied Seneca's Motion in a one-page order, stating, without citation to any decisional authority, that denial was warranted because the revisions of R.S.Mo. §537.065 "did not expressly provide for the application of these

[2] See Breckenridge Material Co. v. Enloe, 194 S.W.3d 915, 920 (Mo. App. 2006) ("Unless the record establishes that the complaining party was provided notice of a trial setting, we may conclude the complaining party did not receive notice.").

revisions to proceedings had or commenced…prior to said revisions." (LF 185; App. 24). Seneca timely filed a notice of appeal. On December 18, 2018, after the Court of Appeals for the Western District affirmed the trial court's judgment and denied transfer, this Court granted transfer of the appeal.

POINTS RELIED ON

I. The trial court erred in denying Seneca's Motion to Intervene and Motion for Relief from Judgment, because the only date relevant in applying R.S.Mo. §537.065, as amended effective August 28, 2017, is the date the judgment is entered (i.e., "Before a judgment may be entered…."), not the date a lawsuit is commenced or the date a §537.065 agreement is executed, in that the trial court determined that the clear requirements of R.S.Mo. §537.065, as amended effective August 28, 2017, did not apply with regard to a judgment entered on October 2, 2017 and, therefore, did not grant Seneca's Motion to Intervene and Motion for Relief from the Judgment entered on October 2, 2017 despite that this judgment was entered subsequent to the execution of an agreement pursuant to §537.065 but without the requisite notice and opportunity to intervene.

- **State v. Holden, 278 S.W.3d 674, 678 (Mo. banc 2009)**
- **Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)**
- **Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n, 702 S.W.2d 77 (Mo. banc 1985)**
- **R.S.Mo. §537.065 RSMo. Supp. (2018)**

II. The trial court erred in denying Seneca's Motion to Intervene and Motion for Relief from Judgment, because the notice requirement and the right to intervene added to R.S.Mo. §537.065, as amended effective August 28, 2017, are each procedural and not substantive in nature, as each provides the means or method – the procedure – utilized to protect one's rights and neither impairs anyone's vested rights and, therefore, the statute as amended may apply retroactively to pending actions, in that the trial court determined that the clear requirements of R.S.Mo. §537.065, as amended effective August 28, 2017, did not apply with regard to a judgment entered on October 2, 2017 and, therefore, did not grant Seneca's Motion to Intervene and Motion for Relief from the Judgment entered on October 2, 2017 despite that this judgment was entered subsequent to the execution of an agreement pursuant to §537.065 but without the requisite notice and opportunity to intervene.

- **Vaughan v. Taft Broadcasting Co., 708 S.W.2d 656 (Mo. banc 1986)**
- **State Comp. Fund of Arizona v. Fink, 233 P.3d 1190 (Ariz. Ct. App. 2010)**
- **Estate of Pierce v. Dep't of Soc. Servs., 969 S.W.2d 814 (Mo. App. 1998)**
- **Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. banc 2007)**

III. The trial court erred in denying Seneca's motion for relief from judgment, because R.S.Mo. §537.065, as amended effective August 28, 2017, requires that "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 that

such insurer "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," in that the trial court entered the Judgment on October 2, 2017 subsequent to the execution of an agreement pursuant to §537.065 but without the requisite notice and opportunity to intervene required by the plain language of §537.065, as in effect on the date the Judgment was entered, rendering the Judgment irregular and void such that it must be set aside.

- **Breckenridge Material Co. v. Enloe, 194 S.W.3d 915 (Mo. App. 2006)**
- **Lambert v. Holbert, 172 S.W.3d 894 (Mo. App. 2005)**
- **R.S.Mo. §537.065 RSMo. Supp. (2018)**
- **Mo. Sup. Ct. R. 74.06**

ARGUMENT

I. The trial court erred in denying Seneca's Motion to Intervene and Motion for Relief from Judgment, because the only date relevant in applying R.S.Mo. §537.065, as amended effective August 28, 2017, is the date the judgment is entered (i.e., "Before a judgment may be entered…."), not the date a lawsuit is commenced or the date a §537.065 agreement is executed, in that the trial court determined that the clear requirements of R.S.Mo. §537.065, as amended effective August 28, 2017, did not apply with regard to a judgment entered on October 2, 2017 and, therefore, did not grant Seneca's Motion to Intervene and Motion for Relief from the Judgment entered on October 2, 2017 despite that this judgment was entered subsequent to the execution of an agreement

pursuant to §537.065 but without the requisite notice and opportunity to intervene.

A. <u>Seneca preserved this claim of error for appellate review.</u>

Seneca preserved this error because it previously moved to intervene and for relief from judgment in the trial court on the basis that §537.065, as amended August 28, 2017, applies in this case, and pursuant to Rules 52.12(a) and 74.06(b). (LF 39-41, 51-62, 177-180). Specifically, on October 2, 2017, the date that the Judgment was entered, §537.065 provided that "**[*b]efore a judgment may be entered against any tort-feasor***" that "has entered" [past tense] into a §537.065 agreement, the insurer of that tort-feasor "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." Based on the plain language of this statute, as it *currently* applied to any Missouri court contemplating entry of a judgment on October 2, 2017, Seneca moved to intervene. To wit, Seneca filed a Motion to Intervene and for Relief from the Judgment on the express basis that §537.065, as in effect on the date of the Judgment, clearly requires that the insurer must receive notice of any §537.065 agreement and must be allowed, if it so moves, to intervene in any pending lawsuit involving any such agreement before judgment may be entered and, therefore, no valid judgment could be entered where there had been no written notice to Seneca and Seneca had no opportunity to intervene. (LF 39). In other words, the basis for Seneca's motion was that it was clear that the law in effect on the day that the Judgment was entered mandated that the Judgment could not be entered. The trial court improperly denied this motion. (LF 185; App. 24). Consequently, Seneca

preserved this point of error because the statute warranted the relief that Seneca sought. (LF 39-41, 51-62, 177-180).

"Our rules for preservation of error for review are applied, not to enable the court to avoid the task of review, nor to make preservation of error difficult for the appellant, but, to enable the court – the trial court first, then the appellate court – to define the precise claim made by the defendant." State v. Amick, 462 S.W.3d 413, 415 (Mo. banc 2015). Moreover, "trial judges are presumed to know the law and to apply it in making their decisions." Id. Accordingly, a party need not cite every single possible argument, so long as the trial court has enough information to make its decision in the first instance. Id. at 415 (although counsel did not cite the exact statute in his motion, the trial court was adequately informed of the position); Schwarz Pharma v. Dowd, 432 S.W.3d 764, 769 (Mo. banc 2014) (a party need not include an explanation as to *why* a motion to transfer venue was timely brought in order to preserve right to present such arguments on appeal of a ruling that it was not timely).

Here, in its memorandum of law in support of its Motion to Intervene and Motion for Relief from Judgment (LF 51-61), Seneca argued that the requirements of the amended §537.065 applied to this case. Inherent in this argument, and obvious to the trial court, is the fact that the amended §537.065 should have been applied on the date that the Judgment was entered because that was, in fact, the law of this State on that date. The law does not require, nor should it, that a litigant must articulate in detailed briefing each and every facially apparent reason why a particular statute requires a certain result (e.g., that entry of judgment without notice to the insurers after the effective date of the amended statute was

improper because *that is what the statute says*) in order to preserve its appellate rights.

The reasoning of Amick holds true here. Seneca satisfied Rule 52.12(c) by setting forth in its Motion to Intervene that it was entitled to intervene under amended §537.065. (LF 39-180). And, as highlighted by this Court in Dowd, notably absent from Rule 52.12 is the requirement that Seneca specify in detail each reason why it is entitled to intervene, beyond the stated basis that §537.065 provides that it is allowed to do so.

Moreover, the unusual procedural history in the trial court underscores the specious nature of any argument that Seneca failed to preserve any issue. Respondents' own failure to comply with §537.065 necessitated that the Motion to Intervene be prepared, heard, and resolved by Judge Kanatzar on an emergency basis. In the context of this background, any contention that Seneca is somehow precluded from availing itself of a more thorough analysis in this Court of *all* of the reasons why its motion should have been granted is both inequitable and absurd. See Petrol Prop. v. Steward Title, 225 S.W.3d 448, 455 (Mo. App. 2007) ("One who has engaged in inequitable activity regarding the very matter for which he seeks relief will find his action barred by his own misconduct."). Respondents should not be rewarded in any way for their own failure to follow §537.065 to Seneca's detriment.

Finally, although Seneca properly preserved this claim of error, Seneca nonetheless submits that even if it were assumed *arguendo* that it did not, Rule 84.13(c) provides this Court authority to review any point or argument in order to avoid manifest injustice. Roy v. Mo. Pac. R.R., 43 S.W.3d 351, 363-64 (Mo. App. 2001); see In re C.G.L., 28 S.W.3d 502, 505 (Mo. App. 2000) (denying intervention and ability to assert substantive

rights is "a manifest injustice and amounts to plain error").

B. Applicable Standard of Review.

"The denial of a motion to intervene as of right under Rule 52.12(a) must be affirmed unless it is against the weight of the evidence, unsupported by sufficient evidence, or it either misinterprets or misapplies the law." Kinney v. Schneider Nat. Carriers, Inc., 200 S.W.3d 607, 609 (Mo. App. 2006). "However, where intervention is sought as of right and the movant brings himself within the terms of Rule 52.12(a), the trial court has no discretion in the matter and it must grant the motion." Charles v. Consumers Ins., 371 S.W.3d 892, 897 (Mo. App. 2012) (citation omitted). The trial court is vested with broad discretion when acting on a motion to set aside a judgment. Breckenridge Material Co. v. Enloe, 194 S.W.3d 915, 918 (Mo. App. 2006). The appellate court should not interfere unless the record convincingly demonstrates an abuse of discretion. Id. Questions of law, however, are reviewed de novo. Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976); Lambert v. Holbert, 172 S.W.3d 894, 895 (Mo. App. 2005).

C. Section 537.065, as amended on August 28, 2017, applies only prospectively to judgments entered after the amendment's effective date – Article I, Section 13 of the Constitution is not implicated.

As discussed more fully below in Point II, Article I, section 13 of the Missouri Constitution provides that "no law … retrospective in its operation … can be enacted." An improperly retrospective law is one that creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. See Squaw Creek Drainage Dist. No. 1 v. Turney, 138 S.W. 12, 16 (Mo. 1911). However, "[a]

statute is ***not retrospective or retroactive*** [if] it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation." Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n, 702 S.W.2d 77, 81 (Mo. banc 1985) (emphasis added). Whether application of the amended §537.065 to this matter is a proper "non-retroactive" application is a question of law. Am. Family Mut. Ins. Co. v. Fehling, 970 S.W.2d 844 (Mo. App. 1998).

The language of the amended §537.065 prescribes only what must occur "before a judgment may be entered" pursuant to §537.065. Consequently, the relevant date for the purpose of applying the statute is the date that Judgment was entered, i.e., October 2, 2017, and not the date of injury, case filing, or the §537.065 agreement. See R.S.Mo. §537.065 (as amended effective August 28, 2017).

This Court has made clear that analysis of a statute's language is the key factor in determining the date for purposes of retrospectivity analysis. See State v. Holden, 278 S.W.3d 674, 678 (Mo. banc 2009). In Holden, this Court analyzed its own holding in Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006), where the Court determined that recently enacted statutory registration requirements for certain criminal offenders were improperly retrospective in operation with respect to those people who were convicted or pled guilty (i.e., against whom judgment had been entered) *prior* to its effective date of the statute. See Phillips, 194 S.W.3d at 852-53:

> Missouri's constitutional bar on laws retrospective in their operation compels this Court to invalidate Megan's Law's registration requirements as to, ***and only as to***,

> those persons ***who were convicted or pled guilty prior*** to the law's January 1, 1995, effective date.

(Emphasis added).

In the context of Phillips, the Holden Court confirmed that the "key factor" in determining whether application of a statute (or amendment to a statute) is impermissibly retroactive is the analysis of the statute's language and that because the statute at issue in Phillips "focuses on those convicted, found guilty of, or who have pled guilty to the underlying offense and who have not timely registered their address … the trigger date for purposes of retrospective analysis ***is the date of the conviction or plea, not the date of the underlying offense***." Id. (emphasis added). The Court went on to hold that "so long as the plea or conviction occurs ***after the effective date of the statute*** [i.e., this could certainly be after the individual was charged with the offense or a trial even began] … the registration requirements are not retrospective in operation, regardless of the date the underlying offense was committed." Id. (emphasis added).

This precedent is directly applicable to this case. By its clear terms, the amended §537.065 requires that ***"[b]efore a judgment may be entered*** … 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." R.S.Mo. §537.065 (emphasis added). This amendment prescribes *only* a trial court's ability to "enter judgment" under §537.065. Whether an alleged tort occurred prior to the effective date of the amended statute (or a trial occurred) is entirely irrelevant. Missouri law is clear that when the application of a statute depends

on events occurring after the law's effective date (e.g., a conviction, guilty plea, or judgment), application of the law is not retroactive. Holden, 278 S.W.3d 674.

Therefore, like the innumerable potentially affected individuals that may have allegedly committed offenses, or even been charged with those offenses or tried for them, prior to the effective date of the statute in question in Holden and Phillips, it is simply of no consequence that the Desais' alleged damages claim arose, or that the Desais and Garcia Empire entered into the §537.065 agreement, prior to the revised §537.065 taking effect. The only date relevant to the analysis of whether the trial court's entry of the Judgment was proper is the date the ***judgment was entered***, October 2, 2017, which was ***after*** the revised §537.065 took effect. See Jerry-Russell Bliss, 702 S.W.2d at 81 (holding that a statute is not retrospective or retroactive because it relates to prior facts).

Significantly, there is no support, either at law or in the express terms of the amended §537.065, for the position that any event other than the act of entering a judgment pursuant to a §537.065 agreement is relevant to this analysis. First, by its plain terms, nothing that §537.065 proscribes takes place prior to the moment judgment is entered. Specifically, the amendment has no effect on the terms of an executed §537.065 agreement. The parties to the agreement still get what they bargained for, i.e., a protection of the defendant's assets from execution in the event of judgment (in effect a release of the alleged tortfeasor). But, as of August 28, 2017, the law in Missouri is that if the parties wish for judgment to be entered in "any pending lawsuit" in which an insured tort-feasor "***has entered***" into an agreement pursuant to §537.065 (at any time), the tort-feasor's insurer must first receive notice and have the opportunity to intervene.

In this regard, the Legislature's direction that the amended §537.065 applies to agreements executed prior to the statute's effective date, but prior to entry of judgment, is made clear by the statute's *express* terms: "Before a judgment may be entered against any tort-feasor after such tort-feasor ***has entered*** into a contract…" There is no qualifying phrase to indicate that the §537.065 agreement must be executed after the effective date of the statute. See Bd. of Registration for Healing Arts v. Boston, 72 S.W.3d 260 (Mo. App. 2002) (use of past tense in statute illustrates express intent for application immediately, including with respect to events that may have already occurred).

Indeed, the amendment adopted by the Legislature and put into effect on August 28, 2017 expressly provides that the insurer shall have the opportunity to intervene in "any pending lawsuit" before judgment can be entered. If the Legislature intended the application of the statute to be limited, it could have included language to that effect as it has done in the past. See § 2 of HB 393 (as Truly Agreed and Signed) (2005) (adopting various tort-related changes and providing that "[t]he provisions of this act … shall apply to all causes of action filed after August 28, 2005"); see also, Greenlee v. Dukes, 75 S.W.3d 273, 278 (Mo. Banc. 2002) ("legislatures are presumed to have acted within their constitutional power … [i]t is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.").

The trial court's reliance on the fact that the amended language "did not expressly provide for the application of these revisions to proceedings had or commenced … prior to said revisions" (LF 185; App. 24) is erroneous. This statement is in no way dispositive of

the issues in this case; it simply articulates one of ***two***, separate well-established exceptions to constitutional prohibition on retroactive laws, generally. See Pierce v. Dep't of Soc. Servs., 969 S.W.2d 814, 822 (Mo. App. 1996). The trial court entirely ignored the fact that the amended statute, as in effect on October 2, 2017, was ***not*** a retroactive law with respect to judgments that had not yet been entered. Consequently, the trial court erred in not applying the notice and intervention requirements contained in the revised §537.065. This Court should therefore reverse the Judgment and remand with instructions to set aside the Judgment and grant Seneca's Motion to Intervene.

II. The trial court erred in denying Seneca's Motion to Intervene and Motion for Relief from Judgment, because the notice requirement and the right to intervene added to R.S.Mo. §537.065, as amended effective August 28, 2017, are each procedural and not substantive in nature, as each provides the means or method – the procedure – utilized to protect one's rights and neither impairs anyone's vested rights and, therefore, the statute as amended may apply retroactively to pending actions, in that the trial court determined that the clear requirements of R.S.Mo. §537.065, as amended effective August 28, 2017, did not apply with regard to a judgment entered on October 2, 2017 and, therefore, did not grant Seneca's Motion to Intervene and Motion for Relief from the Judgment entered on October 2, 2017 despite that this judgment was entered subsequent to the execution of an agreement pursuant to §537.065 but without the requisite notice and opportunity to intervene.

Seneca preserved this error because it previously moved to intervene and for relief from judgment in the trial court on the basis that §537.065, as amended August 28, 2017, applies in this case, and pursuant to Rules 52.12(a) and 74.06(b). (LF 39-41, 51-62, 177-180). The trial court denied Seneca's Motion to Intervene and Motion for Relief from Judgment. (LF 185; App. 24). "The denial of a motion to intervene as of right under Rule 52.12(a) must be affirmed unless it is against the weight of the evidence, unsupported by sufficient evidence, or it either misinterprets or misapplies the law." Kinney, 200 S.W.3d at 609. "However, where intervention is sought as of right and the movant brings himself within the terms of Rule 52.12(a), the trial court has no discretion in the matter and it must grant the motion." Charles, 371 S.W.3d at 897 (citation omitted). The trial court is vested with broad discretion when acting on a motion to set aside a judgment. Breckenridge, 194 S.W.3d at 918. The appellate court should not interfere unless the record convincingly demonstrates an abuse of discretion. Id. Questions of law, however, are reviewed de novo. Murphy, 536 S.W.2d 30; Lambert, 172 S.W.3d at 895.

As a threshold matter, this area of the law makes use of the separate terms "ex post facto," "retrospective" and "retroactive." As Missouri courts have recognized, these are separate and distinct terms with materially different legal meanings. See, e.g., State v. Thomaston, 726 S.W.2d 448, 459 (Mo. App. 1987) ("The term ex post facto is a term applicable to criminal legislation only ….. while the term retrospective refers exclusively to laws related to civil rights and remedies."); id. at 459-60, (quoting State ex rel. Meyer v. Cobb, 467 S.W.2d 854, 856 (Mo. 1971)) ("A law is 'retroactive' in its operation when it looks or acts backward from its effective date and is retrospective 'if it has the same

effect as to past transactions or considerations as to future ones ....'"). Accordingly, "'[t]he constitutional inhibition against laws retrospective in operation … does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested.'" Id. at 460 (quoting Fisher v. Reorganized Sch. Dist. No. R-V of Grundy County, 567 S.W.2d 647, 649 (Mo. banc 1978)). Here, however, no matter what terminology or definition is used, this constitutional prohibition is simply inapplicable.

Although Article I, section 13 of the Missouri Constitution provides "[t]hat no ex post facto law, nor law … retrospective in its operation … can be enacted," there are two well-established exceptions to this rule: "(1) when the legislature specifically provides that the statute have retroactive effect and; (2) when the statute is procedural or remedial only and the substantive rights of [the] parties are not affected." Pierce, 969 S.W.2d at 822. Here, as set forth above, this Court need not undertake this analysis because §537.065, as already amended and in effect by the time the Judgment was entered on October 2, 2017, simply was ***not*** "retrospective in its operation" under the circumstances of this case. (LF185; App. 24). Even if this Court were to find that the revised §537.065 applies retrospectively as a technical matter, the notice requirement and right to intervene would each fall squarely within the second exception to the prohibition because both are procedural or remedial measures only (i.e., neither constitutes a change to substantive Missouri law). Therefore, the trial court erred as a matter of law in denying Seneca's motion.

"[S]ubstantive law[s] relate[] to the rights and duties giving rise to the cause of action," while procedural or remedial laws only "prescribe[ ] a ***method*** of enforcing rights or obtaining redress for their invasion" or "substitute a new or more appropriate ***remedy*** for the enforcement of an existing right." Pierce, 969 S.W.2d at 822 (emphasis added). Procedural or remedial laws do not affect substantive rights. For example, this Court has held that an act abrogating sovereign immunity does not create a new cause of action but provides a remedy for a cause of action already existing for which redress could not be had because of the immunity, and as such is procedural and does not violate constitutional provision which forbids the enactment of a retrospective law which impairs a vested right. Wilkes v. Mo. Highway & Transp. Comm'n, 762 S.W.2d 27 (Mo. banc 1988). Similarly, a Missouri court held that an amendment to a statute, altering the time in which registered sex offenders were required to notify law enforcement of change in residence from ten days to three business days, was not an unconstitutional retrospective law, on the basis that the amendment did not impose any new duty or obligation on defendant and was simply a more appropriate remedy for the enforcement of an existing right, by virtue of fact that the only change resulting from amendment was length of time in which defendant was required to notify. Salasberry v. State, 396 S.W.3d 440 (Mo. App. 2013).

Simply stated, for purposes of a retroactivity analysis, substantive statutes are those that "take away or impair vested rights acquired under existing law, or create a new

obligation or impose a new duty." Pierce, 969 S.W.2d at 822.[3] On the other hand, the prohibition against retrospective laws does not apply to procedural or remedial laws, which "prescribe[] a method of enforcing rights or obtaining redress for their invasion" or "substitute a new or more appropriate remedy for the enforcement of an existing right." Id. Whether an amendment to a statute is substantive and cannot be retroactively applied or procedural and remedial, such that it may apply retrospectively, is a question of law. See Fehling, 970 S.W.2d 844.

Importantly, each section of the amendment to §537.065 must be analyzed separately. See Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 770 (Mo. banc 2007). In Hess, this Court rejected the contention that if any part of a statute can only be given prospective effect, then the entire statute can only be given prospective effect. Id. at 770 n.8. Thus, with respect to this matter, Seneca need only demonstrate that either one of the amendments to §537.065 (i.e., ***either*** the requirement that notice be given to relevant

[3] A vested right has been described as a right with an "independent existence, in the sense that once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired." Mo. Real Estate Comm'n v. Rayford, 307 S.W.3d 686, 691, (Mo. App. 2010) (citation omitted). Black's Law Dictionary defines "vested right" as a "right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy." Black's Law Dictionary 1402 (5th ed. 1979).

insurers ***or*** those insurers' right to intervene) could be applied retroactively in order to warrant reversal of the trial court.

In this context, it is respectfully submitted that this Court must look to the express, and unambiguous language of the revised §537.065 which provides, in relevant part:

> ***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.***

R.S.Mo. §537.065 (emphasis added). By its clear terms, §537.065 as amended requires that: (i) an insurer in Seneca's position must be given at least thirty days' written notice of an agreement between its insured and any alleged tort victim pursuant to §537.065 before judgment may be entered; and (ii) such an insurer is entitled to intervene into the action against its insured – including, specifically "any pending lawsuit" – before any judgment may be entered. Id. Also clear, is that this language does not either take away or impair any vested right under existing law or create any new substantive obligation or duty relative to the actual claims or defenses asserted in the underlying tort claim (i.e., parties to a §537.065 agreement have no vested "right" *not* to provide notice to the tort-feasor's insurer prior to entering into an agreement to allow judgment to be taken against it, and further have no vested "right" *not* to have that insurer intervene in the action).

Prior to this case, no Missouri appellate court has addressed the application of the recent amendments to §537.065. However, when the original §537.065 was first passed,

this Court gave full and immediate effect to an §537.065 agreement executed just 12 days after §537.065 became effective in a matter where the accident, insurance policies, and the ***lawsuit*** all pre-existed the statute. See Farmers Mut. Auto Ins. Co v. Drane, 383 S.W.2d 714 (Mo. 1964). This authority underscores that §537.065 has always been a statute that does not "relate[] to the rights and duties giving rise to [a] cause of action" but rather it merely "prescribes a method of enforcing rights or obtaining redress for their invasion." Pierce, 969 S.W.2d at 822. Thus, this Court's clear precedent with respect to other matters establishes that the trial court erred in not applying the statute as revised and in effect prior to the entry of the Judgment, because both the notice requirement and right to intervene are procedural, not substantive, provisions.

A. The Amendments To §537.065 Are Procedural With Respect To The Insurer's Right To Intervene.

Existing Missouri law makes clear that intervention is merely the machinery that one not initially included in a lawsuit uses to assert its rights or obtain redress for their invasion. See Slack v. Englert, 617 S.W.2d 483, 486 (Mo. App. 1981) ("[T]he question of commencement, therefore, is governed by the ***procedural*** statutes and rules applicable to civil actions." (emphasis added)). Simply inserting one's self into an action provides no relief to that potential intervenor. Rather, intervention is solely a question of commencement (i.e., commencement of the intervenor's involvement in the action), after which its substantive rights and redress are claimed. Allowing a party to merely enter into any matter does not create or impair any vested rights belonging to anyone or impose any new substantive obligations or duties on anyone. Vaughan v. Taft Broad. Co., 708 S.W.2d

656, 660 (Mo. banc 1986) (holding that no person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights).

Here, by specifically allowing an insurer to intervene in cases where its insured intends to allow a judgment to be taken against it (which in all likelihood will become the basis of a garnishment against the insurer), the Missouri Legislature merely created a more appropriate procedure for such insurers to protect their interests. See State ex rel. Farmers Ins. Co., Inc. v. Murphy, 518 S.W.2d 655, 657 (Mo. banc 1975) (Rule 55.06, regarding joinder of claims and remedies, "is purely procedural and since it does not provide to the contrary, it operates retrospectively as well as prospectively").

Not only would such a holding that intervention is procedural be consistent with existing Missouri law with respect to what is and is not an unconstitutional application of retroactive law, it also comports directly with analogous law in other jurisdictions. See State Comp. Fund v. Fink, 233 P.3d 1190 (Ariz. App. 2010); Canatella v. California, 404 F.3d 1106, 1113 (9th Cir. 2005) ("Intervention as of right is merely a procedural means for entering an existing federal action."); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975) ("Intervention would not result in the loss of substantive or procedural rights.").

In Fink, the Arizona Court of Appeals faced a nearly identical situation to this matter. There, the State Compensation Fund (SCF) moved to intervene to protect its interests in an already-pending personal injury action, after an amendment to Arizona's workers' compensation law took effect which granted insurance carriers the "right to

intervene at any time to protect the insurance carrier's or the self-insured employer's interests." Fink, 233 P.3d at 1192.

In analyzing whether the amendment allowing such intervention was procedural and, therefore, applicable to the pending matter, the court first held that the creation of such a statutory right to intervene (even in pending cases) did not constitute an impermissible "retroactive" law because "[a]pplication of a statute in a particular situation is not necessarily 'retroactive' simply because it relates to antecedent facts." Id. In so holding, the court noted that "new rules of procedure are often applied to actions already pending" and '[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.'" Id. (citing Landgraf v. USI Film Prods., 511 U.S. 244, 275 (1994)).

The Fink court held that "no vested rights ... are impacted or impaired by application of the amended statute to authorize [the insurer's] intervention" because there is no "vested interest in a particular procedure" (id. at 1192-1193), and that even if application of the statute granting the right to intervene were to be considered retroactive, the statute nonetheless applies because it is procedural, not substantive. Id. at 1193. In so holding, the court cited precedent nearly identical to Missouri law that distinguishes between "substantive" and "procedural" laws for purposes of retroactivity analysis and held that a statute granting an insurer the right to intervene in a personal injury suit to protect its interests is *procedural* because though the insurer is "seeking to intervene to protect its substantive rights … intervention is the means or method – the procedure – being utilized

by [the insurer] to protects its rights" and there are "no vested right[s] in any given mode of procedure." Id.; see Scheidegger v. Greene, 451 S.W.2d 135, 137 (Mo. banc 1970) ("No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights..."); Vaughan, 708 S.W.2d at 660 (same).

Here, it cannot be disputed that by granting insurers the right to intervene, §537.065 did ***not*** take away a vested right from anyone. Rather, the statute merely describes a procedural event. V.B. v. N.S. V. ex rel. P.M.B., 982 S.W.2d 691, 692-93 (Mo. App. 1998) ("Former section 210.839.4 RSMo 1994 purports to grant a 'right.' However, the statute defines a procedural event.… [T]he statute used the word 'right' but did not create a personal or property interest which others had a corresponding duty not to offend.").

Although allowing Seneca to intervene in the Underlying Action may constitute a different *procedure*, neither the Desais nor Garcia Empire can claim a vested right in any particular mode of procedure. See Vaughan, 708 S.W.2d at 660; State v. Young, 362 S.W.3d 386, 390 (Mo. banc 2012) (vested right "must be something more than a mere expectation based upon an anticipated continuance of existing law"). Neither party to the Underlying Action can complain of the loss of an existing right.

For these reasons, the trial court erred in refusing to enforce the plain requirements of §537.065 as in effect prior to entry of the Judgment because Seneca's right to intervene is nothing more than "the means or method – the procedure – being utilized" by Seneca to protect its interest, and is not substantive because no one has a "vested right in any given mode of procedure" Fink, 233 P.3d at 1194; Vaughan 708 S.W.2d at 660. This alone is

sufficient to grant the relief Seneca seeks. See Hess, 220 S.W.3d at 770 (rejecting the argument that if any part of a statute can only be given prospective effect, then the entire statute can only be given prospective effect).[4]

B. The Amendments To §537.065 Are Procedural With Respect To Notice.

The right to intervene set forth in the revised §537.065 ***alone*** is a sufficient basis to grant the relief Seneca seeks. Additionally, the revised §537.065, as fully in effect on the date the Judgment was entered, provides, without qualification or limitation of any kind, that "[b]efore 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 ...." R.S.Mo. §537.065 (emphasis added). This law is not ambiguous. It unequivocally requires that, prior to entry of *any* judgment subsequent to a §537.065 agreement, notice must be given. Of course, it is undisputed that this did not occur in this case. Accordingly, the Judgment should be reversed.

The Desais do not argue that the plain requirements of the amended §537.065 were satisfied in this case. Their sole basis for challenging Seneca's ability to intervene and seek

[4] It merits noting again that in reaching its decision that the relevant provisions of §537.065, as undisputedly in effect prior to entry of the Judgment, were not applicable to this case, the trial court relied completely on its determination that ***one*** of the two separate exceptions to the prohibition on retroactive laws did not apply (the lack of specific retroactive language), while failing completely to address this second, separate, and clearly applicable, exception for purely procedural changes.

vacation of the Judgment is that the requirement that notice be provided prior to judgment being entered, which took effect prior to the entry of the Judgment in this case, is somehow impermissibly retroactive or retrospective. Just like the right to intervene, however, even if the notice requirement is assumed to require retroactive application (which it does not in this case), it is a valid retrospective law. Specifically, §537.065's notice requirement does not take away or impair a vested right because, as discussed above, no person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. See Vaughan, 708 S.W.2d at 660.

Moreover, jurisdictions that have considered this issue in the specific context of notice provisions have found such provisions to be merely procedural laws that can constitutionally be applied retroactively. See, e.g., Henderson v. DOT, 267 Ga. 90, 91 (1996) (Georgia Supreme Court holding that the notice and service provisions of the Georgia Tort Claims Act are procedural laws that can constitutionally be applied retroactively); Gray v. Comm'r of Revenue, 422 Mass. 666, 670 (1996) (Massachusetts Supreme Judicial Court holding that "notice is procedural" and therefore "the notice provisions of amended c. 119A may be applied retroactively."); Sharma v. District of Columbia, 791 F. Supp. 2d 207, 209 (D.D.C. 2011) (finding that amendments to the D.C. Whistleblower Protection Act regarding notice to be procedural and, therefore, retroactive). Applying these principles here, just as there is no right in any mode of procedure, it is undisputable that there is no vested right in not providing notice to an insurer of the execution of a §537.065 before a judgment may be entered.

This notice requirement contained in the amendment to §537.065 does not create any ***substantive*** new duty or obligation. Indeed, Missouri courts have directly recognized that while "[i]t could be argued that any law that has retroactive application in some manner imposes a new duty or obligation or a new disability with respect to a past transaction …. it is settled that the prohibition against retrospective laws deriving from this prong of the definition 'does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions to the ***substantial*** prejudice of parties interested." Missouri Real Estate Comm'n v. Rayford, 307 S.W.3d 686, 693 (Mo. Ct. App. 2010) (citing Casey's Mktg. Co. v. Land Clearance for Redevelopment Auth. of Independence, Mo., 101 S.W.3d 23, 28-29 (Mo. App. 2003)).

The Missouri cases that have found notice requirements to be improperly retrospective in application are clearly distinguishable. For example, in Brune v. Johnson Controls, 457 S.W.3d 372 (Mo. App. 2015), the court found a statutory amendment imposing a new requirement in the workers' compensation statute that notice of any occupational disease be provided to the employer within 30 days after the diagnosis of the condition (unless the claimant could meet the burden of proving the employer was not prejudiced by failure to receive the notice) to be a "substantive" change to the law in the context of individuals diagnosed with such diseases prior to the effective date of the amendment – i.e., where the new requirement would effectively ***strip*** from anyone diagnosed with an occupational disease more than 30 days prior to its enactment of an otherwise vested, and actionable, claim.

Similarly, the 102-year-old case of Ruecking Const. Co. v. Withnell, 269 Mo. 546 (1917) in which a statutory amendment requiring notice of certain suits to enforce property liens to be provided to a city comptroller within ten days after the institution of the suit, that was enacted more than eighteen months after certain liens had attached to a property (and the lienholder's right to the enforcement had become vested) could not apply retrospectively to impede a suit seeking to enforce those liens.

Unlike both Brune and Withnell, §537.065's notice requirement, applied to the §537.065 agreement at issue in this case, is not an impermissibly retrospective application. In Brune, application of the amended notice requirement in the context of preexisting diagnoses would have resulted in the complete extinguishment of actionable claims in which the employees possessed a vested right prior to the amendment. Here, §537.065's notice requirement does not operate as a bar to any claim possessed by the Desais (or anyone else) – indeed, notice could ***still*** be given to satisfy the statute. It simply modifies the procedures in place for obtaining a judgment that is the result of an agreement pursuant to §537.065. Further, unlike Withnell, §537.065's notice requirement does not place a condition precedent to a vested right. It cannot be disputed that, as a matter of Missouri law, the Desais had no ***vested right*** to have judgment be entered without notice being provided to Seneca. See Vaughan, 708 S.W.2d at 660 (no person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights). In fact, an amendment as minimal as requiring such notice is exactly the species of amendment the Court of Appeals imagined when it noted that "[i]t could be argued that any law that has

retroactive application in ***some manner*** imposes a new duty or obligation." Rayford, 307 S.W.3d at 693 (emphasis added).

There is simply no Missouri precedent to support the proposition that ensuring that an insurer has been notified of an agreement pursuant to §537.065, whereby a defendant has accepted liability for tort damages that it will never pay, creates a ***substantial*** new duty or obligation for anyone. There is no substantive "change" in the legal effect of *any* past or prior holding associated with requiring that insurers, in the future, after the effective date of the statutory amendment, simply be notified of a §537.065 before a judgment may be entered pursuant to that agreement. That is not enough to qualify as a substantive change. Rather, any new obligation must create "***substantial prejudice***" of the parties involved. Id.

In that regard, §537.065's notice requirement is only procedural, not substantive. New rules of procedure are applied to actions already pending. See Claspill v. Mo. P. R. Co., 793 S.W.2d 139, 140 (Mo. banc 1990) ("In Missouri, a statute dealing with procedure only is applicable to all ***pending cases*** (***cases not yet reduced to a final judgment***)." (emphasis added)); State v. Casaretto, 818 S.W.2d 313, 316 (Mo. App. 1991) (referring to "general presumption of retroactive application which applies to all procedural statutes").

Here, it is undisputed that §537.065's notice requirement was in effect ***before*** the Judgment was entered. Accordingly, the trial court erred in not applying §537.065's notice requirement. This alone, or in connection with the trial court's separate error in not applying §537.065's right to intervene, is sufficient to warrant reversal of the Judgment and remand with instructions to set aside the Judgment and grant Seneca's Motion to Intervene.

C. The Trial Court's Order Upsets Well-Established Principles of Governance.

The trial court's order greatly expands what constitutes an impermissibly retroactive application of a legislative enactment and, in doing so, disturbs settled principles to such an extent that it threatens to disrupt the ability of the non-judicial branches of government to legislate. The Missouri Legislature is the proper branch of government to make policy decisions. Parktown Imports, Inc. v. Audi of Am., Inc., 278 S.W.3d 670, 674 (Mo. banc 2009). By enacting amended §537.065, the Missouri Legislature introduced procedural changes to §537.065 in order to fix a specific flaw in the statute that required immediate correction from the standpoint of Missourians' elected representatives. Indeed, the Legislature recognized that an amendment to §537.065 was "needed to allow insurance companies to have their day in court," and that without the amendment, "there are judgments awarded 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 January 22, 2018) (App. 31).

As explained in Point I above, it is clear that the trial erred in undertaking a retrospective analysis in the first place. Application of §537.065, as amended effective August 28, 2017 in the context of a judgment that was entered on October 2, 2017, does not even potentially implicate retrospectivity because the language in question prescribes only what must occur "before a judgment may be entered" in "any pending lawsuit" where the defendant "has entered" into an agreement with a plaintiff pursuant to §537.065.

Consequently, the relevant date for the purpose of analyzing the proper application of the statute here is the date that Judgment was entered, i.e., October 2, 2017. The trial court also erred in finding that application of §537.065's amended notice and intervention requirements in this particular case – where no judgment had been entered – to be an *impermissible* retrospective application. The trial court's ruling in this regard conflicts with decades of Missouri case law and, in doing so, infringes on the well-established power of the Legislative and Executive branches to effect immediate changes to Missouri *procedures* deemed necessary to the interest of maintaining an efficient, fair, and predictable process.

III. The trial court erred in denying Seneca's motion for relief from judgment, because R.S.Mo. §537.065, as amended effective August 28, 2017, requires that "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 that such insurer "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," in that the trial court entered the Judgment on October 2, 2017 subsequent to the execution of an agreement pursuant to §537.065 but without the requisite notice and opportunity to intervene required by the plain language of §537.065, as in effect on the date the Judgment was entered, rendering the Judgment irregular and void such that it must be set aside.

Seneca preserved this error because it previously moved for relief from judgment in the trial court on the basis that §537.065, as amended August 28, 2017, applies in this case, and pursuant to Rule 74.06(b). (LF 39-41, 51-62, 177-180). The trial court denied Seneca's motion for relief from judgment. (LF 185; App. 24). The trial court is vested with broad discretion when acting on a motion to set aside a judgment. Breckenridge, 194 S.W.3d at 918. The appellate court should not interfere unless the record convincingly demonstrates an abuse of discretion. Id. Questions of law, however, are reviewed de novo. Murphy, 536 S.W.2d 30; Lambert, 172 S.W.3d at 895. Because the Judgment was entered without the requisite notice to Seneca, it was irregular, voidable, and inherently void, under Rule 74.06(b)(3)-(4). Id. at 900.

As set forth above, the plain language of §537.065, as in effect on the date the Judgment was entered requires that "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 that the insurer in question "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, as a matter of law, no judgment may be entered with respect to a matter wherein the parties have entered into an agreement pursuant to §537.065 unless and until written notice of the agreement has been provided to the insurer and the insurer has had thirty days to seek intervention.

Here, neither of these things have happened. Neither the Desais, nor Garcia Empire, nor even the trial court have ever provided written notice of any §537.065 agreement to

Seneca. Accordingly, the Judgment was entered in direct violation of current Missouri law, is void or irregular, and must be vacated.

Seneca is entitled to relief from the Judgment under Rule 74.06(b), which provides that the circuit court may relieve a party or the party's legal representative from a final judgment or order for: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

Setting aside that §537.065 clearly should have precluded entry of the Judgment in the first place, Missouri courts have routinely found judgments to be void or irregular under Rule 74.06(b)(4) where notice to the party from whom the judgment was to be collected was insufficient. See, e.g., Breckenridge, 194 S.W.3d 915 (holding that the trial court abused its discretion in failing to set aside an amended judgment in a supplier's breach of contract suit against contractors where the contractors were not given notice of the trial setting, as required by statute, or the subsequent entry of judgment against them); Lambert, 172 S.W.3d 894 (finding that the trial court did not abuse its discretion in setting aside the damages award in the plaintiff's negligence suit against a defendant driver following a car accident, where the defendant did not receive a copy of the complainant's motion for sanctions, nor a notice for the hearings); Lambert, 172 S.W.3d at 898 ("An irregular judgment is one rendered contrary to a proper result, i.e., it is materially contrary to

established forms and modes of procedure for the orderly administration of justice."). The intent of the Legislature here is clear. If a party intends to collect a judgment against another, notice is required.

In disregard of existing law, Seneca never received any notice of the §537.065 agreement between its insured and the Desais nor an opportunity to intervene. Consequently, the Judgment is due to be reversed and the cause remanded with instruction to set aside the Judgment.

CONCLUSION

For the reasons stated above, Seneca respectfully requests that this Court reverse the Judgment and remand with instructions to set aside the Judgment and grant Seneca's Motion to Intervene.

Dated: January 22, 2019

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CERTIFICATE OF COMPLINACE WITH MISSOURI SUPREME COURT RULES 55.03 AND 84.06

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 11,701 words, excluding parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

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I hereby certify that on January 22, 2018, a true and correct copy of the foregoing brief was served via electronic service and email to:

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