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SC97361

IN THE SUPREME COURT OF MISSOURI

NEIL DESAI, M.D., and HETA DESAI

Plaintiffs/Respondents

v.

GARCIA EMPIRE, LLC, D/B/A ROXY'S

Defendant,

SENECA SPECIALTY INSURANCE COMPANY

Appellants/Intervenors

Jackson County, Missouri Case # 1716-CV05305
Missouri Court of Appeals-Western District Case # WD81220

RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF FACTS

To properly present an issue for appellate review, an appellant's statement of facts cannot omit evidence supporting the ruling at issue. *Evans v. Groves Iron Works*, 982 S.W.2d 760 (Mo. App. 1998). The requirements of Rule 84.04 (A38-39) are not met when the appellant "highlights facts that favor the appellant and omit facts supporting the judgment." *Prather v. City of Carl-Junction*, 345 S.W.3d 261, 263 (Mo. App. S.D. 2011). Instead, Rule 84.04 requires that Appellant's Brief include facts supportive of the judgment from which it appeals and then explain why, despite these facts, the appellant should still prevail. *Id.* Failure to provide an accurate and fair recitation of the facts as required by the Rule is "an admission that if the Court was familiar with all of the facts, the appellant would surely lose." *Id.* Respectfully, Appellant's Statement of Facts does not meet this standard as it omits, mis-cites, or simply misstates what the actual factual record was before the Trial Court. As a fair hearing requires a full and fair factual statement, Respondents would offer the following supplement facts in response to Appellant's argumentative, incomplete, and inaccurate statement of facts.

A. Background of the case

Plaintiffs in the underlying case are Dr. Neil Desai and his wife Heta Desai. Legal File (L.F. 4, 6; 18). Dr. Desai and his wife Heta brought claims against Garcia Empire doing business as Roxy's for negligence regarding an injury Dr. Desai suffered after being escorted from Roxy's premises on October 2, 2014. Id. The initial Petition was filed in May of 2015, and forwarded to Seneca for defense. (L.F. 44, 181; Supp. L.F. 1). Seneca denied coverage and refused to defend or indemnify Garcia Empire. (L.F. 44,

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181). Several times more Seneca refused to defend or consider settlement offers. (L.F. 44, 181-182). Eventually, the operative pleading at issue, the Second Amended Petition was filed on May 20, 2016, (one year after the initial Petition was filed) and Seneca again refused to defend or indemnify without reservation. (L.F. 4-9; 44; 182-183). On or about October 11, 2016, Counsel for Garcia Empire rejected any reservation of rights, and advised Seneca that Garcia intended to protect itself as allowed by Missouri law, citing this Court's *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761 (Mo. Banc 2009) opinion. (L.F. 44; 183).

Shortly thereafter, upon Seneca's continued refusal to defend, and Seneca's decision to sue its insured in a declaratory judgment action denying coverage, Garcia Empire followed through with its stated intention and entered into an agreement pursuant to the then existing section 537.065. (L.F. 16-17; 44; 51-52, 183). On March 7, 2017, the case was thereafter transferred to Jackson County. (L.F. 15). On May 5, 2017, the case was set for trial, with a trial date of August 17, 2017. (L.F. 1). The trial date was therefore publicly available for review on Casenet for over three months. Id.

B. Contrary to Seneca's alleged facts, the Desais and Garcia Empire did not enter into a "consent agreement", but instead held a bench trial before the Honorable James F. Kanatzar, which Seneca knew was going forward, but chose not to seek intervention before trial.

Seneca was provided multiple opportunities to defend the negligence claim against its insured without reservation of rights but refused to do so. (L.F. 44, 51-52, 181-183). Instead, Seneca chose to continue to deny coverage, and filed a declaratory judgment

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action confirming its refusal to defend or indemnify its insured. (L.F. 44, 51-52). While Seneca's statement of facts appears to argue it was somehow surprised as to the section 537.065 agreement, it was warned that if it would not defend without reservation of rights, Garcia Empire intended to protect itself as early as 2016. (L.F. 182-183). In fact, Seneca was specifically advised this protection would take the form of that identified by this Court in *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761 (Mo. Banc 2009); which case identified entry into a 537.065 agreement under the then existing statute. (L.F. 182-183).[1]

In regard to Seneca's knowledge of the trial and subsequent judgment, the actual record before the Trial Court showed that Seneca was fully aware of the trial setting. Specifically, prior to the date of trial, Seneca's chosen New Jersey counsel contacted two separate lawyers representing the Desais regarding the upcoming trial. (L.F. 199-203).

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[1] While Seneca complains in its statement of facts it has not seen the section 537.065 agreement, it did not seek a copy of the agreement in its motion or briefing before the Trial Court. (L.F.39-48). Further, even under the new section 537.065 statute, there is no requirement to provide a copy of the agreement to an insurer who refuses to defend without reservation. (A31-32). The Trial Court, however, did have the opportunity to review the agreement prior to the Bench Trial on August 17, 2017, and found that it was negotiated and entered into in good faith. (L.F. 16-17). Given Seneca's complaint, and the fact the Trial Court did review the agreement, the section 537.065 agreement is attached in the Appendix. (A58-67).

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Seneca's counsel advised Ms. Agnelly in a voicemail that it understood the underlying injury case was set for trial on Thursday, the 17th of August, 2017. (L.F. 199-201). Seneca's counsel likewise contacted the Desai's other counsel, confirming knowledge of the upcoming trial date. (L.F. 202). Further, in regard to the upcoming trial, Seneca was advised that their filing of a Declaratory Judgment in Federal Court would not change plaintiffs' intention of obtaining a judgment. (L.F. 202).[2] Despite this knowledge of the upcoming trial, and the warnings that its insured intended to protect itself through entry into an agreement under section 537.065 as identified in the *Kinnaman-Carson* case, Seneca did not attempt to intervene in the case before trial was conducted. (L.F. 1-3, 182-183, 187-188, 199-203).[3]

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[2] At the time of trial, Seneca had not attempted to bring the Desais into the federal case, and as late as November 1, 2017, Seneca had not obtained service on the Desais in the federal Declaratory Judgment. (L.F. 200). The federal Declaratory Judgment action was later dismissed.

[3] Given the clear and uncontested record before the Trial Court, it is hard to understand Seneca's citation of *Breckenridge Material Co. v. Enloe*, 194 S.W.3d 915, 920 (Mo. App. 2006) to argue that unless there is record evidence they had notice of the trial, the Court should find they were unaware of it. Here there was overwhelming record evidence Seneca had notice of the trial setting, and that it was told the trial was going to go forward to judgment. (L.F. 199-203). Any claim to the contrary is directly

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The trial occurred as set on August 17, 2017. (L.F. 1-2; 16; A 2). Contrary to Seneca's brief, the parties did not enter into a "consent agreement." Instead, the matter was tried to the Court in a bench trial. (L.F. 1; 16-38; A 2-24). Prior to the start of the trial, the parties without prompting advised the Court that due to the denial of coverage by Seneca, a section 537.065 agreement had been entered into, and provided the Court the opportunity to review the agreement before Trial began. (L.F. 16-17; A 2-3). The Court prior to the commencement of opening statement reviewed the agreement. Id. After review of the agreement, the Court found it had been negotiated in good faith and was free of collusion or fraud. (L.F. 17; A 3). The Court thereafter heard opening statement, evidence, and closing. Id. The trial concluded on August 17, and the case was submitted. Id. Judgment was thereafter entered on October 2, 2017. (L.F. 16-38; A 2-24).

C. After the Section 537.065 Agreement at issue in this case was entered into and the Trial occurred, Section 537.065 was repealed and two new statutory sections were enacted

After both the agreement at issue was entered into, and after the case was tried to the Court and submitted, the legislature repealed the prior Section 537.065. (A54-57). On August 28, 2017, Section 537.065 under which the Desais and Garcia Empire entered into their agreement was repealed, "and two new sections" were enacted "in lieu thereof".

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contradicted by the record and is thus not in keeping with the requirement for a proper statement of facts.

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(A54). Those two new sections were R.S.Mo. 537.058, and the new section 537.065 statute. (A54-57). This new section 537.065 provided both new rights and obligations regarding notice and intervention. (A55-56). Further, the statute set forth language regarding what statutory contracts it was applicable to. (A31-32; A55-56). Specifically, the new section 537.065 provided that the rights and obligations under this new section applied only "after such tort-feasor **has entered into a contract under *this* section**". (A31; A56), emphasis added. The Desais and Garcia Empire entered into the agreement under the prior section and not "this section." (L.F. 16-17, 183; A58-67).

On October 31, 2017, Seneca for the first time attempted to take any action in regard to the Missouri state court case, in reliance on this newly enacted section of Missouri law. Over two months after a trial it knew was going forward, and 29 days after entry of judgment, Seneca filed its motion to intervene. (L.F. 39-41). In it, Seneca multiple times alleged that it was unaware of the trial claiming it "never received *any* notice of.... the proceeding that resulted in the judgment...." (L.F. 60, emphasis in original; See also LF 45). Seneca also argued in this initial briefing that its basis for the relief it sought was that a newly created "**right**" to intervene was contained in the newly enacted Section 537.065. (L.F. 58) (emphasis in original).

At Seneca's request, the Court held an expedited conference call on November 1, 2017. (L.F. 3; 185).[4] Thereafter, the Court allowed the parties to file supplemental

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[4] Seneca did not request the hearing be on the record, and thus no transcript of this hearing has been provided. As such, Seneca's claims as to what arguments were raised

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briefing. (L.F. 177-184; 186-205). Seneca filed a short supplemental memorandum of law, for the first time addressing whether the newly enacted statute applied to an already existing 537.065 agreement, entered into under the prior statute, and to an already completed trial. (L.F. 177-179). Seneca's sole argument in this supplemental briefing was that the newly enacted statute was procedural and not substantive, and should therefore be applied retroactively. Id.

Garcia Empire submitted a response to the Court setting forth the timing of certain events, in relation to the request of Seneca to intervene after trial and judgment had been entered. (L.F. 181-183). Garcia Empire's response identified not only the history of multiple denials of coverage, but also the notice provided to Seneca that its insured intended to protect its interest by entry into an agreement pursuant to the then existing 537.065. Id. The Desais similarly submitted briefing. (L.F. 186-205). In response to Seneca's claim that it was unaware of the trial, the Desais submitted affidavits and a transcribed voicemail message from Seneca's counsel showing that Seneca was aware of the trial and knew that it was going forward to judgment before the trial occurred. (L.F. 199-203).

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by Garcia Empire and the Desais is not only inaccurate, but utterly without any record support. The record, however, does confirm that Garcia Empire and the Desais raised numerous grounds in opposition to the last-minute attempt by Seneca to intervene. (L.F. 181-183; 186-196).

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Further, contrary to Seneca's brief, plaintiffs did not argue the statutory revisions were not applicable solely because the case was commenced prior to the effective date of the amendment. Instead, plaintiffs argued the statute did not apply because, among other things:

(1) The claim accrued prior to the statute going into effect;

(2) The §537.065 statutory contract at issue was entered into under the prior section, well before the new statutory section became operative;

(3) The statute was substantive because Seneca's own moving papers argued it had a newly created "right" to intervene;

(4) The amendment was substantive because it placed a new obligation of notice on the parties;

(5) The statute could not apply under the facts of this case to allow intervention in a trial which already occurred before this new Section went into effect; and

(6) Even if the statutory obligations and rights were procedural, they could not be applied to the trial that had already occurred prior to the effective date of the new statute.

(L.F. 186-196).

After consideration of the arguments made by Seneca, and the arguments of the actual parties in the case, the Trial Court denied Seneca's motion to intervene and to set aside the judgment. (L.F. 185; A 1). In its Order, the Trial Court cited three Missouri

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statutes dealing with the applicability of changes to statutes and when and in what circumstances they should be applied. (L.F. 185; A 1).

ARGUMENT

I. The Trial Court properly refused to apply the newly enacted section 537.065 R.S. Mo. to a contract entered into under the prior statute, and where the case had already been tried and submitted before the new statute went into effect, in that the new statute did not state that it was intended to apply retroactively, but instead states it applies only to agreements entered into after its enactment, because the text the legislature chose to use, in compliance with the Missouri Savings Statutes, confirms that this new statute should only be applied prospectively to contracts entered into "under this" newly enacted section. (Responding to Appellant's First Point).

Doe v. Phillips, 194 S.W.3d 833 (Mo. Banc 2006)

In re Murphy, 477 S.W.3d 77, 82 (Mo. App. E.D. 2015)

State v. Holden, 278 S.W.3d 674 (Mo. Banc 2009)

H.B. 339/714 (2017)

STANDARD OF REVIEW

The denial of a motion to intervene is reversed only if it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares the

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law. *Flippin v. Coleman Trucking, Inc.*, 18 S.W.3d 17 (Mo. App. E.D. 2000). The proposed intervenor bears the burden to prove error. *Id.*

INTRODUCTION

Appellant's argument in this point, that the only date relevant for application of the amendment to §537.065 is the date of the judgment (which respondent label as the "trigger" for the statute's application), was not raised or argued to the Trial Court. Seneca's initial briefing argued that it had a newly created "right" to intervene. (L.F. 39-47; 51-61). Its supplemental briefing likewise did not raise this argument, instead arguing that the statute was purely "procedural." (L.F. 177-179). As such, Seneca failed to argue or raise any issue that the statute was not retroactive or retrospective on the grounds the statute's focus was only on the entry of Judgment. As Appellant not only failed to raise this issue, but in fact argued directly contrary to the position it now seeks to take, its first point has not been preserved. *In re G.M.G. v. T.R.E.*, 525 S.W.3d 162 (Mo. App. W.D. 2017). Likewise, the plain error review requested by appellant "is rarely granted in civil cases". *Mayes v. St. Lukes Hosp. of Kansas City*, 430 S.W.3d 260, 269 (Mo. Banc 2014).

Even had Seneca preserved this issue, its Point I begs the question as to whether the legislation specifically states that it applies to agreements which were entered into long before the statute existed, to cases already on file, or to cases which have already been tried and submitted. The reason Appellant seeks to ignore this issue (or in some cases simply leave the applicable portion of the statute off when discussing it) is that as the Trial Court found, the statute does not "expressly provide for the application of these

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revisions to proceedings had or commenced by virtue of §537.065 prior to said revisions." (L.F. 185; A 1). Unless the legislature specifically and clearly states that the statute is to apply to such claims retroactively, Missouri law holds that it does not.

Instead, to the exact contrary, here, the statute and the express language the legislature chose to utilize confirms this new statute and the new statutory provisions thereunder apply **only** "after" an agreement has been "entered into" under the new statutory "section". (L.F. 204, A31). Rather than stating the statute is applicable to any case where judgment is entered after its enactment, it states the exact opposite. ("**After such tort-feasor has entered into a contract under this section**"). (L.F. 204; A31), emphasis added. The agreement in this case could not have been "entered into" under "this section" because "this section" and its provisions did not exist at the time of the entry into the agreement in question. (L.F. 16-17, 44, 183). Accord Seneca's Brief at page 4. That "this section" means the new section is further confirmed by the fact the bill which created the new statutory provisions Seneca seeks to rely upon clearly states the prior statute "is repealed and two new sections enacted in lieu thereof". H.B. 339/714 (A54).

Seneca's argument that what triggers application of the statute is the entry of judgment thus ignores the actual text of the bill in question and the new "section" created therein, which clearly identifies that the relevant time frame or "trigger" for the application of the statute is the entry into a 537.065 agreement. Indeed, that is essentially what Seneca argued before the Trial Court. (L.F. 179). The entry into the 537.065 agreement is the event or act which starts the statutory provisions into action, triggering

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notice, which then (as Seneca argued before the Trial Court), triggers intervention, the two new obligations/rights that Seneca now seeks to apply.

Applying Seneca's own argument to the actual text of the statute confirms that the Trial Court correctly ruled that the amended statute could not apply to a 537.065 agreement entered into almost a year before the statute went into effect, for a case on file for years, which had already been tried and submitted under the valid law in existence at the time.

A. Seneca did not preserve the argument it makes in Point I of its brief, but instead argued directly contrary to the claim it now seeks to raise.

A party fails to preserve an argument where there is no record showing it was raised to the trial court. *In re G.M.G.* at 165. A point on appeal which was not raised to the trial court is therefore defective and should be denied. *Geier v. Sierra Bay Development, L.L.C.*, 528 S.W.3d 51, 55 (Mo. App. S.D. 2017). If the appellant "did not make this argument before the trial court," it will not be considered on appeal. *BMJ Partners v. King's Beauty Dist. Co.*, 508 S.W.3d 175, 179 (Mo. App. E.D. 2016).

In the briefing provided to the Trial Court, Seneca initially did not address the retroactivity or retrospectivity issue at all, instead arguing **solely** it had a newly created "right" to intervene. (L.F. 39-47; 51-61). This issue was addressed by Seneca only in the brief supplemental memorandum it filed after the matter was raised at the telephone hearing. While this supplemental memorandum did discuss the issue of retroactivity, it did so **only** in the context of arguing that the statute and its newly created rights and obligations were purely "procedural." (L.F. 177-179). At no point did Seneca raise the

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claim that the application of the revision to §537.065 was not retroactive. Id. Instead, it simply argued that while retroactive, it was procedural. Id.

In fact, the only time Seneca raised an argument about the statute's "trigger," or the "relevant event" for application of the new rights and obligations created by the amendment, it argued contrary to the position it seeks to take in this Court. Rather than the "judgment" being the alleged key or "trigger" for application of the statute, Seneca claimed before the Trial Court that the "relevant event" which starts application of the revised statute is the "notice of execution of the 537.065 contract". (L.F. 179). Having not only failed to raise the issue asserted in its first point, but actually argued to the contrary, this point is not preserved and should be denied on this basis. *BMJ Partners v. King's Beauty Dist. Co.*, 508 S.W.3d 175, 179 (Mo. App. E.D. 2016).

The cases cited by Seneca in its brief to try and avoid this failure are not remotely similar to a party who not only fails to make the argument sought to be raised on appeal, but actually argued to the contrary below. In *State v. Amick*, 462 S.W.3d 413 (Mo. Banc 2015) this Court held the requirement for preservation is that the grounds or basis for the alleged error must be specifically identified to the Trial Court so that the exact issue could be known and ruled upon. *Id.* at 415. *Amick* was a criminal case where the jury deliberated for five hours, and then one of the jurors had to be excused due to health issues. *Id.* at 414. The Trial Court thereafter recalled a formerly discharged juror who had gone home and had the jury "continue to deliberate" with this newly substituted juror. *Id.* Defense counsel in that case specifically objected to this procedure, advising the Trial Court that allowing substitution of a juror after deliberations had already begun

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would create significant error, as a new juror could not be later added after deliberations had already begun with other panel members. *Id.* at 415. This argument sufficiently apprised the Trial Court of the same position raised on appeal (that it was error to substitute a formerly discharged juror after deliberations had already begun). *Id.* In *Amick*, this Court held it is not whether one cites a particular statute, it is whether the argument sought to be made on appeal was sufficiently explained below. *Id.* In *Amick*, while appellant did not cite the specific statute in question which prohibited this conduct, he "plainly and unequivocally" informed the Trial Court of the issue to be decided and why it was error. *Id.*

Here the exact opposite is true. Before the Trial Court, Seneca merely cited the statute, and now argues that any and every argument which could be made is somehow preserved by this mere citation. Further, Seneca not only did not make the argument it now seeks to make to the Trial Court as to why it should apply the statute, but instead made the exact opposite argument. While Seneca now claims in this point that the statute is not retroactive because the only date relevant is the date for entry of judgment, to the Trial Court Seneca argued it was retroactive, but the Court should apply it anyway. (L.F. 177-179). Having made the exact opposite argument, Seneca did not "apprise the trial court" of the grounds for the argument it now seeks to make.[5] Contrary to Seneca's

[5] *State ex rel Schwarz Pharma Inc. v. Dowd*, 432 S.W.3d 764 (Mo. Banc 2014) involved issues of whether the specific argument that the motion was timely had been raised to the Trial Court. *Id.* at 769. The Court in *State ex rel Schwarz* held that having

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claim that this position was somehow "inherent" or "obvious", there is nothing inherent or obvious about a claim that is not made, but instead is directly contrary to the position actually taken below.

The Trial Court cannot be convicted of error on an argument it was never presented with. *Public Water Supply Dist. No. 2 v. Davis*, 607 S.W.2d 835, 837 (Mo. App. 1980)(Holding this rule is "well settled" law); *Collings v. State*, 543 S.W.3d 1, 14 (Mo. Banc 2018)(Argument on appeal which is different than that made to the Trial Court is not preserved and will not be reviewed); *Duffley v. McCaskey*, 134 S.W.2d 62, 65 (Mo. 1939)(Noting even 80 years ago, it was "elementary law" that the Court will not consider new arguments raised for the first time on appeal, and the appellant is thus bound to the arguments made below).

Seneca's argument regarding "inequitable conduct" is hard to understand given the fact that Seneca (1) had been warned that if it continued to deny coverage Garcia Empire was going to protect its interest under Missouri law pursuant to the then existing Section 537.065, and (2) that Seneca knew of the upcoming trial date and was told by plaintiffs they intended to obtain a judgment in August of 2017, **before the trial occurred.** (L.F.

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raised the argument it was timely, there was no additional requirement under Rule 51.045 regarding transfer of venue to show specifically why it was timely. To be consistent with Seneca's argument below, the moving party in *Schwarz* would have needed to argue that it was not timely, but it didn't matter, and then sought to change its position on appeal.

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182-183, 199-203). There is nothing "inequitable" about telling the insurer that you are going to do something, and then doing it.

Indeed, having refused to defend, it was Seneca's obligation to monitor the docket and seek to intervene before trial if it wished to do so. *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 766 (Mo. Banc 2009)(Insurer who refused to defend could not complain it was not aware of the entry of a 537.065 agreement, and a subsequent trial and judgment entry, as having denied coverage, it was the insurance company's "duty to keep abreast of developments" in the case, including monitoring the docket for trial setting and the entry of judgment); *Mercantile Bank of Lake Ozark v. Jones*, 890 S.W.2d 392, 394 (Mo. App. W.D. 1995)(Motion to intervene must be made prior to trial or at least the judgment to be timely); *Eakins v. Burton*, 423 S.W.2d 787, 790 (Mo. 1968)(Insurer who denied coverage, and then moved to intervene to set aside judgment after insured entered into a 537.065 agreement and had a bench trial, properly denied intervention as motion should have been filed before trial or the judgment). As this Court held in *Eakins*, the insurance company cannot complain that it decided to take the risk of not seeking to intervene in a case against its insured before it went to trial. *Id.* Seneca cites no case holding it was not required to preserve the error it now wishes to raise, because there are none.[6]

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[6] The only case Seneca cited on its "equity" argument had nothing to do with failure to preserve error at all. Instead it revolved around a party who engaged in banking and lending fraud, which prevented it from claiming it had been defrauded because it had

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Finally, Seneca's brief tacitly recognizes the failure to preserve this issue by asking the Court to review this point under "plain error". As this Court has consistently held, however, plain error review is rarely granted in civil cases. *Mayes v. St. Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 269 (Mo. Banc 2014). Plain error review in a civil case is thus limited to those exceptionally rare circumstances where an injustice so egregious has occurred that it will "weaken the very foundations of the process" and undermine the entire civil justice system. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 176 (Mo. App. 2000). A failure to follow statutory law does not fall within this extremely high standard. *Williams v. Mercy Clinic Springfield Communities*, _____ S.W.3d ____, 2019 WL 191808, *8 (Mo. Banc 2019).[7]

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participated in the fraud in question. *Petrol Properties Inc. v. Stewart Title Co.*, 225 S.W.3d 448, 455 (Mo. App. S.D. 2007). Such a case has quite literally nothing to do with Seneca's failure to raise the argument it now seeks to make. Likewise, it affords no explanation for Seneca making the exact opposite argument to the Trial Court, comparted to what it now argues in this Court.

[7] Indeed, in one of the cases relied on by Seneca, the Court did not find plain error, despite gratuitously reviewing the issue. *Roy v. Missouri Pac. RR. Co.*, 43 S.W.3d 351, 364 (Mo. App. W.D. 2001)(Instructional error alleged did not raise to level of plain error for civil review). The other, *In re C.G.L. v. Bilyeau*, (Mo. App. S.D. 2000) did not involve a failure to present the issue to the Trial Court at all, but instead a briefing deficiency which the Court noted was cured by the argument portion of the brief.

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Respectfully, Seneca did not preserve the argument it seeks to make in its first point on appeal.

B. By its terms, the statutory change to R.S.Mo. 537.065 does not apply to an agreement which was not "entered into" under the newly enacted statute, but instead under the prior version of the statute, or for a cause of action which went to trial and was submitted before the new section existed.

Under Missouri law, all statutes are read to operate prospectively, unless the legislative intent is clear and expressly states that it should apply retroactively. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34-35 (Mo. Banc 1982). In deciding whether a newly adopted law applies to a specific case or claim, the Court must first determine whether the legislature clearly and explicitly stated the statute is intended to be retroactive. *In re Murphy*, 477 S.W.3d 77, 82 (Mo. App. E.D. 2015). If the statute does not contain specific language requiring its application retroactively, it will be applied only prospectively. *Id.*

No language of the new statutory section clearly expresses an intent that it apply retroactively to agreements entered into before its enactment or trials conducted prior to its effective date. In fact, Seneca tries mightily to ignore the portion of the text of the statue which clearly states it applies only prospectively. Instead, Seneca raises an amorphous public policy argument that the Court should apply this new section to an already existing agreement because Seneca believes the provision should be retroactive based on its interpretation of the intent of the new statute. Legislative intent, however, is discerned from the language the legislature chose to use in the statute. *State ex rel*

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Robison v. Lindley-Myers, 551 S.W.3d 468, 472 (Mo. Banc 2018). Accord *Newsome v. Kansas City Missouri School Dist.*, 520 S.W.3d 769, 780-781 (Mo. Banc 2017)(Rejecting argument that did not have a basis in the plain language of the statute, as the Court cannot "add" statutory language to fit an argument).

As this Court has stated in the past, the legislature's intent, and what "public policy" they wish to implement, is thus determined by the plain language of the statute. *State ex rel Heart of America Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo. Banc 2016). In *State ex rel Heart of America Council*, a similar policy argument was made to argue the purpose of the statute (to extend the statute of limitations for "childhood sexual abuse") should include anyone responsible under the law, and not just the perpetrator. *Id.* at 327. In rejecting this policy argument, the Court held the intent and scope of the statute must be determined by the words the legislature actually chose to use. *Id.* This is because "Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning". *Id.* In language equally applicable to the argument Seneca makes, this Court held that it is the legislature who chooses what language to use, and the Court "under the guise of discerning legislative intent, cannot rewrite the statute." *Id.*

Here, in regard to the enactment of the new section 537.065, had the legislature wished to apply this provision retroactively, it certainly knew how to do so plainly and clearly. For instance, in 2005 when the legislature made changes to various provisions of tort law, House Bill 393 specifically stated that all of the various changes "shall apply to

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all causes of action filed after August 28, 2005" (A47); Accord *Good Hope Missionary Baptist Church v. St. Louis Alarm*, 358 S.W.3d 528, 532 (Mo. App. E.D. 2012).

Likewise, in *Doe v. Roman Catholic Dioceses of Jefferson City*, 862 S.W.2d 338, 340 (Mo. Banc 1993) the legislature stated the statute creating a new statute of limitations for childhood sexual abuse was intended to apply to all actions "commenced on or after August 28, 1990". Further, the legislature clearly and explicitly stated this was to apply retroactively to reinstate any claim that would not have been timely prior to the passage of the law. *Id.*

Similarly, the legislature also knows how to clearly and concisely state that it intends to apply the law retroactively **to all claims**, whenever filed. In the case of *In re Murphy*, 477 S.W.3d 77 (Mo. App. E.D. 2015) the legislature amended R.S.Mo. §632.480 through House Bill 215, which was signed into law on July 2, 2013. *Id.* at 78; (A49-53). In no uncertain terms, the legislature stated in that circumstance in the text of that Bill it was the "intent of the legislature to apply these provisions retroactively." *Id.* at 80. In determining the threshold issue of whether the statute was prospective or retroactive, the Court held such clear and specific language must be included to overcome Missouri's strong presumption of prospective application. *Id.* at 83.

The language of the August 28, 2017 enactment of a new section 537.065 does not have **any** language similar to the above clear and specific language. It does not state that it applies to causes of action which have already been filed. It does not state it applies to cases which have already gone to trial. It certainly does not state that it is intended to apply to §537.065 contracts which had already been entered into before its effective date

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(A 31-32). Had the legislature intended to have the statute apply to such situations, it was required to state this intent explicitly. As seen in regard to the statutory changes noted above, the legislature knows how to put such clear language in the statute to overcome the strong presumption that it does not apply to such cases. Having decided not to include such language in the statute, but instead language to the contrary, the new statute does not apply in this case.

Seneca's argument at its essence asks the Court to add language to the statute that does not exist. Specifically, its argument requires that the Court add some combination of the following language in parenthesis:

> Before a judgment may be entered against any tort-feasor (at any time) after such tort-feasor has entered into a contract under this section (or the previous section of this statute which was repealed by 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 (regardless of whether the lawsuit has already been tried or submitted) involving the claim for damages. (It is the intent of the legislature to apply these provisions retroactively to all agreements no matter when entered into). (A031-A032, without added language in parenthesis).

Setting aside the constitutional impediments to such a statute (discussed below), the legislature clearly did not write the statute as argued by Seneca. The statute has no language whatsoever which would require that it apply retroactively to claims filed after

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a certain date, to claims already filed and tried, or to 537.065 agreements entered into before the effective date of the statute (A031-A032). As there is no such language in the actual statutory language chosen by the legislature, this Court cannot add such language in the guise of discerning "legislative intent" or the purported policy espoused by Seneca. *State ex rel Heart of America* at 327

The language the legislature chose to use is also in accord with Missouri statutes and case law. As the Trial Court noted, R.S.Mo. §1.150 states that any amendment to a law in place shall not in any way affect "any proceeding had or commenced", but instead such claims already on file shall commence to final judgment and termination as if the revision had not been made (A 27). Similarly, R.S.Mo. §1.170 states that the repeal or change to any civil statute does not affect anything already done or any suit commenced prior to the repeal (A 28). These provisions have been part of Missouri law since the early part of the last century and have been consistently interpreted as savings statutes which prevent the type of change that Seneca argues should occur in this case. *State ex rel Bair v. Producers Gravel Co.*, 111 S.W. 2d 521, 524-525 (Mo. 1937). The Court in *State ex rel Wayne County v. Hackmann*, 199 S.W. 990 (Mo. 1917) held that these provisions have been put and kept in place to ensure that each individual statute does not require its own savings clause. The Court in *Hackmann* noted that the Legislature's intent was made clear by the fact they did not include just one savings statute, but two, so as to ensure that it did not leave "the validity of acts done to implication". *Id.* at 991-992.

> These sections, construed together, so modify a repealing statute as to not only render valid initiatory or preliminary acts in the exercise of a power

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conferred by a former statute, **but authorize such subsequent acts as may be necessary to effectuate the purpose originally contemplated**.

Id. at 991, emphasis added.

In other words, §537.065 as it existed at the time of the entry into the agreement, and the filing of the suit and trial remains valid for all actions taken up to that point. Further, any other subsequent acts (such as the entry of judgment after trial and submission to the Court) necessary to effectuate the §537.065 agreement and the trial conducted under the terms of that statute at the time the trial occurred, are to be considered done under the prior law. These savings provisions are included in every Missouri statute, whether or not expressly stated therein. *Protection Mutual Ins. Co. v. Kansas City*, 551 S.W.2d 909, 912 (Mo. App. 1977). This principle is further "buttressed" by the general presumption against retroactive application of a statute. *Id.* Finally, this statutory scheme of preserving the law as it was for claims already filed has no language that would "confine the operation of those sections to the preservation" of only "vested rights" *Id.*

Just as the Trial Court found, once a claim is on file, the existing law applies until its conclusion, absent the specific and clear language used by the legislature in the situations cited above. As there is no such language in the newly enacted section 537.065, Seneca's argument falls apart on the first issue the Court must decide, whether the legislature intended the statute to apply retroactively to claims and agreements such as the one at issue in this case. *In re Murphy*, 477 S.W.3d 77, 82 (Mo. App. E.D. 2015).

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C. Seneca's relevant event or "triggering" argument is contrary to the express terms of the statute, as the relevant event or "triggering event" is whether the contract was entered into under the prior section 537.065 or instead pursuant to the new section 537.065.

Having no argument that the legislature intended the statute to be retroactive, Seneca comes up with the novel argument that the statute, which creates a substantive right to intervene, and creates a new obligation of notice, is not actually retroactive, because the only thing of importance is the judgment. This is not only directly contrary to the text of the statute, but also Seneca's other points on appeal, which focus on things antecedent to the judgment which Seneca claims it was entitled to as a matter of right under the new section 537.065; (1) notice of entry into the 537.065 agreement, and (2) the absolute right to intervene in the trial of the case (despite the fact the trial occurred prior to the statutes effective date). Seneca attempts this sleight of hand by arguing the newly created obligations under the statute are actually "triggered" by the entry of judgment. This is contrary to the terms of the revised statute and common sense. If the judgment were the "trigger" then the new notice provision, and the right to intervene would not begin to run until the judgment, which even Seneca concedes is not correct.

The actual triggering event under Seneca's analysis, consistent with the fact it is an amendment to R.S.Mo. §537.065, is the entry into the §537.065 agreement. The "trigger" which creates the obligations and rights and starts the statutes machinery

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moving is the entry into the contract to limit recovery under the amended statute.[8] The very text of the statute makes this clear when stating the new statutory rights and obligations created accrue or arise "***after*** **such tort-feasor has entered into a contract** ***under this section***". R.S.Mo. § 537.065.2 (2017) (A 31-32). Emphasis added. Under the actual terms of the new statute, it is only "after" a new section 537.065 agreement has been entered into "under this section", that the amended statute "triggers" the newly created rights/obligations created therein. First, the statute creates a new obligation on the parties to the agreement to provide notice to the insurance company after execution of the agreement. The statute then creates a new "right" to intervene in the suit after such notice of a new section 537.065 agreement has been given. The judgment is not the "triggering" or relevant event for application of the statute. Rather the judgment is the last thing that occurs under the text of the statute. Further, as clearly stated in the text of the statute, these intervention rights before judgment is entered do not apply unless the section 537.065 agreement is entered into pursuant to the new statute.

The Court therefore need look no further than the exact language the Legislature chose to utilize in crafting this new statute. Rather than choose to add language showing an intent to apply the statute retroactively, the legislature chose to utilize language

[8] Seneca's argument on page 17 of its brief there is no "qualifying language" that limits application of the statute to contracts entered into after its effective date is directly contrary to the statutory requirement that the agreement be entered into under "this section" and not the prior section.

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making quite clear that the new statute applies only to §537.065 agreements entered into after it went into effect. Thus, while Seneca provides emphasis to almost the entire statute on page 5 of its brief, the only part of the statute it fails to bold or italicize is the portion of the statute that identifies when it is applicable, the exact issue it asks the Court to decide. Similarly, when Seneca cites the statute on page 17 of its brief, it cites "entered into a contract" but cuts off the rest of the statute, leaving the key language of "under this section" completely out of its argument, as if it did not exist. While Seneca may wish this provision did not exist, it clearly is part of the statute passed. The likely reason for these continued omissions is that the statute clearly and expressly states that it applies only when the "tort-feasor has entered into a contract under this section," which "section" is the amendment to the newly revised section 537.065. See e.g. *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo. Banc 2016)(Holding that the plain language of the term "brought pursuant to this section" when used in a new statutory provision means exactly that, the new statutory provision in question).[9]

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[9] The only case counsel could find holding similar language could be applied to a later statute involved operation of the savings statutes, and a situation where the prior and revised statute had the exact same terms at issue. *Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W.40, 44 (Mo. 1909). The Court in *Clark* held that as the time prescribed in the revised statute was the same in the prior repealed version, and the savings statutes carry forward the old law in force, the savings provision of the non-suit statute applied to give the plaintiff one year in which to refile the claim. The protection

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This plain language reading of the statute is likewise consistent with the text of the bill which created this new statute. Here, the new section Seneca relies upon was created pursuant to House Bill 339/714. (A54-56). H.B. 339/714 states that this revision is a new section, **repealing** the prior section, and putting two new sections in its place. The first new "section" created by the bill was section 537.058, the new statutory time limit offer bill. Under subsection 2 of that new provision, the legislature chose to utilize similar language, stating that any time limit demand "shall reference this section". (A54). Like its sister statute, it would be impossible to reference "this section" (537.058) before it existed.

HB 338/714's second "new section" was the new 537.065 statute. The old §537.065 under which the contract in this case was entered into was thus "repealed and two new sections enacted in lieu thereof". H.B. 339/714 (A54). As noted above, the savings statutes apply to prevent any issues with the valid contract entered into prior to this amendment. Further, by choosing to use the exact same language in the statute and the enacting language (section), the legislature clearly and expressly identified exactly what agreements fall within the new provisions of this brand new section or statute. It is **only** those where the tort-feasor (here Garcia Empire) "has entered into a contract under

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by the Court of the actions which had already been taken under the prior law is in keeping with Respondent's position, and the Trial Court's ruling. *Id.* at 43 (Holding that steps already taken, and all things done under the prior law still stand after a revision to a statute).

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this section". As this "new section" did not exist at the time of the contract at issue between Garcia Empire and the Desais, the statute's express terms state the new provisions do not apply. Respectfully, plaintiff would submit this plain language and consistent use between the two "new sections" enacted under the Act resolve the issue of application of the statute and the Court need look no further. *State ex rel. Heart of America Council* at 327.

The "judgment" language that Seneca seeks to hang its hat upon thus actually states the notice and right to intervene Seneca seeks to apply are applicable only if before the judgment in question "such tort feasor **has entered into a contract *under this section.*"** (A31, emphasis added). Seneca's argument that entry into a 537.065 agreement under the old statute somehow triggers the new statute is thus directly contrary to the language the legislature chose to use, tying application of the new statute to an agreement entered into under the new statute's provisions. It is hardly surprising given it is an enactment repealing the prior section 537.065, and enacting "in lieu thereof" a new statutory section, that its application would hinge upon whether the agreement was entered into under the new or old law. This plain language of the revision to section 537.065 therefore chose to place the applicability of the new statute on whether the agreement was entered into under the old law (for which the old law applies) or the new revised law (for which the newly enacted section and its newly created rights and obligations apply).

Seneca's argument that the judgment is the relevant trigger or only important date for application of the statute also ignores the new obligation to provide notice, and the

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intervention "right" that Seneca sought to enforce below and in other portions of its brief. To argue no other event is relevant is thus not only directly contrary to the statute, but also Seneca's arguments to the Trial Court, the Court of Appeals, and even this Court. Here, it is not contested that the §537.065 contract was not entered into under "this" amended section which went into effect on August 28, 2017. As such, the very text of the statute makes clear that none of the new sections rights, obligations, or other machinery apply to the circumstances at hand, an agreement entered into and a trial conducted before "this section" went into effect.

Further, the legislature is deemed know the law, and the presumption is the General Assembly did not intend to craft a statute that violates the law or constitution. *State ex rel Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 602-603 (Mo. Banc 2012). Entry into the 537.065 agreement occurred in November of 2016, well before the statute went into effect. (L.F. 183; Seneca's Statement of Facts, page 3). As the action the statute identifies as the "triggers" for its application occurred almost a year before the statute went into effect, an attempt to apply the new statute to an already existing contract, to create both a new obligation and a new substantive "right" to intervene and set aside a trial which has already occurred is not only unconstitutionally retrospective, but would also require the Court to undo everything that had occurred under the then existing and valid law, in direct violation of R.S. Mo. §1.170 (A28). The decision by the legislature to write the statute to avoid the messy implications of such an interpretation is yet another reason Seneca's argument is textually and logically wrong. While Seneca spends considerable effort discussing "policy" issues it argues should be

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considered, they have zero bearing on this case, as the legislature in the statute stated the amendment only applies to contracts entered into once this "new section" went into effect.

The case cited by Appellant for its trigger or relevant date argument likewise confirms a "trigger" or the relevant date is what sets in motion the obligations in question. In *State v. Holden*, 278 S.W.3d 674 (Mo. Banc 2009) the statute at issue was the convicted sex offender's registration statute. Holden pled guilty in 1995 to two counts of sodomy with a child, which occurred in 1994. *Id.* at 677. While his trial was ongoing, the legislature passed the sex offender registration statutes, which became effective on January 1, 1995.

Unlike the statute at issue in this appeal, the legislature in the sex offender registration laws made explicit it intended the law to apply retroactively. *Id.* at 678 (Noting the statute applied to any such conviction or plea after July 1, 1979). The registration laws mandated that anyone who had such a conviction or plea of guilty was required to register their address and provide notice within 10 days of any move. *Id.* at 678. Holden was charged in 2007 of not complying with this registration law and convicted at trial. *Id.* at 677.

On appeal, Holden argued that this law applied retrospectively to him in violation of Article I, section 13 of the Missouri Constitution. *Id.* at 678. Specifically, Holden argued it applied retrospectively to him because the conduct for which he was convicted occurred prior to the statute's effective date, i.e. he committed the crime of sodomy in April of 1994, and the statute at issue became effective January 1, 1995. The Court held

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that Holden was confusing the conduct for which he was convicted initially (sodomy), and the conduct for the later conviction (failure to register), which were two separate incidents. *Id.* at 678. Holden had already been convicted and sentenced for the crime of statutory sodomy, and thus when that crime occurred was irrelevant as he was not being charged or convicted of anything to do with that offense. Instead, the statute for which he was charged and found guilty was registration, which obligation began when his conviction was entered. *Id.* In other words, the date of his criminal sodomy would have been the "trigger" date for conviction of that crime. However, since he had already been punished for the crime of sodomy, the date that occurred was irrelevant to the later offense of failing to register. *Id.*

Regarding the failure to register, that did not operate retrospectively because this separate offense was tied to the status of whether someone was convicted of specific crimes, and thereafter failed to register. *Id.* The obligation to register was created in January 1995, and Holden's conviction in March of 1995 made him subject to its terms. *Id.* The Court thus held the "trigger" date of the statute, i.e. what began the obligation to register, was not the commission of the crime for which he was punished, but instead the date of the plea or conviction. *Id.*

Importantly, the Court held that if the plea or conviction had occurred prior to the effective date of the statute, it would be retrospective in application, because that is what set the statutory obligations running. *Id.* The Court in *Holden* therefore looked at what set the obligations in motion under the statute and found that as to the defendant it did not occur until after the statute's effective date. Here, the exact opposite is true. The

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obligations created by the revision to §537.065 are created or begin to run by the express terms of the statute "after such tort-feasor has entered into a contract under this section". R.S.Mo. §537.065.2 (August 28, 2017) (A 31-32). Only <u>after</u> the 537.065 agreement is entered into does the statute then begin to create obligations, as well as new statutory rights. Under the statutory scheme as actually written, entry into a 537.065 agreement under the new statutory section enacted on August 28, 2017 is what "triggers" the following duties and obligations:

1. The obligation or duty to provide the insurer written notice of the execution of the contract; and

2. The insurers newly created "right" to intervene in the trial.

Id. (A031-032).

Rather than the "trigger" or first thing which sets in motion the obligations or rights at issue, the entry of judgment is the last thing. Put another way, judgment is not the Alpha which comes first and creates the new obligations and rights, but the Omega, which concludes the process begun in this case long before the new statute was even considered, let alone passed into law.

At the time the "trigger" occurred under Seneca's argument, section 537.065 did not have any requirement of notice, grant any right of intervention, or pose any restriction on entry of judgment (A030). Seneca's argument to the contrary is as wafer thin an analysis as possible, trying to make two things part of a set when they are clearly and distinctly different. While the conviction in *Holden* "triggered" the new obligations, the judgment in this case triggered nothing.

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What the Court in *Holden* meant by "trigger" can be confirmed by review of the case it relied upon, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. Banc 2006). In *Phillips*, the Court held that the portion of "Megan's law" which required persons convicted of certain crimes to register was retrospective, in violation of Article I, Section 13, of the Constitution. It did so, because the law created a new obligation which was "triggered" by the conviction date under the statute. For those who had been convicted after the statute went into effect, the statute was unconstitutional because it created a "new obligation and imposes a new duty," which has been improper under Missouri law since the first Constitution of 1820. *Id.* at 851-852. Thus, a statute which creates a new obligation which did not exist at the time of the event which "triggers" the obligation is retrospective. As the section 537.065 agreement here was entered into well prior to the effective date of the statute, it would be improper to interpret the statute as Seneca argues.

CONCLUSION

Seneca did not preserve the claim it seeks to raise in this point, as it not only failed to make this argument to the Trial Court, but instead argued the exact opposite. Further, even had it preserved the issue, Seneca's argument is contrary to the actual text of the statute, and long-standing Missouri law on how new statutes should be interpreted. Here, the Desais and Garcia Empire entered into a contract under the old section 537.065. They did so well before the revision to the statute that Seneca seeks to apply occurred. The case was thereafter set for an August 17, 2017, trial date in May of 2017. Despite knowing of the upcoming Trial, and the intent to obtain a judgment, Seneca chose not to

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intervene in the case, and judgment was entered. Only after Judgment, and the statutory revision did Seneca seek to intervene. Its argument the new statute should apply to an agreement entered into under the prior section is contrary to long standing Missouri law, and the very text the legislature chose to utilize. While Seneca argues public policy should require the statute apply to the agreement in question, the express terms the legislature chose makes clear the new rights and obligations apply only if the section 537.065 agreement was "entered into" under the terms of the new statute. As that admittedly is not the case, Seneca's first point should be denied.

II. The Trial Court properly denied Seneca's motion to intervene and for relief from judgment, interpreting the new statute to not be applicable to the case before it, because the amendment to R.S.Mo. 537.065 which created a new obligation to provide notice and provided for a new right of an insurer to intervene, are both substantive in nature, in that the notice requirement creates a new obligation or duty on the part of the parties to a 537.065 agreement which did not exist when the contract was entered into, and the "right" to intervene did not exist prior to the statutory amendment, which interferes with the vested rights of the parties to the 537.065 agreement, and application of the revised statutes as Seneca requested would violate the Missouri Savings Statutes as well as Article I Section 13 of the Missouri Constitution, which prohibits retrospective application of newly enacted laws in civil cases and impairment of existing contracts (Responding to Appellant's Second Point).

Doe v. Phillips, 194 S.W.3d 833 (Mo. Banc 2006);

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F.R. v. St. Charles County Sheriff's Dept., 301 S.W.3d 56, 62 (Mo. Banc 2010); *State ex rel St. Louis- San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. Banc 1974).

STANDARD OF REVIEW

The denial of the motion to intervene is reversed only if not supported by substantial evidence, is against the weight of the evidence, or erroneously declares the law. *Flippin v. Coleman Trucking, Inc.*, 18 S.W.3d 17 (Mo. App. E.D. 2000). The proposed intervenor bears the burden to prove error. *Id.*

INTRODUCTION

Seneca's claim in this point is that the Court should read a statutory amendment, which creates new substantive rights and obligation retrospectively because they are really "procedural." Uniform Missouri law has held that the creation of a new obligation is substantive, not procedural. *Doe v. Phillips*, 194 S.W.3d 833 (Mo. Banc 2006). Similarly, the creation of a new "right" which did not exist prior to the enactment of the statute which would alter the legal effect of past events is prohibited. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. Banc 1974)(Missouri law holds it is repugnant to alter the legal effect of events which have already transpired, and trying to label such changes procedural "does not give sufficient consideration to this principle.")

Seneca's argument that the Court should apply these new substantive changes to (1) a case that had been on file for several years, (2) a 537.065 agreement which had been

entered into well before the new statute went into effect, and (3) a trial that had already occurred, is inconsistent with not only Missouri law, but common sense. The Trial Court could not apply the new section 537.065 to a contract entered into under the prior section. The Trial Court therefore properly construed the new statute to be prospective as required by the clear text of the statute (as set forth in Point I) and to avoid any implications that would make the statute violate two different provisions of the Missouri Constitution.

Finally, Seneca's new "principles of governance" argument in part C of its brief is not only newly raised in this Court and thus not preserved, but also contrary to the actual ruling of the Trial Court. The Trial Court did not find the statute unconstitutional, but instead found that as written, and pursuant to the savings statutes, it did not require application to the case at hand. (L.F. 185). Nowhere did the Court in its order find the statute "to be an impermissible retrospective application" of the law as Seneca argues for the first time in this Court. Page 23-24 of Seneca's brief. This entire section, and the "policy arguments" raised by Seneca are thus a complete and utter straw man, which has no relation to the actual ruling at issue, as Seneca never argued this to the Trial Court, and the Trial Court clearly never made the ruling Seneca assails. Further, this is a new section to Point II of its brief which was **not** argued to the Court of Appeals. having failed to raise this issue in the Court of Appeals, under Rule 83.08(b), it is not preserved for review in this Court upon transfer. *Sun Aviation, Inc. v. L-3 Communications Avionics Systems, Inc.*, 533 S.W.3d 720, 730 FN8 (Mo. Banc 2017).

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A. The new notice provision of the revision to 537.065 is substantive if applied to create a new obligation to provide notice of the entry into an already existing 537.065 agreement and would likewise alter an existing contract. Therefore, the Trial Court properly ruled the amendment to R.S.Mo. 537.065 may only be applied prospectively.

(1) The creation of a new obligation to give notice of execution of a 537.065 agreement would be retrospective if applied to 537.065 agreements which were already in place prior to the new statute.

When interpreting the revision to R.S.Mo. 537.065 The Court must start with a presumption that the statute operates prospectively only. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34-35 (Mo. Banc 1982). As set forth more fully in Point I above, there was no clear language that the legislature intended that the statute should apply retroactively. Instead, the language chosen was the exact opposite. Further, even if such language was present, no statute may apply retrospectively, or impair contractual obligations. *Id.* As the Court must construe a statute as constitutional if possible, a reading of a statute that it is intended to apply retrospectively is not favored. *Id.*

Unlike the constitution of most states, the Missouri Constitution since initial adoption in 1820 has prohibited not only ex post facto criminal laws, but also included a much broader prohibition on civil laws "retrospective in their operation". *State v. Wade*, 421 S.W.3d 429, 432 (Mo. Banc 2013); *State v. Honeycutt*, 421 S.W.3d 410, 414-420 (Mo. Banc 2013). This provision has remained in every Constitution since 1820. *Id.* This phrase has a long, well understood meaning. A retrospective law is one which:

takes away or impairs any vested right acquired under existing laws, **or** creates a new obligation, **or** imposes a new duty, **or** attaches a new disability in respect to transactions or considerations already past.

State v. Honeycutt. at 419, emphasis added. Accord *Squaw Creek Drainage Dist. v. Turney*, 138 S.W.12, 16 (Mo.1911). The scope of the retrospective law prohibition is thus much broader than that on ex post facto laws. *State v. Honeycutt* at 419, citing *Calder v. Bull*, 3 U.S. 386 (1798). Further, "regardless of the legislative intent, it should be obvious that a statute cannot supersede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. Banc 1993)(Explaining that the "exception" identified in older Missouri cases has been clarified by the Court's opinion in *Dept. of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327 (Mo. Banc 1985) to explain that no matter how clear legislative intent might be, it cannot authorize a retrospective law, prohibited by the Constitution).[10]

If the new section gives to something already done a different effect from that which it had when it transpired, it is a retrospective law in violation of the Constitutional prohibition. *Squaw Creek at 16.* Therefore, statutes are substantive and impermissibly retrospective if they take away or impair vested rights acquired under existing law **or** create a new obligation **or** impose a new duty. *Keernan v. Myers*, 172 S.W.3d 466 (Mo. App. S.D. 2015). This Court has explicitly confirmed that the "or" in this test is

[10] Appellant appears to argue the contrary in its brief, despite this clear and unassailable law. See e.g. page 20 of Seneca's brief.

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disjunctive, and that a showing of any one of these things requires a finding that the statute is retrospective in application. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 62 (Mo. Banc 2010). While impairment of a vested right is one way a statue is retrospective, such a showing is not necessary if it otherwise imposes a new duty or obligation, attaches a new disability to past transactions, or otherwise falls afoul of any other prohibited action. As such, the Court need go no further once it has found any of these prohibited actions. *F.R.* at 62.

Here, the amendment revises statutory contracts under R.S.Mo. 537.065 (A 31-32). In this case, the 537.065 agreement was entered into long before the statutory amendment became law. Despite this, Seneca argues that the new law which creates a new obligation under the statutory contract to provide notice is not substantive because it did not impair a "vested right". This argument, however, ignores clear Missouri law that no such showing is necessary, as the test for improper retroactive laws **is in the disjunctive**. *F.R.* Supra at 61-62. Anything that creates a new duty, obligation or disability which did not exist previously is retrospective and would violate Article I section 13 of the Constitution. As the Trial Court's interpretation of the statute avoids this problem, and is further consistent with the plain language of the new section and Missouri's savings statutes, the Trial Court did not err when holding the statute did not apply retroactively. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838 (Mo. Banc 1991).

At the time the 537.065 contract in this case was entered into, the statutory section did not have any obligation or duty to advise anyone, let alone the insurer, of the entry

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into the contract (A 30). Seneca's argument requires the Court find that almost a year after the agreement was entered into, once the new section 537.065 became effective it added a new duty or obligation to the parties to the contract to provide written notice **of the past execution of the statutory contract**. This would clearly create a new obligation or duty or disability, or attach a new disability with respect to transactions or considerations already past (the entry into the 537.065 agreement almost a year before the new section became effective). *Buder* at 410; *F.R.* at 62. As the entry into the contract and subsequent notice are conditions precedent to the right to intervene, the Court need go no further in deciding it cannot be applied retroactively as Seneca argues. *Id.*

In a very analogous situation, this Court in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. Banc 2006) held that a law which required a sex offender to register based on a conviction prior to the law going into effect was retrospective and thus violated Article 1 §13 of the constitution. In *Phillips*, some of the complainants had been convicted of certain crimes prior to the adoption of "Megan's law" which required sex offenders to register with designated authorities, and to provide notice when they changed their residence. *Id.* at 837. This Court considered this provision as it related to people who had already completed the condition precedent for the new duty or obligation (conviction) prior to the law going into effect. The Court held that registration and notice, "by its nature imposes a new duty or obligation." *Id.* at 852. In language equally applicable to this case, the Court held there was thus no argument it was not retrospective. *Id.* Any circumstance where the statute would take status or actions prior to the passage of the law and utilize that to impose a new duty or obligation to provide

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notice violates "our constitutional bar on laws retrospective in operation." *Id.*, citing *Jerry Russell Bliss v. Hazardous Waste*, 702 S.W.2d 77 (Mo. Banc 1985).

Similar to Seneca's "trigger" argument, the Court in *Phillips* looked at what event required notice and registration. Finding in that case the statute defined the condition as conviction, the Court held the "trigger" which started the statutory proceedings moving was therefore completed before Megan's law was passed, and it could not be applied to such conditions already completed. Here, the same is true of the condition which sets the notice requirement in motion, entry into the §537.065 contract, which occurred long before the new statute's effective date.

In *Phillips*, the Court explicitly held that requiring someone to register or provide notice was a new obligation or duty. Further, as that duty did not exist until the change in the law, it could not be applied retrospectively to pre-amendment conduct. That is identical to the new section 537.065 and its newly created duty or obligation to provide notice to the insurer. There is no material distinction between the obligation to register and provide notice in *Phillips*, and the obligation to provide notice in this case. Both "impose a new duty or obligation," which would violate not only Missouri case authority but also the "constitutional bar on laws retrospective in operation" if applied as Seneca requests. *Phillips* at 852.

Similarly, the Court in *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 62-63 (Mo. Banc 2010) held that a law which required a person to "do something" they were not required to do before the law went into effect is the imposition of a new obligation or duty. A statute therefore is retrospective if it requires a person to take some

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action they did not have an obligation to do before the passage of the law. *Id.* In *F.R.*, one plaintiff raised the statute's requirement that he not live within1000 feet of a school, while the other had not posted a sign at their house which stated, "No candy or treats at this residence" during Halloween based upon his conviction as a sex offender. *Id.* at 59-60. Analyzing the two claims, the Court held the decision was "simple", as both parties appealing had been given new obligations. *Id.* at 61.

As to plaintiff F.R., the law's restriction that he could not live within 1,000 feet of a school imposed a new obligation to ensure that his residence was not within the proscribed distance. *Id.* at 64. Similarly, a provision which required plaintiff Raynor post a sign in his yard on Halloween likewise created a new duty or obligation. *Id.* at 64. As both were required to take some action not previously required of them, the law improperly applied retrospectively to both plaintiffs. *Id.* at 65. Here, application of the new section 537.065 would require action (providing notice of the agreement) which was not required at the time of entry into the statutory contract. Under *F.R.*, such an interpretation would be unconstitutional and is thus not proper. Accord *Missouri Real Estate Commission v. Rayford*, 307 S.W.3d 686, 693-695 (Mo. App. W.D. 2010)(Citing *Phillips* and *F.R.* to hold that while statute in question would not impair a vested right, it would still fall afoul of the Constitutional Prohibition on retrospective laws if it were interpreted to impose a new duty to give up a real estate license based on a condition

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which occurred before the statute went into effect).[11]

Seneca likewise goes to great lengths to attempt to avoid the holding of *Brune v. Johnson Controls*, 457 S.W.3d 372 (Mo. App. E.D. 2015). The argument and claims made by Seneca in doing so, however, are not in keeping with the actual decision in that case. Instead, the opinion clearly and concisely states that a notice provision which requires an injured worker provide notice of injury within 30 days (very similar to the notice requirement of the new section 537.065) was substantive because it created a new obligation or duty of notice which did not exist at the time the plaintiff was injured. *Id.* at 379.

In *Brune*, the appellant, like Seneca, argued the new notice statute was "remedial" and therefore should be applied to events which occurred before it went into effect. *Id.* Under the statute the "relevant time" or "trigger" for application of the new notice provision was injury. *Id.* At this relevant time, there was no requirement that anyone provide notice. *Id.* In holding the revision to the section which created a new

[11] *Salasberry v. State*, 396 S.W.3d 440 (Mo. App. 2013) cited by Seneca did not involve the creation of a new obligation to give notice. Instead, the obligation to provide notice already existed, and the new statute simply shortened the time frame from 10 days to 3 days. Unlike all of the above cases, therefore, the newly enacted section did not impose a new duty upon anyone. *Salasberry* would be applicable only if the prior section 537.065 had a notice provision that the new section modified, which admittedly is not the case.

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requirement to give notice could not be applied retroactively, the Court held the notice requirement in the new section was substantive because it imposed a new obligation which previously did not exist. *Id.* As such this new duty to provide notice could only be prospectively applied. *Id.* Contrary to Seneca's arguments, and in conformity with this Court's opinions in *Phillips* and *F.R.* Supra, there was no discussion whether this new obligation was onerous or substantial. Instead, consistent with the constitutional provision and the cases applying it for over 100 years, the decision focused on whether a new duty or obligation was created, period. Since it was, the provision could not be applied retroactively. The constitutional prohibition against retrospective application of laws is not a sliding scale that allows some retrospective laws if they are deemed not too onerous. Instead, it is a simple and clear mandate that prohibits any statute from impairing existing rights, or creating new obligations or imposing a new duty, or attaching a new disability to transactions which have already been consummated. *Ruecking Const. Co. v. Withnell*, 191 S.W. 685, 688 (Mo. Banc 1916).

While Seneca seeks to avoid the holding of *Ruecking Const. Co. v. Withnell*, 191 S.W. 685, 688 (Mo. Banc 1916) by critiquing it as a "102-year-old case", the cases age shows that the law in this area has been consistent and uniform. The citation above that the prohibition on retrospective laws is in the disjunctive is consistent with the earliest cases until this Court's most recent opinions. See e.g. *F.R.* Supra at 61-62. This is not surprising given the retrospective application of law provision has been in every Constitution since 1820. *State v. Wade* Supra at 432. Therefore, as noted by Seneca, even 100 years ago, this Court held "in no uncertain terms" that any construction which

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creates a new obligation **or** imposes a new duty of notice is impermissibly retrospective and would violate this constitutional prohibition. *Ruecking Const.* at 688. Requiring notice of any kind for something that occurred prior to the statutes enactment would be improperly retrospective. *Id.,* citing cases. Statutes which create new notice requirements therefore can only be construed prospectively. *Id.* Further, whether the statute is felt to be "remedial" has no bearing on this constitutional requirement for statutory construction. *Id.*

Finally, the argument made by Seneca regarding the opinion in *Farmers Mutual Automobile Ins. Co. v. Drane*, 383 S.W.2d 714 (Mo. 1964), construing the prior section 537.065 is hard to follow, as the agreement in that case was entered into only after the prior statutory section went into effect. In *Drane*, the prior section 537.065 went into effect and became law on August 29, 1959. *Drane* at 718. On September 10, 1959, 12 days **after** the section became effective, the parties entered into an agreement under the new statutory section. *Id.* at 716, 718. In arguing against the insurers claim to dismiss or strike, the parties to the agreement noted the agreement had been "duly and lawfully made and entered into" under the provisions of the statute which was "in force and effect **at the time said agreement was entered into**." *Id.* at 717, emphasis added. The Court held that as the contract was entered into after the statute became effective, "the effect of the agreement must be determined in the light of the statute." *Id.* at 718. That is the exact argument made by Respondent, and in complete conformity with the decision by the Trial Court. The only prior interpretation of the application of the prior section 537.065 therefore specifically held it should be construed to apply to agreements entered

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into once the provision became effective (i.e. the "trigger" for the statute was when the agreement was entered into), directly contrary to the argument Seneca continues to espouse.

The new statute is quite clear that the entry into the agreement is what "triggers" the application of the new statutory provisions. (After such tort feasor has entered into a contract **under this section**)(L.F. 204; A31). The notice provision cannot be applied to prior agreements, and thus the new obligations and rights Seneca seeks to utilize under this new section do not apply, exactly as the Trial Court ruled.

(2) If the revision to 537.065 is interpreted to create a new obligation under an existing agreement to provide notice, which did not exist at the time of entry into the statutory contact, it would also violate Article I Section 13's prohibition on laws that impair contracts.

While either the text of the new section, or the prohibition on interpreting the statute as retrospective is sufficient to affirm the Trial Court's ruling, the fact that the statutory revision would change the effect of a contract already entered into is another basis upon which to affirm the Trial Court. Article I Section 13 of the Missouri Constitution prohibits not only laws retrospective in their operation, but also laws which impair obligations of contracts (A 25). There is significant overlap in these two provisions. *Hoyne v. Prudential Savings & Loan Assoc.*, 711 S.W.2d 899, 902 (Mo. App. 1986). The contract provision of the Constitution therefore prohibits not only any change in contractual rights, but also prohibits any "change in contractual duties". *Id.* (Holding

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that a statutory change that would create a new duty under an existing contract would violate the contract clause).

The rights and obligations under a contract are therefore set based upon the law in existence at the time they are entered into and cannot be altered. *Hubbard v. Hubbard*, 264 S.W. 422, 425-426 (Mo. App. 1924). Accord *Home Telephone Co. v. Sarcoxie Light & Telephone Co.*, 139 S.W. 108, 112 (Mo. 1911)(Amendment of law subsequent to entry into a contract cannot affect or change the contract, as the Court must "take the law in force at the date of the contract"); *Melton v. Country Mutual Ins. Co.*, 75 S.W.3d 321, 326-327 (Mo. App. E.D. 2002)(Insurance Company could not be forced to conform an insurance policy to a law passed after the policy was entered into); *Nahorski v. St. Louis Elec. Terminal Ry. Co.*, 274 S.W. 1025, 1026 (Mo. 1925)(Contract which is entered into under existing law cannot be changed or altered by later enacted statute.); *State ex rel Koster v. Quick*, 332 S.W.3d 199, 203-204 (Mo. App. W.D. 2011)(Same).

The Court in *Vandervort v. Nationstar Mortgage, LLC*, 2015 WL 12731917 (W.D. Mo. 2015) made this distinction in regard to a new statute regarding a defense in a credit agreement. In that case, the contract complied with the law at the time it was entered into. A subsequent amendment would not have allowed one of the parties to present a defense if applied. The Court held whether a party could present a defense was clearly not procedural, but instead substantive. *Id.* at *4-5. Therefore, the statute could not be applied to the contract in question which was formed well before it went into effect. *Id.* The same is true here, but more so, as Seneca seeks not only to submit a new substantive defense, but to do so for a case that has already been tried.

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At the time the 537.065 agreement at issue in this case was entered into, the statute allowed exactly what occurred in this case. Upon the refusal of the insurer to defend and indemnify without reservation, the insured and the plaintiff can enter into the agreement and try the case to the Court. *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700 (Mo. Banc 2011); *Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258 (Mo. Banc 2013); *Allen v. Bryers*, 512 S.W.3d 17 (Mo. Banc 2016).

Further, there was no obligation upon the parties entering into the contract to provide notice to the insured. Instead, as this Court previously held, it was the obligation of the insurer to stay abreast of the case through Casenet or otherwise. *Kinneman-Carson* Supra at 766. Here, Seneca was repeatedly warned that if it would not defend, the insured would protect its interest. Further, well beyond anything required, the insured advised Seneca it would protect its interest as described in this Court's *Kinneman-Carson* case. (L.F. 182-183). That case specifically identified entry into a 537.065 agreement and a bench trial, exactly what occurred here. *Kinneman-Carson* at 763; 766. Finally, Seneca after being warned the insured was going to enter into a 537.065 agreement admittedly knew of the upcoming trial date, and the fact that it was going to result in a judgment. (L.F. 199-203). Even under the new statute, let alone the statute in place at the time, this would be sufficient to prevent the alleged "surprise" Seneca now seeks to claim. It is disingenuous at best for Seneca to argue it was unaware that the parties were entering into an agreement under section 537.065 and intended to have a bench trial, and it should not be allowed to foist its own decision not to attempt to intervene before trial or judgment upon the parties who provided it more information than required under the law

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at the time. Indeed, the purpose of even the new statute was met, despite it not being in effect, as Seneca had been told the insured was going to enter into an agreement under the statute, and it was likewise well aware of the upcoming trial and the intent to have a judgment entered.

Application of the amended statute to this already existing 537.065 agreement would change the legal effect of the contract and impose new burdens on the parties that neither agreed to under the law at the time of contracting. For this separate and independent reason, the Trial Court properly applied "the law in force at the date of the contract" and found the notice requirement could not be applied to an already existing contract.

B. The newly created absolute "right" of Seneca as an insurer denying coverage to intervene in the case is also substantive.

The new obligation to provide notice is sufficient to find the revised statute is substantive and cannot be applied retroactively. However, even were the notice provision not part of the statute, the amendment would still be a substantive change in the law, providing a new, never before recognized "unconditional right" to an insurer.

Seneca when presented with the claim of the Desai's, multiple times chose to deny coverage and refuse to participate in the lawsuit against their insured. (L.F. 44; 51; 181-183). Thereafter, it sued its insured in federal court. (L.F. 44). Under Missouri law, this decision to deny coverage was likewise a decision to not take part in the case. *Lodginsky v. American States Preferred Ins. Co.*, 898 S.W.2d 661, 667 (Mo. App. W.D. 1995); *Griffitts v. Campbell*, 426 S.W.2d 684, 688 (Mo. App. S.D. 2014).

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Having refused to defend, the insurer could not shoehorn its way back into the case and demand to control the defense by an attempt to intervene, as long-standing Missouri law holds an insurer does not have sufficient substantive legal interest to intervene in the injury case. *Whitehead v. Lakeside Hosp. Assoc.*, 844 S.W.2d 475, 480 (Mo. App. WD. 1992), citing in part *State ex rel Farmers Mutual Auto Ins Co. v. Weber*, 273 S.W.2d 318 (Mo. Banc 1954). An insurance company therefore under the law existing at the time of the execution of the 537.065 agreement (and at trial) could not force an insured to accept their participation in the case under reservation of rights, and likewise did not have a sufficient substantive interest under Missouri law to intervene. *Ballmer v. Ballmer*, 923 S.W.2d 365, 368-369 (Mo. App. W.D. 1996)(insurer who denies coverage under Missouri substantive law may not thereafter insist upon taking part in the case); *Flippin v. Coleman Trucking, Inc.*, 18 S.W.3d 17, 20-21 (Mo. App. E.D. 2000)(Insurance company does not have sufficient **legal interest** to justify intervention).

Because of this substantive law, Missouri courts have identified that the insurer's decision to deny coverage is thus "attended with risk." *Whitehead* at 481. One of those risks is that the insurer has no right to take part in any aspect of the case. *Id.* Accord *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700, 710 (Mo. Banc 2011)(Insurer cannot deny coverage and at the same time continue to control the defense of the claim). As the Court stated in *Griffitts v. Campbell*, Supra, an insurer is bound by its decision to deny coverage by seeking a declaratory judgment as Seneca did in this case. Having done so, under Missouri substantive law, Seneca was "properly excluded from the underlying actions." *Id.* at 688. The law in place at all times relevant held the

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insurance company "has no right" to intervene and can therefore only participate in an injury lawsuit through a defense without reservation. *Sherman v. Kaplan*, 522 S.W.3d 318, 326 (Mo. App. W.D. 2017).

The insured and the claimant therefore had a substantive right to enter into a 537.065 agreement and try the matter to the Court without the participation of the insurance company who refused to defend given the conflict this would create. *Whitehead at* 480-482. That is exactly what the Desais negotiated under the 537.065 agreement in this case with the insured, Garcia Empire, and how the trial was conducted in accordance with Missouri law. (L.F. 16-38; A2-24; A58-67); *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700, 709 (Mo. Banc 2011); *Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258, 264-265 (Mo. Banc 2013); *Allen v. Bryers*, 512 S.W.3d 17, 34-36 (Mo. Banc 2016).

Seneca is thus not seeking to enforce already existing rights under a procedural change. Instead, it is seeking to utilize a brand new substantive right to deny coverage, and thereafter still control the defense of the case. This requires the creation of what Seneca conceded multiple times below in its briefing before the Trial Court of a new "right." The fact that this was a new "right" can be seen not only by Seneca's own statements, but its own actions. Despite being aware the case was going to trial on August 17, 2017 (L.F. 199-203), Seneca did not seek to intervene in the case prior to trial, or at any time until the last day before the judgment became final. (L.F. 39-40). When it did file its last second motion to intervene, Seneca's position was that it could do so **solely** based upon a newly created "right" to intervene.

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This newly created "right" is contained in the newly enacted section 537.065 which became effective not only after entry into the 537.065 agreement in this case, but after the trial had been completed. No less than 15 times in its moving papers, Seneca referred to the sole basis for its attempted intervention as this newly created "right," emphasizing this point by bold face, italics, and even capital letters to drive home its argument that the new section had granted it a never before recognized "unconditional right" to intervene. (L.F. 39-62).

Contrary to Seneca's argument, prior to the adoption of the amendment to R.S.Mo. 537.065 an insurer did not have an absolute substantive right to intervene in a case where it had refused to defend. *Griffitts* Supra at 688. Instead, Missouri substantive law precluded the insurer from utilizing the procedure of Rule 51.12, as they lacked sufficient substantive legal interest. The statute thus did not create an alternate remedy for enforcement of an existing right, but instead created a brand new substantive right that had never existed before under Missouri law. That is why Seneca before the Trial Court numerous times argued this exact position. The creation of a new "right" is clearly substantive, and not procedural, and Seneca's verbal gymnastics cannot get around this clear and simple fact. Seneca's argument would give to something already done (the 537.065 agreement, the rejection of the defense under reservation, and the trial under existing law) "a different effect from that which it had when it transpired" and is thus impermissibly retrospective. *Squaw Creek* at 16.

Seneca's claim these new rights and obligations are "procedural" confuses the substantive right necessary under Missouri law to utilize Rule 52.12 with the procedural

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aspect of how one intervenes under the Rule once that substantive right is shown to exist. See e.g. *Moxness v. Hart*, 131 S.W.3d 441, 444-446 (Mo. App. W.D. 2004)(Right to intervene under Missouri law equated with the capacity to sue). Here, had this Court amended Rule 52.12 to alter the procedure for how one with a substantive right to intervene makes such an application, that would have been procedural. But Missouri substantive law has been consistent that the insurer did not have such a right, and that they therefore could not meet the requirements to intervene set forth by the Rule. *Ballmer* at 368-369. Accord *Estate of Langhorn v. Laws*, 905 S.W.2d 908, 911 (Mo. App. W.D. 1995)(Discussing the difference between the substantive "interest" required under Missouri law and the procedural aspect of Rule 52.12).

This distinction between the substantive interest required and the procedure of the Rule can be seen by looking at the nearly identical Federal Rule of Civil Procedure 24, upon which Rule 55.12 was crafted (A43-44). In their treatise on Federal Practice, Wright and Miller at 7C Fed. Prac. & Proc. Civ. §1905 (3d ed. 2017), discusses this significant distinction. Specifically, in regard to what law governs intervention, the substantive law of the state applies in diversity actions to determine whether the person seeking intervention has the requisite substantive interest required by the Rule. *Id.* Once such a substantive right under state law is shown, the procedural matters are thereafter determined under the terms of the procedure of Federal Rule 24. *Id.* Under such an analysis, as Rule 55.12 was not amended, the change was to Missouri substantive law.

This point was made clear by the Court in *McDonald v. E.J. Lavino Co.*, 430 F. 2d 1065 (5th Cir. 1970). In *McDonald*, the Circuit Court of Appeals held that the substantive

law which determined whether the purported intervenor had sufficient substantive rights to intervene would be state law. *Id.* at 1069-1070. The Court held that as the substantive law showed a sufficient legal right, the next question became one of procedure, which was governed by the Rule, and not the state substantive law. *Id.*[12] Accord *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir. 1984)(Intervention requires sufficient interest under substantive law); *Mason v. Scarpuzza*, 383 N.W.2d 158, 160 (Mich. App. 1985)(Statute which granted an insurer the a "right to join in the action" created a "substantive right" for the insurance company).

Indeed, one of the cases cited by Seneca makes this same point regarding the procedural aspect being the Rule, not the substantive statutory law. In *Slack v. Englert*, 617 S.W.2d 483 (Mo. App. 1981) the Court dealt with how an amendment to a Rule impacted whether a claim was on file within the statute of limitations. Specifically, the plaintiff filed their suit within the time limit. However, as the case was expected to resolve, counsel for plaintiff asked the clerk not to have the summons served for a few days. *Id.* at 483-484. The defendant moved to dismiss, arguing that the suit had not been "commenced" because the summons was not issued at plaintiff's request immediately.

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[12] Such federal precedent is persuasive authority when considering similar Missouri Rules of Civil Procedure. *Stortz v. Seier*, 835 S.W.2d 540, 541 (Mo. App. 1991).

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Id. The Court held that the amendment to the rule showing commencement on filing controlled, and thus the suit was timely.

In doing so, the Court made a specific distinction between matters of substantive law and matters of procedure. First, the Court noted that under Missouri law, the Missouri Supreme Court may not alter substantive rights with rule changes. *Id.* at 486. Instead, matters of procedure are controlled by the Rule and substantive rights require legislative action. *Id.,* citing the Missouri Constitution, Article V, Section 5 (A 26). As the statute of limitation is substantive, the respondent argued the Court was altering this substantive law. *Id.* The Court rejected this argument, holding that the claim was not brought under the Rule, but instead the substantive law set forth in the wrongful death statutes. *Id.* Therefore, the substantive law identified what rights existed, while the rule merely governed the procedure of when a suit was "commenced". *Id.*

Here, the same holds true. The interest required by the intervention statute is substantive law. *McDonald* Supra at 1069-1070. Rule 52.12 is the procedure that Seneca must follow **if** it has such a substantive right (A 33). A procedural change, therefore, would have been if Rule 52.12 were amended to set forth a different procedure to intervene on an already existing right.[13] That is what occurred in one of the cases Seneca relied upon, *State ex rel Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. Banc 1975).

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[13] Further, if the procedure of a Rule were to be changed, it would have required a statute solely for that purpose. *State ex rel Collector of Winchester v. Jamison*, 357 S.W.3d 589, 592-593 (Mo. banc 2012).

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In *Murphy*, Missouri substantive law was not changed to create a new right, as it already allowed for the injury claims at issue against the defendant, as well as the uninsured motorist claim against plaintiff's own insurer for the actions of a phantom vehicle. *Id.* at 656. Instead, the change was to the Missouri Rules of Civil Procedure regarding joinder. *Id.* at 657. The Court in *Murphy* therefore held that as the change was to the Rule which was procedural only, it could be applied retroactively. *Id.*

That is admittedly not what occurred here. The procedural Rule, Rule 55.12, was not changed or amended (A 33). Instead, under Missouri substantive law Seneca had no right to any involvement in the injury case, having refused to defend and indemnify Garcia Empire. The amendment to R.S.Mo. 537.065 changed this substantive law, providing Seneca with what it argued below was a newly created "right" (A 31-32). It was this substantive right which Seneca then attempted to utilize to come within the procedural requirements of Rule 52.12. This is the exact opposite of *Murphy*.

Further, at the time of the entry into the 537.065 agreement and at the time of trial, Garcia Empire and the Desais had an already "vested" right in the rejection of Seneca's involvement in the case. When Seneca denied coverage, and Garcia Empire exercised its right to reject a defense under reservation, Garcia Empire did not have a "mere expectation" that they could do so. They had a vested right, which they in fact exercised. As the Court stated in *Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686, 690-691 (Mo. App. W.D. 2010) a vested right is one which allows the party a "legal exemption from a demand made by another." That is exactly what Garcia Empire had at the time of the entry into the 537.065 agreement and the trial of this case, as they had a "legal

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exemption" from Seneca's demand to take part in the case. Under substantive Missouri law, Garcia and the Desais could and in fact did enter into a 537.065 agreement under the prior section and try the case to the Court. This was not an inchoate right, but instead one which had vested, and in fact been exercised prior to the statutory amendment in question.

That is a significant difference from the cases Seneca cites about procedural changes. Accord *Good Hope Missionary Baptist Church v. St. Louis Alarm,* 358 S.W.3d 528, 531-533 (Mo. App. E.D. 2012)(Change to law that required suit be filed within 120 days of demand letter to collect prejudgment interest was not procedural, as it would have affected the past transaction (the sending of the pre judgment interest letter) after the right had vested , and thus would work a substantive change in the rights of one party, which is not allowed); *Four Seasons Racquet & Country Club v. Butler*, 539 S.W.3d 122, 130 (Mo. App. S.D. 2018)(No "analytical gymnastics" are required to determine that matter was not procedural but substantive, as it altered the rights of the party from what they were prior to its enactment).

Seneca's briefing continues to ignore that while infringement on a vested right is one way a statute is impermissibly retrospective, it is only one of several ways. A law is likewise impermissibly retrospective if it "creates a new obligation, **or** imposes a new duty, **or** attaches a new disability in respect to transactions or considerations already past." *State v. Honeycutt*. at 419, emphasis added. Here, Seneca's position requires a new obligation exist for the insured to be obligated to allow the insurer to control the defense of the case without agreeing to defend or indemnify. Similarly, a new disability

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is placed upon the plaintiff who must now prosecute its claim against another party (the insurer) who had previously been excluded under the 537.065 agreement, and Missouri substantive law, and in fact the trial which actually already occurred. Finally, the change would affect past transactions (entry into the 537.065 agreement and subsequent trial) to the prejudice of the parties by altering the statutory agreement **and eradicating a trial on the merits** which occurred prior to its enactment. *Rayford* at 693 (Law improperly retrospective if it affects past transactions to the prejudice of the parties involved).

A change to the law which changes whether a party is entitled to bring a defense in a case is substantive, especially where a different rule of law was in place at the time a contract was entered into. *Vorhof v. Vorhof*, 532 S.W.2d 830, 833 (Mo. App. 1975). Thus, interpreting the statute to have retrospective application would be contrary to the "express provisions" of the Constitution. *Id.* (Holding whether party may bring a defense in a case is a matter of substantive law, not procedure).

The standard of how Court's should apply Article I, Section 13 of the Missouri Constitution is well established:

> It is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto. Merely to label certain consequences as substantive and others as procedural does not give

sufficient consideration to this principle, and notions of justice and fair play in a particular case are always germane.

State ex rel St. Louis- San Francisco Ry. Co. v. Buder, 515 S.W.2d 409, 411 (Mo. Banc 1974). Accord *Protection Mut. Ins. Co. v. Kansas City*, 551 S.W.2d 909, 912 (Mo. App. 1977)(Attempts to construe provisions as procedural allowing elimination of a right is inconsistent with the underlying reason for such laws as stated in *Buder*).

At the time of the entry into the 537.065 agreement in question in this case, certain legal effects were ascribed to that agreement. Those legal effects were carried forward to the trial and the submission of the case. To change those effects to allow Seneca after the fact to undo everything that has gone on in the past would be the exact type of retrospective application of law the Court in *Buder* held repugnant. Accord *Rayford* at 693 (Law improperly retrospective if it affects past transactions to the prejudice of the parties involved). The Trial Court therefore properly denied Seneca's request to do so. As the *Buder* Court held, a law is retrospective if it attaches "a new disability in respect to a transaction or consideration already passed." *Id.* at 410. That is exactly what Seneca asked the Trial Court to do in regard to an agreement entered into long before, for a trial already completed. The Trial Court's denial of Seneca's request to do so was therefore proper for this reason as well.

Indeed, Appellant's argument lacks internal consistency between its points. On page 24 of its brief, Seneca claims that merely intervening or "inserting ones' self into an action provides no relief to the potential intervenor." If that is the case, how could Seneca then move to set aside an already completed trial? The answer, consistent with

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logical and prior case law is that it cannot. The same is true for its arguments in Point III that the judgment is void or irregular, as if Seneca has no new rights, there is no prejudice and it is entitled to no relief. If the intervention Seneca seeks to utilize were purely procedural, then it would simply be intervening to do nothing, which would entitle Seneca to no relief.

In contrast to all of the above Missouri law on a Missouri Constitutional provision, Seneca relies upon an out-of-state case with significant distinguishing differences. In *State Compensation Fund of Arizona v. Fink*, 233 P.3d 1190 (Ariz. App. 2010) the plaintiff was injured in 2004 and filed a claim in 2006. Under the substantive law of Arizona at the time of the injury, the State Compensation Fund had a statutory lien on any recovery. *Id.* at 1191. After the claim was on file, but before any trial in the case, the insurer moved to intervene based upon both existing substantive rights and an amendment which granted the fund a statutory right to intervene. *Id.* at 1192. Unlike Missouri, Arizona does not have a constitutional prohibition on retrospective laws. Instead, it simply has a statute which holds laws will not be applied retroactively unless the law in question states otherwise. *Id.*

Without citation to any authority or analysis, the Court in *Fink* based its decision on the assertion that intervention is procedural. *Id.* at 1193. In doing so, there is no analysis or discussion of Arizona's intervention Rule, or the difference between the "interest" required substantively and the procedure of how to intervene if one has the required substantive standing to intervene. The statute in *Fink* likewise did not require a new burden or obligation imposed on the parties such as the notice requirement here.

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Unlike this case, there was also no pre-existing case law that the injured claimant had a right to prohibit the fund from the case. *Id.* Finally, unlike this case, at the time of the "intervention" in question, the case was still pending and no trial had occurred. *Id.* at 1192.

All of these differences are significant and materially distinguish *Fink*. *Fink* likewise was interpreting a statute that allowed "retroactive laws" if the legislature simply stated it wished the law to so apply. *Fink*, at 1192. Missouri law is to the exact contrary. Please see *Doe v. Phillips* at 851 (**Legislative intent cannot supersede the constitutional prohibition on retrospective laws**).

Further, there is a significant difference between retroactive laws and retrospective laws. *Rayford* at 690. A law is retroactive when it looks back from its effective date, whereas a law is retrospective "if it has the same effect as to past transactions or considerations as future ones." *Id.*, emphasis added. Missouri therefore has a specific prohibition on retrospective laws which the Arizona decision in *Fink* did not even consider, let alone decide. Here, the law is retrospective if applied as Seneca asks because it will have the same affect to past transactions (the entry into the 537.065 agreement and the trial, both conducted before the law went into effect) as it has to future 537.065 agreements and trials. Under *Rayford*, Appellant's position would make the statute impermissibly retrospective, and not retroactive. *Id.* Respectfully, the Arizona decision in *Fink* is not decided under the same standards required by Missouri law.

Wilkes v. Missouri Highway & Transp. Com'n, 762 S.W.2d 27 (Mo. Banc 1989) relied on by Seneca is likewise not on point for Seneca's argument for several reasons.

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First, in *Wilkes* the substantive law already allowed for the cause of action at issue. *Id.* at 28. The change at issue therefore simply provided a new remedy for a substantive right which already existed. Here, the substantive law was the exact opposite, holding that Seneca did **not** have a legal interest and could **not** force the insured to allow it to participate in the case having refused coverage. Seneca had already utilized the substantive rights it had in such situations by filing a declaratory judgment.

Just as importantly, the Constitutional prohibition on retrospective laws does not apply to laws which waive the rights of the state. *Savanah R-III School Dist. v. Public School Retirement System*, 950 S.W.2d 854, 858 (Mo. Banc 1997). *Wilkes*, therefore, was not addressing the constitutional prohibition on retrospective laws. As the Court said in *Savanah R-III Schools*, the analysis would be different were the Court called upon to consider such a claim raised by individuals and not the state. *Id.* at 858.

Finally, *V.B. v. N.S.V ex rel. P.M.B.*, 982 S.W.2d 691 (Mo. App. E.D. 1998), cited by Seneca, is distinguishable for several reasons. First, unlike here, there was no new obligation imposed on anyone to do something, which every Court has held is sufficient by itself to find the law retrospective. Further, the appellant in *V.B.* did not raise the issue the law was improperly retrospective, but instead that it was an "ex post facto" law. *Id.* at 692. As noted above, the prohibition on ex post facto laws, however, is much narrower, and only applies in criminal cases.

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C. Seneca's policy argument regarding "principles of governance" has no relation to the actual ruling made by the Trial Court, and likewise was not made to the Trial Court nor to the Court of Appeals, and is thus not preserved.

The final argument raised by Appellant is another policy argument that the Trial Court's alleged "Order" regarding retrospective application of law "disturbs settled principles" of governance. This argument can be disposed of by the fact that the Trial Court never made any such ruling. This can be seen by the clear language of the actual Order, and the fact that Seneca never argued this to the Trial Court, nor did it make this argument in the Court of Appeals. Instead, this newly created argument for reversal is raised for the first time in this Court. As the Trial Court cannot be found to have erred (1) for a ruling it never made, (2) on grounds that were not preserved in the Trial Court, or (3) which were not raised in the Court of Appeals, this new section is beyond meritless. Finally, the "Summary" Seneca relies upon is not legislative history, but instead paraphrases what industry proponents of the bill alleged at a single committee hearing. (A57). Such dubious "authority" cannot change the text of the statute and the language the legislature actually chose to use. Further, the "Summary" language cited by Appellant, despite it coming from insurance industry proponents, does not contain a single word about application of the statute to prior events or transactions, nor express the intent of anyone, let alone the legislature, to apply the statute retroactively or to agreements which have already been consummated, let alone been tried.

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1. The Trial Court did not make any of the "rulings" that Appellant complains about.

In regard to the claim the Trial Court's Order somehow disrupts the legislatures ability to govern because its ruling on what is impermissibly retrospective under the Constitution is too broad, the simple answer to this argument is the Trial Court never made such a ruling. In the two pages where this argument is set out, Appellant cites to nothing in the record for the errors it claims the Trial Court made. The reason for this failure is that the Trial Court's Order did not hold the statute was unconstitutional in any way, shape or form. (L.F. 185). Likewise, nowhere is there a single word or sentence where the trial court held the statute to be "an impermissible retrospective application". Compare this allegation in Seneca's Brief Page at page 34 with the actual Order of the Trial Court (L.F. 185). The same is true for the claim that the Court's Order "greatly expands what constitutes an impermissibly retroactive application of a legislative enactment". Seneca's Brief at page 33.

Much of subpart C to Seneca's brief appears to actually be aimed not at the Trial Court's ruling, but instead the Court of Appeals decision. On transfer to this Court, however, it is not proper to argue alleged error by the Court of Appeals. *Williams v. Hubbard*, 455 S.W.3d 426, 431 (Mo. Banc 2015). Instead, the error argued must be that of the Trial Court. *Id.* at 431-432 (Focus of alleged error must be what Trial Court did, not anything done by the Court of Appeals on the prior review). As nowhere did the Trial Court make any of the rulings that Seneca rails against in this subpart, this entire

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section is nothing more than a straw man for an argument Seneca wishes to make, but has no basis to do so.

2. *Appellant failed to preserve this argument as it was not made to the Trial Court, nor was it raised in its brief in this point to the Court of Appeals.*

As noted above, none of the things that Seneca complains about in this section actually occurred, as the Trial Court did not make any of the rulings Seneca decries. That this argument is utterly baseless can be seen not only by reading the short and concise ruling issued by the Trial Court, but also by the fact that Seneca did not make any such policy arguments about "well established principles of governance" to either the Trial Court or the Court of Appeals.

First, in order to preserve a claim of error on this basis, Seneca must have raised it to the Trial Court. *Collings v. State*, 543 S.W.3d 1, 14 (Mo. Banc 2018). Nowhere in the initial motion and briefing, or the supplemental brief filed by Seneca did it even remotely raise or argue the position it takes in subpart C. (L.F. 42-49, 51-62, 177-180). No bill "summaries" or legislative principles were discussed at all. Instead, Seneca's only position in regard to retrospectivity was that the new statutory section was procedural. (L.F. 177-180). As these arguments were not raised below, they are not preserved here. *In re G.M.G.* Supra.

Further, this case was transferred to this Court after opinion by the Court of Appeal for the Western District of Missouri. As such, Rule 83.08(b) states that the substitute brief filed by Appellants cannot raise new arguments not presented to the Court

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of Appeals. (A36-37). Just as this issue was not raised to the Trial Court, it likewise was not made by Seneca in its brief to the Western District Court of Appeals. As such, this is likewise fatal to the allegations raised, as they are "not preserved for review in this Court" for this separate and independent reason. *Sun Aviation, Inc. v. L-3 Communications Avionics Systems, Inc.*, 533 S.W.3d 720, 730 FN8 (Mo. Banc 2017). Accord *Essex Contracting Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. Banc 2009)(Under rule 83.08, the Supreme Court will not consider an argument in a point on appeal which was not made in the brief of the appellant at the Court of Appeals).

Indeed, it appears much of this argument has simply been taken from Appellant's motion for transfer, and inserted Trial Court into the place where in its motion for transfer it argued against the Court of Appeals decision. The Court of Appeals decision, however, is not what is on appeal in this Court. Instead, it is only the ruling of the Trial Court. *Williams v. Hubbard* Supra at 431-432. As such, Seneca's section C to its second point is fundamentally flawed for this reason as well.

3. There is nothing about the Trial Court's decision holding a new statute should be applied prospectively that would "upset" principles of governance

As noted above, the Trial Court did not make any of the rulings that Appellant complain about in this part of the brief. Instead, it simply held that as the legislature did not expressly provide that the statute in question should be applied retroactively, the new statutory sections did not apply in this case. (L.F. 185). The savings statutes the Court relied upon in making its ruling have been part of Missouri law for over 100 years. So

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too has the requirement that statutes should be interpreted prospectively absent clear and express language to the contrary. Finally, the constitutional prohibition against retrospective laws has been in place since the first Constitution in 1820. *State v. Wade* Supra at 432. There is nothing onerous, or which infringes upon the legislature's authority, when the Trial Court construes statutes in conformity with the savings statutes, long standing Missouri law, and the presumption that the legislature intended the statute to be constitutional. Indeed, as noted in Point I above, the legislature recognizes this requirement and knows quite well how to state its desire that a new statutory section apply retroactively. See e.g. *In re Murphy* Supra at 80.

Further, citation to the language of the statute the legislature chose to use, and not to a purported "Bill Summary", is the proper way to discern legislative intent. *State ex rel Heart of America Council v. McKenzie*, 848 S.W.3d 320, 327 (Mo. Banc 2016). This is especially true in Missouri, as Missouri does not have legislative records, or records of debate on the floor, to allow determination of why a bill was adopted by the legislature. *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. Banc 1977). It is thus not possible to look at legislative records like it might be in other jurisdictions to know why the legislature enacted or failed to enact a specific law. *Id.* See also *Ocello v. Koster*, 354 S.W.3d 187, 202 (Mo. Banc 2011)(Motivations or statements of particular legislators is not evidence or proof of why the legislature as a whole enacted a provision).

Despite this, Seneca seeks to argue a purported "Bill Summary" should be given significant consideration in how to interpret the newly enacted statute in question. The "Bill Summary" cited by appellant, however, is not the bill summary from the bill itself,

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or the legislators who ultimately passed the bill. Instead, the "Summary" cited by Seneca is actually a summary of what the proponents of the bill argued at a single committee hearing. (A57).

The language that Seneca relies upon in its brief thus comes from a summary of what the people who testified at the hearing as proponents of the bill, many of them from the insurance industry, argued. (A57). The prepared remarks in support of a bill by its industry proponents is not indicative of what the legislature intended, any more than the summary of what the opponents argued. Prepared statements from lobbyist in support of a bill at a committee hearing is not "legislative intent". While decrying the Trial Court's ruling, Seneca seeks to ignore the language used by the legislature in place of arguments raised by interest groups. Missouri law does not allow the substitution for such interested parties goals or desires to override the actual legislation passed.

Finally, even were this summary of what the industry and interest group proponents had to say relevant to the issue, nothing in the "Summary" of these proponent arguments say anything about there being an emergency, that the statute needs to be effective immediately, or that it should be applied retroactively. (A57). Ironically given the policy argument Seneca makes in this subpart, the proper place for Seneca's argument would be to the legislature, who chose contrary to Seneca's claim, to use language that limited the statute's application to contracts entered into after the new statutory section had gone into effect. The will of the legislature is not "thwarted" by applying the text of the statute they passed, consistent with constitutional principles almost 200 years old.

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CONCLUSION

Here, the new section if applied to the already existing 537.065 agreement, and a trial which had already occurred, would run afoul of numerous constitutional prohibitions. The parties to an existing agreement cannot be required to provide notice of that contract when a new statutory section is passed, when there was no obligation or duty of notice at the time the contract was entered into. A new statute also cannot create new rights or disabilities which would overturn already exercised lawful rights, such as the trial in this case. The Trial Court's interpretation of the statute was in keeping with the plain language of the new section which states it only applies to agreements entered into after the new section went into effect. The Trial Court's decision was also in conformity with the savings statutes and long-standing Missouri law regarding retroactive application of laws requiring explicit and clear language evidencing such an intent. Finally, the Court's interpretation of the statute as being prospective was in keeping with the universal requirement for all Courts that they construe the statute as constitutional if possible. The Trial Court properly denied Seneca's last second motion to intervene months after the Trial occurred, and a month after even the judgment had been entered. Likewise, the Trial Court's decision to deny Appellant's request to set aside a trial which had already occurred based upon a new statutory section which by its express terms stated it did not apply, was not error. Citation to arguments raised at a hearing by proponents of the bill cannot override the actual text of the statute, long standing Missouri standards, and the constitutional prohibition on retrospective application of the law which has been sacrosanct since 1820.

III. The Trial Court properly denied Seneca's motion for relief from judgment because (1) Seneca's motion was deficient as it did not include the required evidentiary proof and did not properly raise the limited grounds for the relief it sought; (2) Seneca was not entitled to notice or to intervene in the case; and (3) Seneca was not a party and therefore could not seek relief under Rule 74.06(b).

Allen v. Bryers, 512 S.W.3d 17, 29 (Mo. Banc 2016)

Sherman v. Kaplan, M.D., 522 S.W.3d 318 (Mo. App. W.D. 2017)

STANDARD OF REVIEW

An appellate court will not interfere with the Trial Court's decision whether to vacate a judgment "unless the record convincingly demonstrates an abuse of discretion." *Johnson v. Brown*, 154 S.W.3d 448, 450 (Mo. App. S.D. 2005).

INTRODUCTION

A motion to set aside a judgment is not self-proving. *Johnson v. Brown* at 451. A motion to set aside the judgment on the basis it is void is limited to two very discrete circumstances; (1) where the Trial Court lacks jurisdiction, or (2) where the party seeking relief can show a violation of their due process rights. *Platt v. Platt*, 815 S.W.2d 82, 83 (Mo. App. 1991). Seneca did not allege let alone prove either of these limited grounds for the relief it sought. As such, its motion provided no basis for relief that the judgment was void, and the Trial Court's ruling was correct. The same is true of its motion to set aside as irregular, as the actual record before the Trial Court showed despite the fact

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Seneca was not a party and had not moved to become a party before judgment was entered, that it was well aware of the trial date and chose to do nothing.

The inapplicability of the two grounds upon which Seneca moved for relief from judgment is also shown by yet another dispositive issue which precludes the relief it seeks. Seneca moved to set aside the Judgment pursuant to Rule 74.06(b). (L.F. 59). Rule 74.06(b), however, is applicable only to parties who were in the case at the time judgment was entered. (A34-35). The cases Seneca relies upon in its briefing therefore all relate to parties who did not receive required notice of the trial or judgment which resulted from the trial. At the time of trial, and even the judgment, Seneca was not a party, and had not attempted to become a party despite its knowledge of the upcoming trial, and the multiple warnings that the insured intended to protect itself through entry into a 537.065 agreement. In a similar circumstance, this Court held that an insurer who attempted to set aside a judgment after a bench trial pursuant to a 537.065 agreement could not do so as Rule 74.06(b) is "limited to parties." *Allen v. Bryers*, 512 S.W.3d 17, 29 (Mo. Banc 2016). As Seneca was not a party, the Trial Court was therefore without "authority to grant any relief" on its motion. *Allen*, at 29.

A. Seneca's motion to set aside the judgment was deficient.

To satisfy its burden to reverse the Trial Court's denial of the motion to set aside the judgment, Seneca must show that the record below "convincingly demonstrates an abuse of discretion." *Johnson v. Brown*, 154 S.W.3d 448, 450 (Mo. App. S.D. 2005). In doing so, the Court must be mindful that a motion to set aside a judgement is not self-proving. *Id.* at 451. Seneca's motion and briefing provided no evidentiary support for

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any claim made on either basis it alleged in its motion. (L.F. 39-50; 51-176; 177-180). Therefore, as it provided **no** record below, its motion was deficient, and the Trial Court would have committed an abuse of discretion had it granted relief. *Johnson*, at 451.

Seneca likewise failed to allege, let alone prove, either of the two very limited grounds for finding a judgment void; either (1) the Court rendering the judgment lacked jurisdiction over the parties or the subject matter, or (2) the Court acted in a manner inconsistent with due process. *Platt v. Platt*, 815 S.W.2d 82, 83 (Mo. App. 1991). Here, there is no dispute the Circuit Court had jurisdiction. Further, Seneca did not allege any violation of due process in its pleadings before the Trial Court, let alone offer proof of such a claim.[14] Seneca's motion to set aside the judgment as void therefore failed to plead and prove either of the two limited grounds for the relief it sought. *Platt*, at 83. (Holding that in the "interest of finality, the concept of void judgment must be narrowly restricted"). Seneca's motion was properly denied on this independent and equally dispositive basis. *Sieg v. International Environmental Management*, 375 S.W.3d 145, 149-155 (Mo. App. W.D. 2012).

Likewise, the grounds on which a judgment may be set aside as irregular "is very narrow". *Barney v. Suggs*, 688 S.W.2d 356, 358 (Mo. Banc 1985). It must be

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[14] Indeed, such a claim would be contrary to Seneca's argument that the statutory amendment was only procedural, as the creation of a new substantive right that created a new constitutional due process consideration would be the direct opposite of a "merely procedural" change involving already existing rights.

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"patent" on the record before the Trial Court in the motion to set aside. *Id.* at 358-359. Further, the focus is on the proceedings leading up to the rendition of the judgment. *Orvis v. Elliot*, 65 Mo. App. 96, 101 (1896). If the "*proceedings* leading up to the rendition of the judgment" were in accord with the law and practice of the Courts at the time, there is no grounds for relief from the judgment on irregularity grounds. *Id.*, emphasis in original. A judgment properly rendered should not be "disturbed by loose interpretation of cases and newly created and imposed rules". *Barney v. Suggs* at 360.

Here, there is no question that the proceedings leading up to the rendition of the judgment were in accord with the law, as at the time of trial Seneca was not entitled to any "notice" of the trial setting or the 537.065 agreement, being a non-party insurer who had refused to defend. *Kinnaman-Carson* at 766. Further, the actual record before the Trial Court showed that Seneca in fact did receive notice the trial was going forward before it occurred, that the parties intended to obtain a judgment from the trial proceedings, and that Seneca chose not to attempt to intervene or take any action in regard to this knowledge. (L.F. 199-202).[15] Likewise, Seneca had also been repeatedly

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[15] Indeed, the new statute Seneca relied upon for relief went into effect on August 28, 2017. Seneca therefore also had over a month **after** the statute went into effect before the judgment was entered to move to intervene and it did not. The sole basis for Seneca's failure before the Trial Court for its failure to intervene until almost a month after the judgment was entered was its unsupported claim it was unaware of the trial. (L.F. 45,60). The actual record before the Trial Court, however, was uncontroverted that Seneca knew

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told that the insured intended to protect itself, including citing to the *Kinnaman-Carson* case and its discussion of entry into a 537.065 agreement and a bench trial. (L.F. 182-183). A party who the records shows had "actual notice" before the complained of event cannot seek relief based upon a claim it did not receive another form of notice. *Missouri Highway & Transp. Com'n v. Myers*, 785 S.W.2d 70, 75 (Mo. Banc 1990). Having had "actual notice", however acquired, inaction thereafter cannot be excused, or serve as grounds for relief. *Id.*

The record before the Trial Court was therefore not patent and clear as required. Instead, it either utterly lacked the necessary claims and proof, or showed the exact opposite from that claimed by Seneca and necessary for the relief sought. Refusal to set aside the judgment on the record before the Trial Court was thus not a clear and convincing abuse of discretion. *Barney v. Suggs* at 359-360.

B. Seneca was not entitled to intervene for the reasons previously identified, and its request to set aside the judgment to allow for it to revisit the issues already tried and submitted was improper.

As set forth in Point I, the new R.S.Mo. 537.065 does not state that it applies retroactively. Under long standing Missouri law, the legislature having failed to specifically and clearly states in the statute that it is to apply to claims retroactively, it will not be interpreted to do so. Further, as set forth in Point II, the new section 537.065

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of the trial date and the intention to have judgment entered, but did nothing for months thereafter. (L.F. 199-202).

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cannot be applied to a contract or trial prior to its effective date. Here, at the time the 537.065 agreement was entered into, there was admittedly no requirement or obligation for anyone to provide "notice" to the insurer. Instead, the insurer accepted the risk of such an agreement by declining coverage. *Kinnaman-Carson* at 766.

Requiring notice based on entry into the 537.065 agreement before the statute went into effect would thus be an impermissible retrospective application of the law. *Doe v. Phillips,* 194 S.W.3d 833, 852 (Mo. Banc 2006); *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 62-63 (Mo. Banc 2010). If the notice provision could not be applied to require notice of entry into the agreement under the prior statute based upon a requirement in the new statute, both of Seneca's arguments on its request for relief from the judgment are meritless. Seneca's entire argument in this point admittedly requires that it was owed notice of the entry into the 537.065 agreement before the statute went into effect. Further, the statute makes clear that notice and intervention are tied together as it states these two conditions are in the conjunctive as the intervention is 'triggered" by the notice requirement. (L.F. 204; A31). If no such notice was required, Seneca has no basis for relief even under the strained interpretation of case authority it seeks to rely upon.[16] Likewise, if it had no right to notice, that is dispositive of the entire appeal. The

[16] While Seneca's entire argument rises or falls on whether the notice provision of the new statute can be applied to agreements entered into under the prior statute, the new section at issue is also substantive for other reasons. Specifically, the parties had a right which had not only vested, but in fact been exercised to enter into the agreement

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only affirmative relief sought by Seneca, its motion to set aside the judgment on the grounds it was void or irregular, requires that Seneca show it was entitled to notice it did not receive. If Seneca did not have a "right" to notice, there is no basis to set aside the judgment, and thus no error or prejudice.

The fact the new "right" created was substantive and not procedural can be seen by the fact Seneca never attempted to intervene before the statute was enacted. If Seneca truly had such a right before the statutory amendment, it would have been required to file a timely motion to intervene under Rule 52.12(a)(2). (A 32). The record shows that Seneca was aware of the case for years, was aware that Garcia would not accept a reservation of rights, had warned Seneca it intended to protect itself by entry into a 537.065 agreement and trial as approved in the *Kinnaman-Carson* case, and was aware the case was going to trial on August 17. If Seneca already had a substantive right to intervene, its failure to do so until after trial and judgment would make its application untimely. *Mercantile Bank of Lake Ozark v. Jones*, 890 S.W.2d 392, 394 (Mo. App. W.D. 1995)(Motion to intervene is not timely where made subsequent to trial or judgment); *Eakins v. Burton*, 423 S.W.2d 787, 790 (Mo. 1968)(Insurer who denied coverage, and then moved to intervene to set aside judgment after insured entered into a

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allowed by Missouri law at the time of its execution. The parties likewise had a vested right which was again exercised to refuse to allow Seneca to participate in the case. Any one of these makes the amendment at issue substantive, and prospective only.

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537.065 agreement and had a bench trial, properly denied intervention as motion should have been filed before trial and judgment).

Further, the trial here was conducted pursuant to the law in place at the time, which did not include a right to intervene. To set aside the trial and resulting judgment would be improper even were the statute purely procedural. Please see *Pierce v. State Dep't. of Soc. Servs.*, 969 S.W.2d 814, 823 (Mo. App. W.D. 1998). In *Pierce*, the Court stated even as to purely procedural changes, "Procedural or remedial amendments **do not apply, however, to any part of a proceeding completed prior to the effective date of the amendment**." *Id.* at 823, citing *State v. Thomaston*, 726 S.W.2d 448, 462 (Mo.App.1987), emphasis added. Here, the agreement and the trial were already concluded well before the statute went into effect. Seneca therefore could not intervene and set aside a trial that had already occurred. Whether substantive or procedural, a change in the law does not re open or invalidate what has gone before under then existing law. *Id.* "[T]he steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law will stand unless an intention to the contrary is plainly manifested". *Pierce*, at 823, citing *Clark v. Kansas City, St. L. & C.R. Co.*, 219 Mo. 524, 118 S.W. 40, 43 (1909); *Orvis v. Elliott*, Supra at 101 (If the proceedings which led up to the rendition of the judgment were in accord with the law at the time, there is no basis to set aside the resulting judgment).

Finally, Seneca has shown no prejudice even were the new "right" procedural. The only way Seneca could show prejudice would be to set aside that which has already occurred, the trial and the submission of the case to the Court. However, a request to set

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aside that which had already occurred under existing valid law at the time of the trial is contrary to even Seneca's "procedural" argument. *Pierce*, at 823. Seneca cannot defend at a trial that occurred prior to the effective date of the amendment to R.S.Mo. 537.065.

Having no right to re-open what has already been concluded, Seneca can show no prejudice, and can be granted no relief. *Barron v. Abbott Labs*, 529 S.W.3d 795, 798-799 (Mo. Banc 2017)(Holding that if a fair trial was conducted, no prejudice exists, and thus no relief can be granted under Rule 84.13(b)). This Court on multiple occasions has held that a bench trial pursuant to a 537.065 agreement is a fair procedure, resulting in a valid judgment which may not be challenged. Please see e.g. *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700, 709 (Mo. Banc 2011); *Columbia Cas. Co. v. Hiar Holding*, L.L.C., 411 S.W.3d 258, 264-265 (Mo. Banc 2013); *Allen v. Bryers*, 512 S.W.3d 17, 34-36 (Mo. Banc 2016).

Seneca's argument ignores these fundamental issues. Nowhere in Seneca's brief does it address how it could intervene in a trial which has already occurred. Likewise, nowhere does Seneca explain how a trial which was valid under the law at the time it occurred is "irregular" or "void" sufficient to show prejudice in entry of the judgment memorializing this already past event. Seneca's entire brief assumes the result it wishes, without anything to support this assumption.

C. Seneca as a non-party was not entitled to seek relief under Rule 74.06.

Seneca moved to set aside the judgment pursuant to Rule 74.06. (L.F. 39-5; 51-176; 177-180). Seneca, however, was not a party to the case. As such, Rule 74.06 has

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no application. The Trial Court's decision to deny this requested relief was therefore in compliance with the express terms of the Rule and recent precedent from this Court.

Rule 74.06(b) allows "a party" or its "legal representative" to make a motion to set aside a judgment. (A34). Seneca was not a party. Further, it was not the "legal representative" of any party, having sued all of the parties prior to its motion to set aside. (L.F. 44, 51-52). Instead, Seneca was a non-party seeking to utilize a Missouri Rule of Civil Procedure contrary to its own terms, and the most recent pronouncement on the issue in *Allen v. Bryers*, Supra.

In *Allen* the insurer denied coverage for an injury on the basis that the policy's "assault and battery" provision excluded coverage. Like here the insurer tried to defend under reservation, and later filed a federal declaratory judgment action. *Id.* at 24. The insured and the claimant then entered into a 537.065 agreement, and the case was tried to the Court. *Id.* at 25-27. This Court held that the Trial Court properly denied the motion to set aside the judgment, because Rule 74.06 is "limited to parties." *Id.* at 29. As the insurer was not a party in the injury case, they were not "entitled to bring a Rule 74.06(b) motion." *Id.* A Circuit Court in such circumstances is therefore "without authority to grant any relief on that motion." *Id.*

The same ruling was made in the case of *Sherman v. Kaplan, M.D.*, 522 S.W.3d 318, 326 (Mo. App. W.D. 2017), holding that an insurer who had denied coverage could not utilize Rule 74.06 to set aside a judgment entered between its insured and the plaintiff pursuant to a 537.065 agreement. *Id.* (Holding Trial Court committed reversible error in setting aside judgment in similar circumstances).

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This point is further reinforced by the cases Seneca cites in its brief, which all deal with **parties** who were not provided notice of trial. See e.g. *Breckenridge Material Co. v. Enloe*, 194 S.W.3d 915 (Defendant was not given notice of the trial setting, and did not appear due to this lack of notice resulting in a judgment against them); *Lambert v. Holbert*, 172 S.W.3d 894 (Mo. App. S.D. 2005)(Defendant did not receive notice of sanction hearing, nor of subsequent damage trial, resulting in judgment against them). Here, Seneca was not a party at the time of trial or the denial of its motion to set aside. As such the Trial Court could not grant any relief on that motion, even were it not fundamentally deficient under established law. *Sherman*, at 326.

Further, Seneca was aware of the trial date. Despite Seneca's unsupported claims to the contrary, the only record evidence was that Seneca knew and acknowledged the trial date. (L.F. 199-203). As confirmed by two affidavits and the transcript of a telephone message from Seneca's counsel prior to the trial, Seneca knew the claim was going to trial on August 17, 2017. *Id.* Despite this knowledge, Seneca offers no explanation for its failure to attempt to timely intervene, i.e. before the trial and subsequent judgment. At the time of the trial, Seneca had actual notice of the trial, and that the parties intended that trial to result in a judgment. (L.F. 199-203). Seneca therefore received considerably more notice than it was entitled to under the law existing at the time of trial. *Rowell v. Killion*, 538 S.W.3d 346, 351-352 (Mo. App. W.D. 2017)(Adversarial party has no obligation to provide notice to insurer of trial). As this Court stated in *Kinnamon-Carson,* and as Seneca was specifically directed towards after it denied coverage and brought a declaratory judgment action in 2016, an insurance

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Company who denies coverage is the one charged with a duty of keeping abreast of developments in the case, "including the scheduling of the trial and the court's entry of a judgment" *Id.* at 766. Even the authority Seneca relies upon holds that a complaining party who the record shows actually received notice of the trial cannot complain. *Breckenridge Material Co. v. Enlo*e, 194 S.W.3d 915, 920 (Mo. App. E.D. 2006). Please see also *Missouri Highway & Transp. Com'n v. Myers*, 785 S.W.2d 70, 75 (Mo. Banc 1990)(Party who had actual notice, however acquired, cannot seek relief for its inaction thereafter on the basis it did not receive another form of notice).

CONCLUSION

As allowed by Missouri law, and as Seneca was warned multiple times would occur if it continued to refuse to defend, plaintiffs and defendant entered into a 537.065 agreement in November of 2016. The trial setting was set and published on Casenet in May of 2017, and the trial went forward as schedule three months later on August 17, 2017. The case was tried, concluded and submitted on that date. Seneca did not move to intervene in the trial despite knowing the matter was going forward to judgment, and that its insured intended to enter into a section 537.065 agreement under the then existing version of the statute. Seneca did not even move to intervene after the new section 537.065 went into effect. Instead, Seneca waited until immediately before the judgment became final to move to intervene. It did so based solely on the new amendment to section 537.065 which admittedly was not in effect when the claim was filed, when the 537.065 agreement was entered into, or when the trial was completed. The statutory amendment in question has no language that it should be applied retroactively. As such,

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it applies only prospectively. The Trial Court correctly overruled Seneca's motion to intervene on these grounds.

Further, Seneca's arguments the statute should be applied retrospectively to invalidate or alter an existing contract and a trial already conducted under then existing law is inconsistent with not just the savings statutes, but Article I Section 13 of the Missouri Constitution. A revision to a statute cannot alter existing rights or create new obligations for things which have already occurred. Having already entered into the section 537.065 agreement under the prior statute, the new statutory section could not create a duty of notice after the fact, nor any other obligation or impediment which flowed from this newly created notice obligation. As this was admittedly the sole basis for Seneca's 11th hour motion, the Trial Court was likewise correct in refusing to interpret the statute in such a manner. Preventing a newly enacted statute from (1) invalidating an existing statutory agreement, (2) setting aside an already conducted trial, and (3) imposing new burdens and obligations on the parties to the agreement, is the exact purpose of both the savings statutes, and Article I Section 13 of the Constitution.

Finally, the actual motion upon which any relief was sought, the motion to set aside the judgment was defective for numerous reasons. Seneca did not plead, let alone prove the elements of either claim it raised, a void or irregular judgment. Even without this dispositive defect, Seneca's motion could not be the basis for relief if the new "notice" provision could not be applied to an already existing agreement, as Seneca has conceded the entire basis for the motion is the alleged "notice" under the new statute.

Seneca's request for relief would require this Court:

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1. Ignore the actual language utilized in both the Bill and the newly created statute;

2. Ignore the constitutional prohibition on both the alteration of existing contracts and the retrospective application of laws;

3. Set aside a trial and judgment which were perfectly proper and valid at the time they occurred;

4. Ignore the fact that Seneca had notice the insured intended to enter into a 537.065 agreement and it knew of the upcoming trial, but chose to take no action; and

5. Ignore that Seneca received not only more notice than it was entitled to, but received actual notice which has historically, and for good reason, prevented a party from setting aside a judgment arising from a trial conducted under proper procedure at the time it occurred.

For these and all of the other reasons set forth above, the Trial Court's ruling should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed via **ECF** and forwarded via **EMAIL** to counsel of record, as prescribed by law, this 13th day of February, 2019.

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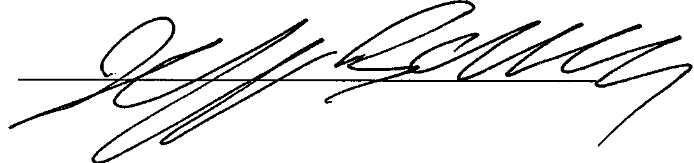

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief contains the information required by Rule 55.03, and complies with the limitations of Supreme Court Rule 84.06(b), as it contains 26,328 words, excluding the parts of the brief exempted by Rule 84.06(b), as calculated by Microsoft Word 2016, the word processing program used to prepare the brief.

I also hereby certify that the electronic file of this brief submitted via the Court's CM/ECF system has been scanned for viruses and is virus-free.

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