Appeal No. SC97361

In The
Supreme Court of Missouri

NEIL DESAI and HETA DESAI
Plaintiffs/Respondents

vs.

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

SENECA SPECIALTY INSURANCE COMPANY
Intervenor/Appellant

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 1716-CV05305

BRIEF OF *AMICUS CURIAE*
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

Filed by Consent of All Parties

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STATEMENT OF FACTS

The abbreviated facts necessary for determination of whether the current, amended version of § 537.065 RSMo (effective Aug. 28, 2017) applies to the § 537.065 agreement involved in this case are as follows:

Plaintiffs Neil Desai, M.D., and Heta Desai and Defendant Garcia Empire, LLC entered into an agreement pursuant to § 537.065, the § 537.065 Agreement, in November 2016. (Legal File, Vol. I p. 16-17; Vol. II p. 183 ¶ 14). The trial of Plaintiffs' claims against Defendant Garcia Empire, LLC was held on August 17, 2017. (Legal File, Vol. I p. 2, 16). Judgment was entered in favor of Plaintiffs and against Defendant on October 2, 2017. (Legal File, Vol. I p. 2, 16-23).

Intervenor Seneca Specialty Insurance Company filed its combined Motion to Intervene and Motion for Relief from Judgment on October 31, 2017. (Legal File, Vol. I p. 2, 39-40). The Motion to Intervene and Motion for Relief from Judgment was denied on November 1, 2017. (Legal File, Vol. I p. 3; Vol. II p. 185).

At the time the § 537.065 Agreement was executed, § 537.065 provided:

> Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, may enter into a contract with such tort-feasor or any insurer in his behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation claiming by or through him will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution,

garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the insurer or insurers not excluded in such contract. Such contract, when properly acknowledged by the parties thereto, may be recorded in the office of the recorder of deeds in any county where a judgment may be rendered, or in the county of the residence of the tort-feasor, or in both such counties, and if the same is so recorded then such tort-feasor's property, except as to the assets specifically listed in the contract, shall not be subject to any judgment lien as the result of any judgment rendered against the tort-feasor, arising out of the transaction for which the contract is entered into.

§ 537.065 RSMo (effective 1959 thru Aug. 27, 2017). Section 537.065 was amended in 2017 as follows:

1. Any person having an unliquidated claim for damages against a tort-feasor, on account of *personal injuries,* bodily injuries*,* or death, *provided that, such tort-feasor's insurer or indemnitor has the opportunity to defend the tort-feasor without reservation but refuses to do so,* may enter into a contract with such tort-feasor or any insurer ~~in~~ *on* his *or her* behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither ~~he~~ *such person* nor any *other* person, firm, or corporation claiming by or through him *or her* will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tortfeasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the insurer or insurers not excluded in such contract. Such contract, when properly acknowledged by the parties thereto, may be recorded in the office of the recorder of deeds in any county where a judgment may be rendered, or in the county of

the residence of the tort-feasor, or in both such counties, and if the same is so recorded then such tort-feasor's property, except as to the assets specifically listed in the contract, shall not be subject to any judgment lien as the result of any judgment rendered against the tort-feasor, arising out of the transaction for which the contract is entered into.

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

3. The provisions of this section shall apply to any covenant not to execute or any contract to limit recovery to specified assets, regardless of whether it is referred to as a contract under this section.

4. Nothing in this section shall be construed to prohibit an insured from bringing a separate action asserting that the insurer acted in bad faith.

§ 537.065 RSMo (effective Aug. 28, 2017; additions in italics, deletions struck through); see 2017 Mo. Legis. Serv. H.B. 339 & 714.

ARGUMENT

The Missouri Association of Trial Attorneys, MATA, received consent pursuant to Rule 84.05(f)(2) from counsel for Defendant/Appellant Seneca and counsel for Plaintiffs/Respondents Neil Desai and Heta Desai to file this amicus brief.

MATA is a statewide membership association of approximately 1,300 attorneys. Our members are dedicated to protecting the rights of individuals to pursue justice when they are injured. MATA provides our members with legal education seminars, facilitates the sharing of resources, compiles research on key legal topics, and represents our membership in the Missouri General Assembly by advocating for their clients' right to seek justice through the Missouri Courts and Workers' Compensation system.

MATA works to protect access to the court system by advocating against caps on damages, systems that block access to the courts for certain types of lawsuits, and immunity for corporations or public entities when they have harmed someone.

In the present case, MATA supports the position of Plaintiffs that the version of § 537.065 effective August 28, 2017 does not apply to antecedent agreements such as the one entered into between Plaintiffs and Defendant Garcia Empire, LLC in November 2016. Amended § 537.065 imposes new restrictions and cannot be applied to contracts executed prior to its effective date and any such application would be impermissibly retrospective. Therefore, the trial court in this case properly denied Seneca any relief and its judgment should be affirmed.

I. Section 537.065 Is Inapplicable to Antecedent Agreements (Responding to Appellant's Point I)

All three of Seneca's points relied on are dependent upon finding that the current, amended version of § 537.065 applies to a contract entered into pursuant to the version § 537.065 in effect prior to August 28, 2017. Consequently, Seneca's points must all be denied because amended § 537.065 does not apply to antecedent agreements for multiple reasons. First, by its own terms, the current version of § 537.065 only applies to agreements executed after its effective date. In addition, application of amended § 537.065 to antecedent agreements would violate Article I, Section 13 of the Missouri Constitution.

Amended § 537.065 cannot be applied to the § 537.065 Agreement involved in the present case for an additional reason. In the present case, the parties had presented their evidence and the trial in this matter had been completed prior to August 28, 2017. The current version of § 537.065 does not evidence any legislative intent to invalidate completed trials or otherwise affect procedural steps that were valid and proper at the time of their completion.

The arguments presented by Seneca and *Amicus Curiae* Missouri Organization of Defense Lawyers misconstrue the amendments to § 537.065 and the effect those amendments would have on antecedent agreements. The trial court properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment and this Court should affirm that ruling.

A. The Terms of § 537.065 Show It Is Inapplicable

In addition to the notice and intervention rights granted to insurers, the 2017 amendments to § 537.065 added an additional prerequisite for the formation of a contract under that section. Consequently, the reference found in subsection 2 of amended § 537.065 to a contract "entered into … under this section" must refer to a contract entered into under the amended version of § 537.065 on or after August 28, 2017. The right to notice and an opportunity to intervene, arising following execution of a contract "under this section," therefore, only applies to contracts executed on or after August 28, 2017 and amended § 537.065 does not apply to antecedent agreements.

The first step in addressing the proper application of the amended version of § 537.065 is to determine whether the legislature has expressed an intent that it applies only to agreements executed following its effective date. If so, that intent is controlling and there is no need to address whether Article I, Section 13 of the Missouri Constitution prohibits application of the amended section to antecedent agreements. A review of both subsections 1 and 2 of amended § 537.065 shows that it was not intended to apply to antecedent agreements and the trial court properly denied Seneca's motion to intervene.

The normally rules of statutory interpretation, of course, apply. "When determining the legislative intent of a statute, no portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions." *BASF Corp. v. Director of Revenue*, 392 S.W.3d 438, 444 (Mo.banc 2012).

> Statutes are presumed to be valid and will not be found unconstitutional unless they clearly contravene a constitutional provision. Because retrospective laws are barred, the Court presumes that statutes operate prospectively unless legislative intent for retrospective application is clear from the statute's language or by necessary and unavoidable implication.

State ex rel. Schottel v. Harman, 208 S.W.3d 889, 892 (Mo.banc 2006) (citations omitted).

> Additionally, when interpreting statutes, "the primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). Therefore, we "enforce statutes as written, not as they might have been written." *City of Wellston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 192 (Mo. banc 2006).

Hogan v. Board of Police Com'rs of Kansas City, 337 S.W.3d 124, 130 (Mo.App.W.D. 2011).

The version of § 537.065 in effect prior to August 28, 2017, with amendments, became subsection 1 of the amended statute. It provides:

> *1.* Any person having an unliquidated claim for damages against a tort-feasor, on account of *personal injuries,* bodily injuries*,* or death, *provided that, such tort-feasor's insurer or indemnitor has the opportunity to defend the tort-feasor without reservation but refuses to do so,* may enter into a contract with such tort-feasor or any insurer ~~in~~ *on* his *or her* behalf or both, ….

§ 537.065.1 RSMo (effective Aug. 28, 2017; additions in italics, deletions struck through); see 2017 Mo. Legis. Serv. H.B. 339 & 714. The amendments to subsection 1 include a prerequisite to execution of a valid § 537.065 agreement that did not previously exist. Amended § 537.065 only allows a tort-feasor to enter into a § 537.065 agreement if the tort-feasor's insurer "has the opportunity to defend the tort-feasor

without reservation but refuses to do so[.]" § 537.065 RSMo (effective Aug. 28, 2017).

This new requirement cannot apply to antecedent § 537.065 agreements. "Subsequent legislation cannot invalidate contracts lawful at the date of their making." *Home Telephone Co. v. Sarcoxie Light & Telephone Co.*, 236 Mo. 114, 139 S.W. 108, 112 (banc 1911).

> Where a contract, when made, is valid by the laws of the State as then expounded by the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the Legislature, or decision of its courts, altering the construction of the law.

State v. Miller, 50 Mo. 129, 133 (1872).

> Further, statutes are to be considered to have a prospective application or operation unless an intent to the contrary is expressed or implied from the language used, especially where to construe legislation would render it unconstitutional.

State v. Thomaston, 726 S.W.2d 448, 460 (Mo.App.W.D. 1987).

Subsection 1 of the amended version of § 537.065 can only apply to agreements executed on or after August 28, 2017 because applying it to antecedent agreements would invalidate some agreements that were valid at the time they were executed.

Consequently, under a practical and natural interpretation of subsection 2 of amended § 537.065, that section does not apply, in any respect, to an antecedent agreement. Subsection 2 of the amended section begins: "Before a judgment may be entered against any tort-feasor after such tort-feasor has entered into a contract *under this section* …." § 537.065 RSMo (effective Aug. 28, 2017; emphasis added).

An agreement executed *prior* to August 28, 2017 was not "entered into … *under this section*[.]" Instead, such an agreement was entered into under the *prior* version of that section, which was a different statute with different requirements and different consequences.[1]

As Judge Martin recognized in this case, subsection 1 of amended § 537.065:

> imposed a new condition on the ability to enter into lawful and enforceable section 537.065 contracts that could not, as a practical and legal matter, be applied to void or negate contracts already in existence. *See* article I, section 13 of the Missouri Constitution (prohibiting laws impairing the obligations of existing contracts). Because section 537.065.1 must be read to apply to contracts entered into ***after*** the effective date of its amendment, section 537.065.2's reference to "has entered into a contract under this section" cannot be inconsistently construed to refer to contracts entered into ***before*** its effective date.

Desai v. Seneca Specialty Ins. Co., 2018 WL 3232697, *7 n. 10 (Mo.App.W.D. 2018) (emphasis in original).

The § 537.065 Agreement involved in this case is *not* an agreement under the amended version of § 537.065. Amended § 537.065 added a new prerequisite to a lawful and enforceable § 537.065 agreement that

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[1] The only case found interpreting "this section" to include a prior version involved a time limitation that was the same before and after the amendment. *See Clark v. Kansas City, St. L. & C.R. Co.*, 219 Mo. 524, 118 S.W. 40, 44 (1909) ("The time prescribed in 'this section' is the same time prescribed in the repealed section—i. e., the old law is continued in force in that regard."). In contrast, amended § 537.065 added requirements for the valid creation of "a contract under this section" that did not previously exist.

did not exist in November 2016 when the § 537.065 Agreement was executed. Subsection 1 can only apply to contracts executed on or after August 28, 2017. Therefore, subsection 2's reference to "a contract under this section" must also apply only to contracts executed on or after August 28, 2017 and does not apply to antecedent § 537.065 agreements such as the one involved in this case. Reference to contract under amended § 537.065 is *not* the same as a reference to a contract under the prior version of § 537.065.

Seneca's arguments ignore the additional requirements for an agreement under amended § 537.065. Seneca's substitute brief fails to mention the additional requirements for a § 537.065 agreement under subsection 1 of amended § 537.065. "When determining the legislative intent of a statute, no portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions." *BASF Corp.*, 392 S.W.3d at 444. The legislative intent of subsection 2 cannot properly be determined without addressing the additional requirements in subsection 1, especially given subsection 2's reference to "a contract under this section[.]" § 537.065.2 RSMo (effective Aug. 28, 2017).

"[A] contract under this section" cannot refer to a contract under the prior version of § 537.065 because the old law was *not* continued in force with respect to the requirements for a valid contract. An agreement under the prior version of § 537.065 is not the same as an agreement under amended § 537.065. The 2017 amendments to § 537.065 added a

new prerequisite to a lawful and enforceable § 537.065 agreement that did not exist in November 2016.

The tort-feasor in this case, Defendant Garcia Empire, LLC, did not enter into a contract under amended § 537.065. Therefore, the requirements for notice and an opportunity to intervene under subsection 2 of amended § 537.065 do not apply. The trial court properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment and this Court should affirm that ruling.

B. The Procedures in § 537.065 Are Inapplicable to the Present Status of the Case

Amended § 537.065 cannot be applied to the § 537.065 Agreement involved in the present case for an additional reason. The trial in this matter was completed prior to August 28, 2017. Amended § 537.065 does not evidence any legislative intent to invalidate completed trials or otherwise affect procedural steps that were valid and proper at the time of their completion.

Even assuming amended § 537.065 could be considered only procedural and thus applicable to antecedent contracts, it would still not apply to the § 537.065 Agreement in this case. The time for providing notice and an opportunity to intervene elapsed prior to any right arising when amended § 537.065 became effective.

> A statute providing or merely affecting the remedy may apply to and operate on causes of action which had accrued and were existing at the time of the enactment of the statute, as well as causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment, unless an intent to the contrary is expressed. *However, if a new procedural or remedial*

> *provision would attach a new legal consequence to a completed event, if applied in a pending case, then it will not be applied in that case unless the legislature has made clear its intention that it should apply.*
>
> In the interests of efficiency and finality, a court will not grant procedural statutes retroactive effect if the proceedings have already progressed past the point at which the statutory change was applicable. Furthermore, *where the pending action has gone beyond the procedural stage to which an amendment pertains, the amendment will not apply*.

82 C.J.S. Statutes § 589 (footnotes omitted; emphasis added). This rule is consistent with Missouri law.

> If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. *But the 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*; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.

Clark, 118 S.W. at 43 (emphasis added). *See State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 762 (Mo.banc 2003) (section 536.016, which applied solely to an agency's proposal of rules, did not apply to rules proposed but still unadopted at effective date of that section).

In the present case, Plaintiffs and Defendant entered into the § 537.065 Agreement in November 2016. (Legal File, Vol. I p. 16-17; Vol. II p. 183 ¶ 14). The trial of Plaintiffs' claims against Defendant Garcia Empire, LLC was held on August 17, 2017. (Legal File, Vol. I p. 2, 16). The trial included an opening statement, the presentment of evidence, and closing argument. (Legal File, Vol. I p. 17). The trial court then took

the matter under advisement. (Legal File, Vol. I p. 17). All of this occurred prior to August 28, 2017, the effective date of amended § 537.065, and was valid and proper at the time it was done.

After August 17, 2017, the trial was a completed event. The parties had nothing left to do, there were no outstanding pleadings, pending motions, or "future proceedings," and the court merely had to enter judgment for either the Plaintiffs or Defendant Garcia Empire, LLC. Applying amended § 537.065 to require notice and an opportunity to intervene to Seneca would involve setting aside a completed trial that was valid and proper on the date it occurred.

The § 537.065 Agreement executed in November 2016 was valid under the law as it existed at that time. The trial on August 17, 2017 was valid and proper under the law as it existed at that time. Seneca was not entitled to notice and did not have a right to intervene as of August 17, 2017, the date of the trial. The trial court could have entered a judgment on August 27, 2017 without any need to provide notice to Seneca or allow it an opportunity to intervene. The fact that judgment was not entered until October 2, 2017, standing alone, cannot invalidate the § 537.065 Agreement and the trial that were both valid and proper when completed.

Seneca's arguments ignore the additional requirements for an agreement under the amended version of § 537.065 and misconstrue the notice and intervention rights created by the amendments. Seneca's focus on the date judgment is entered ignores the multiple steps that occur prior to entry of a judgment under amended § 537.065. The first

requirement is that a "tort-feasor has entered into a contract under *this* section[.]" § 537.065.2 RSMo (effective Aug. 28, 2017; emphasis added). The second requirement, after a contract is entered into under the amended version of § 537.065, is that "the insurer or insurers shall be provided with written notice" of the contract. Finally, "the insurer or insurers … shall have thirty days after receipt of such notice to intervene as a matter of right[.]" § 537.065.2 RSMo (effective Aug. 28, 2017).

Seneca's argument that "nothing that §537.065 proscribes takes place prior to the moment judgment is entered[,]" (Appellant's Substitute Brief, p. 16), is simply wrong. Amended § 537.065 requires multiple steps prior to the entry of a judgment. Seneca is attempting to foist new obligations and duties on events that occurred and were completed prior to August 28, 2017 by focusing solely on the date of judgment. Seneca's argument would add new duties and obligations to the § 537.065 Agreement and invalidate a trial, both of which were proper and valid at the time they were completed.

Further, Seneca, despite arguing that it had a right to notice and to intervene after the trial of this matter was completed, has never explained how that would work since the trial had admittedly been completed. Seneca's right to intervene could not have arisen until August 28, 2017 when amended § 537.065 became effective. The trial of this matter was completed prior to that date. Assuming Seneca had been provided notice and an opportunity to intervene after August 28, 2017, Seneca has not argued or provided any authority showing that it

would have had a right to new trial. As discussed above: "the 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[.]"*Clark*, 118 S.W. at 43.

Amended § 537.065 does not show an "intent by the Missouri General Assembly that the amended statute should apply to any proceeding already completed or to any portion of any proceeding completed prior to the effective date of the amended statute." *Thomaston*, 726 S.W.2d at 462. "When the rule in *Clark* is applied to the present proceedings, it becomes obvious that the pleading and evidentiary stages of this proceeding had 'been done under the old law' and hence, under *Clark*, that part of the proceeding 'remains so.'" *Thomaston*, 726 S.W.2d at 462.

What rights an insurer might have if allowed to intervene prior to trial in an action involving an agreement under amended § 537.065 is an issue that does not need to be addressed in this appeal. Amended § 537.065 does not apply to antecedent agreements and it is undisputed that the trial of this matter was completed prior to the effective date of amended § 537.065. The amendments to that section do not evidence any intent to undo completed trials that were valid when done.

This case had proceeded past the point where the requirements of notice and intervention under amended § 537.065 could apply. Additionally, the tort-feasor in this case, Defendant Garcia Empire, LLC, did not enter into a contract under amended § 537.065. Therefore,

the requirements for notice and an opportunity to intervene under subsection 2 do not apply. The trial court properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment and this Court should affirm that ruling.

II. Article I, Section 13 Prohibits Application of § 537.065 (Responding to Appellant's Point II)

Additionally, amended § 537.065 cannot be applied to antecedent § 537.065 agreements because such application would violate Article I, Section 13 of the Missouri Constitution. Application of § 537.065 to antecedent contracts would create new obligations, impose new duties, and attach new disabilities to the existing contracts, thus violating the prohibition on laws that operate retrospectively.

In the context of civil actions, the Missouri Constitution prohibits retrospective laws.

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Mo. Const. Art. I, § 13. This Court has explained:

> A law is not retrospective simply "because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation." *Jerry–Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1985). A retrospective law is: "[O]ne which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired." [*Doe v. Phillips*, 194 S.W.3d 833, 850

> (Mo.banc 2006)] (quoting *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911)).

State ex rel. Schottel, 208 S.W.3d at 892.

The 2017 amendments to § 537.065 included that addition of subsection 2, which provides:

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

§ 537.065.2 (effective Aug. 28, 2017). Prior to this amendment, an insurer did not have any right to notice of the execution of a § 537.065 agreement. The addition of a new notice requirement involves imposition of a new obligation, duty, or burden. *See Brune v. Johnson Controls*, 457 S.W.3d 372, 379 (Mo.App.E.D. 2015); *Ruecking Const. Co. v. Withnell*, 269 Mo. 546, 191 S.W. 685, 688 (banc 1916).

Likewise, an insurer did not have a sufficiently direct and immediate interest in the litigation between a plaintiff and its insured to entitle the insurer to intervene as a matter of right. *See Sherman v. Kaplan*, 522 S.W.3d 318, 326 (Mo.App.W.D. 2017). Granting an insurer an opportunity to intervene as a matter of right attaches a new disability to the parties' obligations and rights under a § 537.065 agreement.

Consequently, amended § 537.065 is impermissibly retrospective if applied to antecedent contracts. Subsection 2 "creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *State ex rel. Schottel*, 208

S.W.3d at 892 (internal quotations omitted). As Judge Martin explained:

> Before the amendment to section 537.065 took effect, the parties to a section 537.065 contract had no legal duty to notify a tortfeasor's insurer about the contract. And before the amendment to section 537.065 took effect, the parties to a section 537.065 contract had the right to thereafter seek a judgment resolving liability and damages without the tortfeasor's insurer's participation in the proceedings.
>
> Amended section 537.065 imposes a new legal duty and obligation on parties to a section 537.065 contract to afford notice of the contract to the tortfeasor's insurer as a condition of securing a judgment; attaches a new disability on the parties to a section 537.065 contract by permitting the settling tortfeasor's insurer to intervene as a matter of right in litigation addressed by the contract; and gives to the antecedent section 537.065 contract a different effect from that which it had when it transpired. As to this latter point, although the legal consequence of failing to comply with section 537.065.2 need not be determined in this opinion, there can be no meaningful debate that a failure to comply with section 537.065.2 where required will have legal consequences. Those legal consequences arguably might include the right to seek to vacate a judgment, a basis for an insurer to contest coverage, and a right to challenge the legal force and effect of the section 537.065 contract.

Desai, 2018 WL 3232697, *7 (footnote omitted).

Further, the requirements found in amended § 537.065 would give a new and different effect to antecedent contracts than they had under the law as it existed when such contracts were executed. The parties to a § 537.065 agreement negotiate the terms of their agreement based on the law existing at the time. At the time the present § 537.065 Agreement was executed, November 2016, an insurer for the tort-feasor

was not entitled to notice of the agreement, was not entitled to intervene in the action against the tort-feasor, and, consequently, was not entitled take any actions that only parties can take. That existing law can and does affect the terms of the agreement between the plaintiff and the tort-feasor.

Amended § 537.065, if applied to a § 537.065 agreement entered under the prior version, would not simply change the procedural steps involved in obtaining a judgment following execution of a § 537.065 agreement. Instead, it imposes new obligations and duties with respect to a contract that was already executed. The parties might have reached a different agreement had the law in existence at the time required notice to the insurer and granted the insurer a right to intervene. While the extent of an insurer's right to participate following intervention remains unclear, the consequences of an insurer intervening in the action against the tort-feasor could affect the risks incurred by a plaintiff in proceeding pursuant to a § 537.065 agreement, the time and expense involved in preparing for trial, the evidence that will be presented at trial, and the likelihood of an appeal from the judgment.

An agreement under the amended version of § 537.065 involves different risks, consequences, and potential outcomes than an agreement under the prior version of § 537.065. Therefore, applying amended § 537.065 to antecedent agreements would give a different effect to those contracts than existed when those contracts were executed. Such application would be impermissibly retrospective.

> Further, statutes are to be considered to have a prospective application or operation unless an intent to the contrary is expressed or implied from the language used, especially where to construe legislation would render it unconstitutional.

Thomaston, 726 S.W.2d at 460. Thus, the proper interpretation of amended § 537.065 is to apply it only to agreements executed after August 28, 2017, its effective date.

Such a prospective application is consistent with the language of amended § 537.065, as discussed above, as well as with Missouri's various savings statutes. Those sections provide:

> nor shall any law repealing any former law, clause or provision abate, annul or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed, but *the same is as effectual and shall be proceeded on to final judgment and termination as if the repealing law had not passed, unless it is otherwise expressly provided*.

§ 1.150 RSMo (emphasis added).

> The repeal of any statutory provision does not affect any act done or right accrued or established in any proceeding, suit or prosecution had or commenced in any civil case previous to the time when the repeal takes effect; but every such act, right and proceeding remains as valid and effectual as if the provisions so repealed had remained in force.

§ 1.170 RSMo.

> No action or plea pending at the time any statutory provisions are repealed shall be affected by the repeal; but *the same shall proceed, in all respects, as if the statutory provisions had not been repealed, except that all proceedings had after the repeal becomes effective are governed by procedural rules and laws then in effect, insofar as they are applicable*.

§ 1.180 RSMo (emphasis added).

As discussed above, Plaintiffs and Defendant entered into the § 537.065 Agreement in November 2016. (Legal File, Vol. I p. 16-17; Vol. II p. 183 ¶ 14). The trial of Plaintiffs' claims against Defendant Garcia Empire, LLC was held on August 17, 2017. (Legal File, Vol. I p. 2, 16). The trial included an opening statement, the presentment of evidence, and closing argument. (Legal File, Vol. I p. 17). The trial court then took the matter under advisement. (Legal File, Vol. I p. 17). All of this occurred prior to August 28, 2017, the effective date of amended § 537.065, and was valid and proper at the time it was done.

The notice and intervention provisions in subsection 2 of amended § 537.065 are not applicable to the current action because the trial had already occurred. Therefore, this case properly proceeded to final judgment and the trial court correctly denied Seneca's motion to intervene.

Finally, Seneca's reliance on *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Mo.banc 2007), is misplaced. First, as this Court noted, the amendment of the Missouri Merchandising Practices Act in 2000 did not affect the activities prohibited by the MPA. *Hess*, 220 S.W.3d at 769 ("The operative facts that give rise to Chase's liability are the same both before and after the amendment[.]"). The only changes were the class of potential plaintiffs empowered to sue for the violations of the MPA and the potential allowance of punitive damages. *Hess*, 220 S.W.3d at 769-72. As between those two changes, this Court found the first was entitled to retroactive application while the second was only allowed prospective application.

In contrast, the amendment to § 537.065 created new obligations and rights. Before the amendment, § 537.065 agreements were not dependent on the insurer refusing to defend without a reservation of rights, there was no obligation to notify an insurer of an agreement under § 537.065, and an insurer did not have a right to intervene in the action between the plaintiff and the insured. The amendment to § 537.065 did more than simply change procedural rules. The amendment created new obligations and rights that did not exist prior to the amendment and, thus, can only be applied prospectively.

Second, this Court recognized that different provisions in a statute could be treated differently only in the absence of legislative intent to the contrary. *Hess*, 220 S.W.3d at 769. Such intent is clear here. Both the notice and intervention requirements are part of the same subsection and sentence. That sentence provides that notice *and* the opportunity to intervene must be provided before judgment is entered when the tort-feasor has entered into a contract under amended § 537.065. Those two requirements cannot be separated. The only purpose for the notice is to inform the insurer of its right to intervene and the time for intervening runs from receipt of the notice. Neither notice nor the right to intervene under the amended section can effectively exist without the other.

Application of amended § 537.065 to contracts entered into under the prior version of § 537.065 would impose new duties and obligations on the parties to the agreement and give different legal effects to contracts that existed when amended § 537.065 became effective. Consequently,

such application would be impermissibly retrospective in its operation under Article I, Section 13 of the Missouri Constitution. The trial court properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment and this Court should affirm that ruling.

III. Seneca Is Not Entitled to Relief Under Rule 74.06(b) (Responding to Appellant's Point III)

As discussed above, the trial court properly denied Seneca's motion to intervene. Seneca was never a party to the action between Plaintiffs and Defendant Garcia Empire, LLC. Consequently, Seneca was not entitled to any relief under Rule 74.06(b) and the trial court properly denied its motion for relief from judgment.

Rule 74.06(b) provides: "On motion and upon such terms as are just, the court may relieve a *party* or his legal representative from a final judgment or order …." Rule 74.06(b) (emphasis added). "[T]he provisions of Rule 74.06(b) are limited to parties." *Allen v. Bryers*, 512 S.W.3d 17, 29 (Mo.banc 2016). As discussed above, Seneca was not entitled to intervene in this matter and, therefore, "was not a 'party' entitled to bring a Rule 74.06(b) motion. The circuit court was without authority to grant any relief on that motion." *Allen*, 512 S.W.3d at 29.

This Court has made it clear that relief under Rule 74.06(b) is only available to parties. The trial court properly denied Seneca's motion to intervene so that it was never a party to the underlying action. The trial court could not grant Seneca any relief under Rule 74.06(b) and properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment. This Court should affirm that ruling.

CONCLUSION

The amended version of § 537.065, by its terms, does not apply to antecedent agreements such as the § 537.065 Agreement involved in this case. In addition, the trial of this matter was completed before the effective date of the amendments so this case had proceeded past the point where the requirements of notice and intervention under amended § 537.065 could apply. Further, application of amended § 537.065 to antecedent agreements would be impermissibly retrospective. As a result, Appellant Seneca Specialty Insurance Company did not have a right to intervene in the underlying action, the trial court properly denied intervention, and Seneca was never a party entitled to relief under Rule 74.06(b). The trial court properly denied Seneca's combined Motion to Intervene and Motion for Relief from Judgment and this Court should affirm that ruling.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief of *Amicus Curiae* was served pursuant to Rule 103.08, complies with the limitations contained in Rule 84.06(b), and contains 7,081 words.

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