THE SUPREME COURT OF MISSOURI

NEIL DESAI AND HETA DESAI
Respondents/Plaintiffs,

vs.

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

SENECA SPECIALTY INSURANCE COMPANY
Appellant/Intervenor.

APPEAL NO. SC97361

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

ARGUMENT

I. Respondents' Point I should be rejected because Seneca properly preserved all issues on appeal in that it timely moved to intervene under amended R.S.Mo. §537.065; application in this case of the law in effect on the day the Judgment was entered, which by its express terms makes clear that entry of judgment without the required notice and intervention opportunity is precluded after the statute's effective date even where an agreement under the section had been executed prior to the statute's effective date, would not be a retroactive application.

A. Seneca properly preserved all arguments on appeal.

Respondents contend that Seneca failed to preserve its first point—that R.S.Mo. §537.065, as amended effective August 28, 2017, precluded the trial court from entering the Judgment at issue here because Seneca did not receive the required notice or opportunity to intervene prior to its entry as required by the statute. This is simply not so. Indeed, this entire argument underscores the weakness of Respondents' substantive legal arguments and desperate attempts to identify some procedural technicality that will allow their Judgment to survive, despite the fact that it was entered in clear violation of Missouri law.

Respondents' reading of Missouri law, claiming that preservation rules require that an "alleged ***error*** must be specifically identified" (Respondents' Br. at 30), is entirely incorrect. Missouri's preservation rules do not focus on specific errors. Rather, Missouri's rules for preservation of error for review are applied "to define the precise

claim made by the defendant." State v. Amick, 462 S.W.3d 413, 415 (Mo.2015) (Emphasis added). Here, there is no question that the trial court was aware of the ***claim*** that Seneca was making in its memorandum of law in support of its Motion to Intervene and Motion for Relief from Judgment when it argued that the requirements of the amended §537.065 applied to this case. (LF 51-61).[1]

Inherent in Seneca's argument, and obvious to the trial court, which is "presumed to know the law and to apply it," Amick 462 S.W.3d at 415, is the proposition that the amended §537.065 should have been applied prior to the entry of the Judgment. This is because amended §537.065 was, in fact, the law of this state on the date that the Judgment was entered. And, the language in question proscribes only the trial court's ability to enter judgment. Thus, if amended §537.065 had been properly applied, Seneca would have intervened to defend against the Judgment.

As set forth in Seneca's Opening Brief, Missouri law does not require that a litigant articulate every facially apparent reason why a particular statute requires a certain result. See Schwarz Pharma v. Dowd, 432 S.W.3d 764, 769 (Mo.2014) (holding that a party need not include an explanation as to *why* a motion to transfer venue was timely brought in order to preserve the right to present such arguments on appeal of a ruling that

[1] In its Memorandum of Law, Seneca quoted the statutory language that permits intervention. (LF 52). The trial court evidenced its awareness of Seneca's claim when it declined–albeit erroneously–to permit intervention because the Legislature had not expressly made the new language retroactive.

it was not timely). In this regard, Seneca satisfied Rule 52.12(c) by arguing in its Motion to Intervene that it was entitled to intervene under amended §537.065. (LF 39-180). As highlighted by this Court's holding in Dowd, notably absent from Rule 52.12 is the requirement that Seneca specify in detail each reason why it is entitled to intervene, beyond the stated basis that §537.065 provides that it is allowed to do so. Respondents' attempt to impermissibly foist upon Seneca a requirement that it specify why it is entitled to intervene, beyond the stated basis, must be rejected.

Predictably, Respondents argue that Seneca's argument is not "'inherent' or 'obvious'" to them. (Respondents' Br. at 32). Setting aside the inanity of predicating Respondents' position on their substantive grasp of Seneca's arguments before the trial court, Missouri's preservation rules do not contemplate a party's presumed knowledge of the law—only the trial court's. Armick, 462 S.W.3d at 415. Respondents' purported, and self-serving, failure to understand Seneca's arguments in the trial court has no bearing whatsoever on Seneca's right to seek review from this Court as to whether §537.065 precluded the trial court from entering the Judgment at issue here.

Likewise, Respondents' contention that Seneca's supplemental brief to the trial court (LF 177-180) only discussed issues of retroactivity (as opposed to the self-evident threshold contention that the law simply applies as written and in effect on the day in question), is meritless and does not properly account for the history of this case. On the contrary, the hastily-arranged telephonic conference with Judge Kanatzar, of which there is no record, regarding Seneca's Motion to Intervene included a discussion of the trial court's concern regarding whether applying the amended statute would constitute an

improper retroactive application. Thus, because the trial court showed interest in the issue, it was specifically addressed in Seneca's supplemental memorandum. (LF 177-180).

Finally, in light of the fact that §537.065, as in effect on the date of the Judgment, required that ***written*** notice of any ***executed*** §537.065 agreement be provided *to the insurer* prior to entry of judgment, Respondents' contention that Seneca was obligated to monitor the docket—which shifted, without notice to Seneca, from Boone County to Jackson County—to discover the agreement on its own is nothing more than a desperate attempt to blame Seneca for Respondents' conscious disregard of their obligation under the statute.[2] This new and meritless argument has nothing to do with the issue before the Court.[3]

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[2] Similarly, Respondents' repeated insinuation that they satisfied §537.065's "written notice" requirement by informing Seneca they "***intended*** to protect [themselves] as allowed by Missouri law" (Respondents' Br. at 19) (emphasis added), is defeated by the express terms of §537.065. It is undisputed that Seneca never received written notice of an executed §537.065 agreement 30 days prior to the entry of the Judgment.

[3] The vast majority of Respondents' "Statement of Facts" has nothing to do with resolution of the legal issues before this Court and appears intended to distract the Court from those issues. Indeed, the facts referenced by Seneca (Seneca's Opening Br. at 3-7), are the only ones necessary for this Court to reach a determination regarding the legal issue before it and these facts are undisputed.

Because Seneca's Motion to Intervene and for Relief from the Judgment expressly argued that §537.065, as in effect on the date of the Judgment, required that no judgment could be entered unless the tortfeasor's insurer received notice of any §537.065 agreement and had the opportunity to intervene and that, therefore, the Judgment was improper, (LF 185; App. 24), Seneca specifically preserved the arguments addressed in Point I of its opening brief to this Court.

B. Section 537.065, as in effect on August 28, 2017, applies to this case.

As explained in detail below, the Legislature made clear that §537.065 applies to preclude entry of judgment after the effective date even where an agreement was executed prior to the effective date. It is first worth noting, however, that prior to the recent amendments, §537.065's use had strayed far afield from its relatively restrained and limited purpose to provide a means for a tortfeasor to limit the enforceability of a judgment of liability in a case involving other co-defendants. See Farmers Mut. Auto Ins. Co v. Drane, 383 S.W.2d 714, 719-720 (Mo.1964). Indeed, prior to the amendments, insurers, like Seneca here, were required to defend against judgments entered after uncontested "trials" in which the insured offered no defenses, and which often resulted in detailed findings of unopposed facts and conclusions of law. See Brief of *Amicus Curiae* Mo. Organization of Defense Lawyers at 11-19. The Legislature did not intend §537.065 to be a mechanism by which parties could manufacturer artificially inflated judgments. Thus, by amending §537.065, the Legislature restored the original intent of the statute.

i. The Legislature's use of the phrase "has entered" shows that it expressly contemplated contracts executed prior to the effective date.

The Legislature's direction that the amended §537.065 applies to preclude entry of judgment after the effective date even where an agreement was executed prior to the effective date is made clear by the statute's *express* terms: "Before a judgment may be entered against any tort-feasor after such tort-feasor ***has entered*** into a contract…." There is no qualifying phrase or requirement that the amended §537.065 applies only to an agreement executed after the effective date of the statute. Rather, the language expressly contemplates both past and continuing actions. See Bd. of Registration for Healing Arts v. Boston, 72 S.W.3d 260, 265 (Mo.App.2002) (statute's use of present perfect tense "has failed" illustrates legislature's express intent for application immediately, including with respect to events that may have already occurred). If the Legislature intended the application of the statute to be limited, it could have included language to that effect as it has done in the past. See § 2 of HB 393 (as Truly Agreed and Signed) (2005) (adopting various tort-related changes and providing that "[t]he provisions of this act … shall apply to all causes of action filed after August 28, 2005"); see also, Greenlee v. Dukes, 75 S.W.3d 273, 278 (Mo.2002) ("legislatures are presumed to have acted within their constitutional power … "[i]t is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.").

As this Court explained when interpreting the Legislature's use of language in a

change to a venue statute:

> Our venue statute, as amended, provides that in all tort actions '* * * the suit may be brought in the county where the cause of action accrued * * *.' The Legislature could have expressed an intention to look to the future by substituting the word 'accrues' for the word 'accrued.' It did not do so. We think this evidences a clear intention on the part of the Legislature that the statute may operate retrospectively.

State ex rel. LeNeve v. Moore, 408 S.W.2d 47, 48 (Mo.1966).

Respondents argue that §537.065, as amended effective August 28, 2017, applies only to §537.065 agreements executed after the statute's effective date. Notwithstanding Respondents' unilateral contentions about the intent of the language, the statute in question says: "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." Like in Moore, the Legislature could have said, "after such tort feasor **enters** into a contract under this section…." It did not and, therefore, this Court must give the Legislature's use of the phrase "has entered" its intended meaning.

Indeed, Section 537.065's use of "has entered"–the present perfect tense–indicates the Legislature's express intention for §537.065 to apply to agreements executed prior to the statute's effective date, but prior to entry of judgment. See Chicago Manual Style § 5.119 (15th ed.2003) (The present perfect tense encompasses both events that occurred in the indefinite past and past actions that continue into or touch the

present); Dobrova v. Holder, 607 F.3d 297, 301–02 (2d Cir.2010) (noting that the present perfect tense "has been ... admitted" clarifies that the statute at issue applies to both aliens who are currently admitted as lawful permanent residents and to aliens "who were at some earlier time" admitted as such); Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm'n, 863 F.2d 51, 56 (D.C.Cir.1988) ("Use of the present perfect tense of the verb 'to be' in this key context denotes a wide, not narrow temporal range covering both past and present violations."); In re Sheneal W., 45 Conn.Supp. 586, 595, 728 A.2d 544 (1999) (Legislature's use of present perfect tense in statute denotes intent for court to consider actions of parents prior to statute's passage).

Conversely, Respondents' interpretation of §537.065—that the statute applies only to agreements executed after the statute's effective date—makes no sense because there would have been no §537.065 contract that a tortfeasor "has entered into" at that time. Thus, the Legislature's clear direction is that the amended §537.065 applies to agreements executed prior to the statute's effective date, but prior to entry of judgment.

For similar reasons, Respondents' newly raised argument that the amended §537.065 does not apply to this case because the specific §537.065 agreement in question was not entered under "this section" (Respondents' Br. at 28) is nonsensical. Taking Respondents' flawed argument to its logical conclusion, when §537.065 was repealed and replaced (a common legislative practice in Missouri), the §537.065 agreement at issue became nonexistent. In other words, it was a contract executed pursuant to a statute that, according to Respondents' logic, no longer existed on the date that Judgment was entered. Therefore, it could not be recognized by any Missouri court and had no effect on

that date. It is hard to imagine that this is truly Respondents' position and shows why they cite no cases to support their argument.

Respondents' argument also ignores specific Missouri law. Section 1.120 provides that "[t]he provision of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a ***continuation of such law and not as a new enactment***" (emphasis added). This provision was strongly upheld in Kelly v. Hanson, 984 S.W.2d 540 (Mo.App.1998): "[t]he legislature has provided instruction on how reenactments are to be construed in section 1.120, RSMo...." Id. at 544. Here, §537.065, both before and after it was amended effective August 28, 2017, provided that any person "may enter into a contract with such tort-feasor." Thus, Respondents' §537.065 agreement was executed pursuant to a "continued" portion of §537.065. Consequently, the agreement was not executed under a "different" statute than the §537.065 that was in effect on the date that the Judgment was entered. Respondents, therefore, improperly failed to provide notice and the opportunity to intervene to Seneca.[4] Notably, nearly all of Respondents' arguments are dependent on

[4] This never-before-raised argument is also defeated by ¶ 10 of Respondents' §537.065 agreement (Respondents' App. at 63), which provides that the agreement shall be construed pursuant to the laws of the State of Missouri. Under §1.120, this means that the agreement does not constitute an agreement executed under a new section of §537.065. That said, the §537.065 agreement has now been improperly placed in

the Court accepting their meritless "under this section" argument (see Respondents' Br. at 23, 28, 42-46, 49, 62), which Seneca has clearly defeated.

ii. Application to the present case is not retroactive.

The "key factor" in determining whether the application of a statute (or amendment to a statute) is impermissibly retroactive is an analysis of the statute's language (i.e., the actual law enacted by the legislative and executive branches). See State v. Holden, 278 S.W.3d 674, 678 (Mo.2009). Here, the application of the amended §537.065 to the present matter is not "retroactive" because the amendment to the statute had no effect on the terms of prior agreements or proceedings. Rather, it proscribed only what procedurally was required to occur, in the future, "***before a judgment may be entered.***"

Respondents' tortured analysis of what allegedly "starts" or "sets in motion" some process invented by Respondents (Respondents' Br. at 41) is not addressed anywhere in the statute. There is no support, either at law or in the express terms of the amended §537.065, for the position that any event other than the act of entering a judgment pursuant to a §537.065 agreement is relevant to this analysis. Specifically, the statute's plain terms reveal that no event taking place prior to the entry of a judgment is proscribed by §537.065.

Respondents' appendix, as it was not in the trial court record. Therefore, the Court should ignore any arguments derived from the substance of the agreement.

Similarly, the amendment has no effect on the terms of any §537.065 agreement that has been executed: the parties to a §537.065 agreement still get what they bargained for, i.e., protection of the defendant's assets from execution in the event of judgment. Indeed, the parties to a personal injury suit may enter into a §537.065 agreement but never pursue entry of a judgment (but instead pursue settlement). And, as happened here, a trial court may enter judgment after reviewing uncontested facts. The amendment has no effect on these events. But, as of August 28, 2017, the law in Missouri is that if the parties wish for judgment to be entered in a case in which an insured tort-feasor "***has entered***" into an agreement pursuant to §537.065 (at any time), the tort-feasor's insurer must first receive notice and have the opportunity to intervene.

In this regard, Respondents misconstrue this Court's holding in Holden, 278 S.W.3d 674, which in no way focused on "what set the statutory obligations running" when determining whether the statute at issue was retrospective in its operation. (Respondents' Br. at 48). Rather, Holden focused on the language of the statute at issue and found that because the statute only spoke to those convicted, found guilty of, or who have pled guilty to the underlying offense and who had not timely registered their address, the trigger date for purposes of retrospective analysis was the date of the conviction or plea, ***not*** the date of the underlying offense. Id. at 678. Accordingly, so long as the plea or conviction occurred after the effective date of the statute, the registration requirements were not retrospective in operation, regardless of the date the underlying offense was committed (or if a trial had even commenced). Id. The same is true here. So long as a judgment was, or in theory is going to be, entered after the effective date of the

statute, the statute applies as in effect at that time regardless of the date of the underlying agreement or trial.

As amended, §537.065 addresses only the entry of judgment (e.g., "***before a judgment may be entered"***). In this case, the Judgment was improperly entered. Under §537.065, as in effect on the date Judgment was entered, the trial court did not have authority to enter the Judgment absent Seneca having received written notice and the opportunity to intervene. Accordingly, the Judgment entered by the trial court must be vacated.

II. Respondents' Point II should be rejected because as amended §537.065's notice and intervention provisions are procedural, in that neither provision creates any substantive new duty or obligation, as confirmed by courts around the country, and neither provision has any effect on the parties' §537.065 agreement, which would remain fully intact.

A. The notice requirement is procedural.

Even assuming, *arguendo*, that application of the amended §537.065 in this case would be retroactive, the trial court erred in failing to enforce the notice requirement because this procedural issue does not affect any substantive rights. Notably, Respondents ***do not*** argue that they have a substantive or vested right *not* to provide notice to Seneca. Rather, they argue only that §537.065's notice requirement creates a new obligation and imposes a new duty.

What Respondents fail to overcome, however, is the well-settled law in this state that statutes may apply retroactively, notwithstanding the general constitutional

prohibition of retroactive statutes, so long as any new duties or obligations arising out of the statute do not result in "substantial prejudice." See Mo. Real Estate v. Rayford, 307 S.W.3d 686, 693, (Mo.App.2010) (holding that while "[i]t could be argued that any law that has retroactive application in ***some manner*** imposes a new duty or obligation," duties or obligations that are not "substantial" do not preclude retroactive application). The notice provision at issue here does not create any ***substantive*** or substantial new duty or obligation. By accepting Respondents' argument, this Court would effectively be holding that a party has the right, under Missouri law, to have a non-adversarial proceeding intended to artificially inflate damages and assign a basis of liability, both of which have no basis in fact, all for the purpose of receiving a windfall from an insurer.

Respondents' attempt to find support in Doe v. Phillips, 194 S.W.3d 833 (Mo.2006) for the contention that merely providing notice of a §537.065 agreement constitutes a new ***substantive*** duty is misplaced. In Phillips, the Court found that a statute requiring convicted sex offenders (including those convicted long before the creation of the statute) to "register and to maintain and update the registration ***regularly***" imposed an impermissible retroactive duty. Id. at 852. Here, §537.065's notice provision prescribes a single notice requirement, not regular updates and/or maintenance. There is no support under Missouri law, or nationwide, holding that providing a single notice to an insurer constitutes a ***substantial*** duty, such that a statute requiring such notice is impermissibly retrospective. (See Seneca's Opening Br. at 22) (citing cases in various jurisdictions with prohibitions similar to Missouri's regarding retroactive statutes holding

that a notice requirement is purely procedural and ***not*** a substantial duty).[5]

Respondents' reliance on F.R. v. St. Charles Cty., 301 S.W.3d 56 (Mo.2010) similarly fails because the requirements imposed by the statutes determined to be impermissibly retrospective in that case are not remotely similar to the simple notice requirement here. The first statute divested convicted sex offenders—including those convicted years earlier who had already served the sentence imposed upon them at the time of their conviction—of the ability to live within 1,000 feet of a school, meaning it imposed the duty of actually "***moving*** if it turns out that the new residence is within 1,000 feet of a school or day-care facility." Id. at 64. Respondents' equation of the burden of ***moving one's residence*** (from a home that was perfectly lawful when acquired) with §537.065's simple notice provision makes no sense and there is no support for this position. The second statute addressed in F.R. required previously convicted sex offenders to do the following on Halloween night: (1) avoid contact with children; (2) remain inside; (3) post a sign on the door saying that they had no candy; and (4) leave the lights off. Id. at 63. Again, this law imposed new duties and obligations on the effected individuals, that did not exist at the time of their sentencing, so far beyond the notice provision here that they are not even comparable.

Respondents' critique of Seneca for "going to great lengths" to avoid the holding of Brune v. Johnson Controls, 457 S.W.3d 372 (Mo.App.2015) (Respondents' Br. at 60)

[5] Respondents continue to ignore the trove of cases holding that notice requirements are procedural.

is puzzling. Seneca has earlier explained why that case is readily distinguishable. (Seneca's Opening Br. at 30). In Brune, unlike here, the new notice requirement would effectively ***strip*** from anyone who had not provided notice to their employer within 30 days of being diagnosed with an occupational disease (even though no such notice requirement was required at the time of the diagnosis) of an otherwise already vested, and actionable, claim. The amendment to §537.065 resulted in no loss of existing rights.

Finally, Respondents incorrectly argue that the notice provision is somehow comparable to a law that this Court held to be impermissibly retroactive because it forced an individual to relinquish a completely valid, previously issued real-estate license, causing the "new disability…of per se ineligibility to continue to hold an existing license." See Rayford, 307 S.W.3d at 695. It is inapt to compare forcing an individual to do something that changes one's ability to do one's job to §537.065's notice provision.

Section 537.065 as amended does not limit a party's ability to bring, prosecute, or defend claims. Rather, it only codifies the duly authorized decision of the legislative and executive branches to prescribe ***the court's*** ability to enter judgment. There is simply no Missouri precedent to support the proposition that ensuring that an insurer has been notified of an agreement prior to the entry of judgment pursuant to §537.065 creates a ***substantial*** new duty or obligation for anyone. And as noted, Respondents have no vested right in having a non-adversarial proceeding intended to artificially inflate damages.

B. Neither the notice nor the intervention provision affects contractual rights.

Respondents' argument that application of the statute as amended would impermissibly affect the contract between them and Seneca's insured is also misguided. "A statute is ***not retrospective or retroactive*** [if] it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation." Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n, 702 S.W.2d 77, 81 (Mo.1985) (emphasis added). By statute, and in practice, the primary feature of a §537.065 agreement is that the claimant (here, the Respondents) will not levy execution on the tort-feasor (here, Garcia Empire) for any judgment awarding damages against the tort-feasor and will, instead, only seek to collect from the tort-feasor's insurer.

Both before and after the August 28, 2017 amendment, a §537.065 agreement, including the specific agreement in question here, is not *contingent* on entry of judgment in the plaintiff's favor and, therefore, provides both parties the same protection before and after the amendment. There is no support for the proposition that §537.065 as amended changes the terms of the agreement between the Respondents and Garcia Empire. Regardless of whether Seneca was notified or allowed to intervene, as was required by Missouri law on the day that the Judgment was entered, Garcia Empire would still be protected from execution for any judgment ultimately entered against Garcia

Empire and the Respondents would still possess their claims against Seneca if such a judgment was (or is) ever properly entered.

By accepting Respondents' argument, this Court would effectively be ruling that private contracting parties have the ability to bind the Missouri Legislature. This would be an impossible result. It cannot be disputed that the Missouri Legislature can affect existing contracts by enacting new laws. For instance, the Legislature can ban the importation of a product it deems dangerous and, consequently, affect the contractual rights of a company that had contracted to import those products. Similarly, the Missouri Legislature can amend a statute that it deems has been abused by litigants. Specifically, it can require that an insurer receives written notice and an opportunity to intervene before a judgment is entered against its insured that is premised on a claimant's covenant not to execute against the insured. This is in fact what the Legislature did because, like here, allowing this to occur often resulted in excessive damages and liability determinations that have no basis in fact.

Respondents' purported authority in this regard is clearly distinguishable because the statutes addressed in those case directly changed the effect of existing contracts. In Melton v. Country Mut., 75 S.W.3d 321 (Mo.App.2002), the court found that a law could not apply retroactively to force insurers to materially expand the coverage provided to insureds under existing policies. Id. at 326. Vandervort v. Nationstar, 2015 U.S. Dist. LEXIS 183367 (Mo.App. Feb. 11, 2015), is similarly irrelevant to this matter. In that case, the court determined that a subsequent amendment to the Statute of Frauds could not apply to an extent that would materially alter the terms of a contract entered into

before the amendment. Here, the Respondents and Garcia Empire would still have possessed exactly what they agreed to irrespective of whether notice or an opportunity to intervene had been provided to Seneca.

C. Intervention is procedural and does not create a new right.

Respondents incorrectly contend that every "right" is a ***substantive*** right. This is not the case particularly in the context of intervention. See V.B. v. N.S., 982 S.W.2d 691, 692-93 (Mo.App.1998) ("[T]he statute used the word 'right' but did not create a personal or property interest which others had a corresponding duty not to offend."). The amendment to §537.065 merely describes, and places certain limitations on, a procedural event. Thus, the amendment neither creates nor, more importantly, takes away any ***substantive*** right. The "right" that Respondents expressly claim would somehow be infringed if the plain language of the amended statute be properly applied is the so-called "right in the rejection of Seneca's involvement in the case." (Respondents' Br. at 73).[6] In other words, Respondents claim that they had a substantive right to a non-adversarial proceeding. Not only is this not a *substantive* right, this is no right at all. No party has the

[6] To the extent that Respondents argue that some "right" belonging to Garcia Empire, who is not a party to this appeal, would be adversely affected by allowing Seneca to intervene (see id. at 74 ("Seneca's position requires a new obligation exist for the insured to be obligated to allow the insurer to control the defense")), this is simply a fallacy. Seneca is not seeking to "control" the defense. It is merely seeking to protect its interests pursuant to the plain language of amended §537.065.

right to obtain a judgment from a Missouri court that is the result of a non-adversarial proceeding designed to maximize a claimant's possible monetary recovery from an insurer.[7] Because Missouri law does not provide a right to a non-adversarial proceeding, the amendment to §537.065 neither creates nor, more importantly, takes away any substantive right.

Respondents' argument conflates substantive rights with the mechanisms that are created to enforce or protect those rights. Specifically, Respondents attempt to warp an amendment that speaks only about the process of intervention, to imply the creation of a substantive right (or the impairment of a substantive right that had never existed before under Missouri law). The amended §537.065 did no such thing.

Respondents ignore that courts nationwide have consistently, and specifically, held that intervention is procedural, not substantive. See State Comp. Fund v. Fink, 233 P.3d 1190 (Ariz.App. 2010) (right to intervene in a personal injury suit to protect one's interests is *procedural* because though an insurer is "seeking to intervene to protect its substantive rights…intervention is the means or method—the procedure—being utilized

[7] It is an undisputed fact that this Judgment was obtained through a non-adversarial proceeding. (See, e.g., Plaintiffs' App'x at A61) (the improperly submitted §537.065 agreement *requiring* Garcia Empire to "[r]efuse to allow Seneca, or any lawyer affiliated with or hired by Seneca, to play any part in the bench trial or any further proceedings" and to "cooperate and agree to the admission of evidence regarding liability and damages" (and that "evidence may be submitted to the Court in summary fashion.")).

[] to protects its rights" and there are "no vested right[s] in any given mode of procedure."); Canatella v. California, 404 F.3d 1106, 1113 (9th Cir. 2005) ("Intervention as of right is merely a procedural means for entering an existing federal action."); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975) ("Intervention would not result in the loss of substantive or procedural rights.").

More specifically, Respondents' efforts to distinguish this case from the well-reasoned outcome in Fink, which involved nearly identical circumstances (see Seneca's Opening Br. at 25-27) utterly fail. First, the fact that Arizona's prohibition against retrospective laws comes by way of statute is of no consequence. Second, the fact that the Arizona statute at issue did not contain a notice requirement does not take away from the significance that the court clearly found that the statute's right to ***intervene*** to protect one's interests is a ***procedural right*** (i.e., the notice requirement and right to intervene must be analyzed separately).

Moreover, Respondents' contention of ownership of a vested right in *not* having Seneca intervene is simply incorrect. See Vaughan v. Taft, 708 S.W.2d 656, 660 (Mo.1986) ("No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights..."); Beatty v. State Tax Comm'n, 912 S.W.2d 492, 496 (Mo.1995) (no person has a vested right to "insist that a law remain unchanged"). Respondents fail to cite a single case supporting the contention that the so-called right to proceed "without the interference or participation" of Seneca is substantive. This is the very definition of a "particular mode of procedure," in which Missouri courts have long held no party possesses a "vested right." Indeed, Missouri

precedent is clear that *"**[i]ntervention is a process*** by which a third person is permitted to inject himself into a pending action to assert his rights against the claims therein being made by an original litigant." Alamo Credit v. Smallwood, 459 S.W.2d 731, 732 (Mo.App.1970) (emphasis added).

The amendment to §537.065 did not change Missouri substantive law. No new cause of action was being created. Rather, the amendment simply provided a procedure for an insurer to protect its interests. See Wilkes v. Mo. Highway, 762 S.W.2d 27 (Mo.1988). Notably, Respondents also fail to distinguish this Court's holding in Wilkes, in which it was determined, as should be the case here, that the statute in question did *not* create a new cause of action but merely provided a more appropriate remedy for an existing right. (Seneca's Opening Br. at 17). And, contrary to Respondents' contention, Wilkes ***did*** address that statute in the context of potential retrospective application, and the holding is *not* limited to cases involving waiver of the state's rights. See Hess v. Chase, 220 S.W.3d 758, 762 (Mo.2007) (applying Wilkes outside the context of state's rights).

Additionally, the change in §537.065 does not alter anything that parties are permitted to contract for pursuant to §537.065. Specifically, Respondents' contention that a judgment is "necessary" to effectuate a §537.065 agreement (Respondents' Br. at 40) is simply incorrect. Indeed, while Respondents' §537.065 agreement is not properly part of the record before this Court, this argument is belied by the language of that agreement. See Respondents' App'x at A59 ("***if*** Plaintiffs were to obtain a judgment"); id. at A61 ("***should*** a judgment be entered against defendant"). Moreover, §537.065

speaks only in terms of a possible future event ("in the event of a judgment against the tort-feasor"), and it does not state that the trial court necessarily must find for a plaintiff or enter some contractually agreed-to amount of damages. Under §537.065, a plaintiff is not ***entitled*** to any judgment. With or without Seneca's intervention, the trial court could have found for Garcia Empire or entered $0 damages. Private contracting parties cannot now, and could not ever, bind the court to enter a judgment. Allowing Seneca or any other insurer to intervene will not change that.

Respondents also continually conflate the concept of a substantial ***interest*** (as required by Rule 52.12(a) to intervene absent a statute providing the right to do so) with the idea of a substantive ***right*** (which cannot be affected by a statute retrospective in its operation). Compare Rule 52.12(a)(2) (non-party has the right to intervene "when the applicant claims an ***interest***…"); with Pierce v. Dep't of Soc. Servs., 969 S.W.2d 814, 822 (Mo. App. 1996) (exception to ban on retrospective laws where the substantive rights of [the] parties are not affected…). Here, Seneca need not show any particular "***interest"*** in order to intervene because §537.065 satisfies Rule 52.12(a)(1), which looks to whether a statute confers the ability to intervene.

Respondents' focus on whether the amended statute created an "interest" on the part of insurers in an underlying action that did not previously exist, wholly ignores that what the amendment actually did was modify a method of *procedure* in which no one can have any vested interest. Moreover, all of Respondents' cited case law on this issue is either non-binding, entirely distinguishable, misstated, or irrelevant. See McDonald v. E. J. Lavino, 430 F.2d 1065 (5th Cir. 1970) (nonbinding authority from 5th Circuit where

the court found that Fed.R.Civ.P. 24 entitled a party to both permissive intervention and intervention as of right); Mason v. Scarpuzza, 147 Mich.App. 180 (1985) (contrary to Respondents' contention (Respondents' Br. at 71), the court did ***not*** hold that the right to intervene creates a "substantive right" but rather found that an insurance carrier was a real party in interest entitled to intervene); State ex rel. Farmers Ins. v. Murphy, 518 S.W.2d 655 (Mo.1975) (irrelevant case offering no support to Respondents, in which it was held that Rule 55.06, regarding joinder of claims and remedies, operates retrospectively as well as prospectively); Good Hope v. St. Louis Alarm, 358 S.W.3d 528 (Mo.App.2012) (finding that if an amendment were applied to the case, it would change a party's substantive right to recover pre-judgment interest, making it impossible to comply with the new statutory requirements); Four Seasons v. Butler, 2018 Mo.App. LEXIS 153 (Mo.App. Feb. 21, 2018) (finding that an amendment that affected the order of a lien (i.e., a clearly substantive right) could not be applied retroactively).

No substantive change to any vested right would have resulted from Seneca intervening before final judgment, as mandated by the procedure crafted by the legislative and executive branches. Accordingly, and as discussed in length above and in Seneca's opening brief, §537.065's intervention provision is only procedural, not substantive.

D. The trial court's Order upsets well-established principles of governance.

Allowing the trial court's denial of Seneca's Motion to Intervene and for Relief from Judgment to stand would greatly expand what constitutes an impermissibly

retroactive application of a legislative enactment and, therefore, disturb settled principles of separation of powers to an extent that would disrupt the ability of the non-judicial branches of government to legislate. Respondents first attack this truism asserted in Seneca's opening brief by arguing that the trial court did not make any findings regarding whether application of the amended §537.065 would be impermissibly retrospective. Respondents are correct that the trial court did not undertake a retrospectivity analysis in its three sentences of reasoning in denying Seneca's well founded motion. Rather, the trial court simply held that because the "Legislature did not expressly provide for the application of [the amended §537.065] to proceedings had or commended," Seneca's motion must be denied. (LF 185). This failure to provide substantive analysis only bolsters Seneca's position. The trial court failed to take the next required step: in light of the statute's lack of express intent only to apply prospectively, the trial court was required to determine whether application of the statute would be *impermissibly* retrospective. For purposes of this appeal, and in the context of applicable and binding Missouri law, it can–and must–be presumed that the trial court ruled that application of amended §537.065 was (in the trial court's opinion) impermissibly retrospective. Indeed, if the trial court thought it were permissibly retrospective, Seneca would likely be labeled the Respondent in this proceeding. Thus, it is entirely appropriate for Seneca to highlight that by enacting amended §537.065, the Missouri Legislature introduced procedural changes to §537.065 in order to fix a specific flaw in the statute that required immediate correction from the standpoint of Missourians' elected representatives.

Next, Respondents argue that Seneca did not properly preserve this "public policy" argument. However, public policy arguments are in fact encouraged by Missouri's Civil Practice Rules: "The substitute brief allows a party to provide a more detailed analysis of the pertinent issues, to expand upon the proper application of the law, ***to discuss the public policy and other societal concerns pertinent to the issues***…." 17 Mo. Prac. 83.08:3. Thus, the Court may consider the public policy implications presented in this matter.

Notably, the support for amending §537.065 was substantial–more than two-thirds of the Legislature voted in favor of the amendment. See HB0339C Roll Call (https://house.mo.gov/billtracking/bills171/rollcalls/062.015.pdf) (last visited February 25, 2019). In enacting the amended §537.065, the vast majority of the Legislature agreed with the bill's proponents that an amendment to §537.065 was "needed to allow insurance companies to have their day in court," and that without the amendment, "there are judgments awarded requiring insurance companies to pay when the insured is not covered for an act and they don't have an opportunity to have the courts hear their side." See HB0339C BILL SUMMARY (https://house.mo.gov/billtracking/bills171/sumpdf/HB0339C.pdf) (last visited February 25, 2019) (App. 31).

The trial court's ruling blatantly conflicts with decades of Missouri case law and, in doing so, infringes on the well-established power of the Legislative and Executive branches to effect immediate changes to Missouri *procedures* deemed necessary to the interest of maintaining an efficient, fair, and predictable process.

III. Respondents' Point III should be rejected because the Judgment is irregular and void, in that §537.065 as amended established that Seneca was required to receive notice and have the opportunity to intervene, and Seneca raised sufficient grounds for the relief it sought, which did not include the need to show prejudice.

Point III of Respondents' Brief consists of little more than re-argument of Respondents' positions addressed herein above, save for certain new arguments with respect to Seneca's ability to set aside the Judgment, all of which should be rejected.

Respondents contend that Seneca's motion to set aside the judgment was somehow deficient. However, Respondents' reliance on Johnson v. Brown, 154 S.W.3d 448 (Mo.App.2005) as authority for this position is misplaced. In Johnson, the court found that trial court erred in vacating a judgment where the moving party's only contention was that the *amount* of the judgment was improper and would result in a double recovery for the judgment holder despite a lack of either actual allegations to support the claim or affidavits to evidence any such facts. Id. Here, the validity of the Judgment turns on a question of law, not facts. All that is required to demonstrate the Judgment's invalidity is the undisputed fact that prior to the Judgment being entered Seneca was not provided with either notice of the agreement or the opportunity to intervene, as required by §537.065. (LF 59-60) (string citing cases demonstrating that Missouri courts routinely find judgments to be void under Rule 74.06(b)(4) where notice is insufficient).

Respondents also argue that Seneca must show prejudice before the facially irregular Judgment can be set aside. There is no support for this argument. Barron v. Abbott Labs., 529 S.W.3d 795 (Mo.2017), Respondents' lone cited case in this regard, addresses only the concept of prejudice as a prerequisite to reversal of an order denying transfer of venue. There is no precedent requiring prejudice before a judgment that is clearly contrary to the plain language of the duly enacted law of this state on the date that it was entered can be vacated.

CONCLUSION

Faced with an issue of long concern to the people and businesses of Missouri, the House, Senate, and Governor acted within their authority to *require* that effective August 28, 2017, no court could enter judgment against any tort-feasor that had entered into a §537.065 agreement absent that tort-feasor's insurer having been provided with both notice of the agreement and the opportunity to intervene prior to the entry of judgment. The trial court's decision to ignore these clearly mandated requirements effectively, and improperly, divested these constitutionally empowered players of their proper authority to address this concern. Accordingly, and for the reasons stated above, Seneca respectfully requests that this Court reverse and remand with instructions to set aside the Judgment and grant Seneca's Motion to Intervene and for Relief from Judgment.

Dated: February 25, 2019

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CERTIFICATE OF COMPLINACE WITH MISSOURI SUPREME COURT RULES 55.03 AND 84.06

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 7,232 words, excluding parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, a true and correct copy of the foregoing brief was served via electronic service and email to:

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