IN THE SUPREME COURT OF MISSOURI

VINCENT HEGGER (DECEASED), et al.,	)	
	)	
Appellant,	)	
	)	No.: SC97993
vs.	)	
	)	
VALLEY FARM DAIRY COMPANY, et al.,	)	
	)	
Respondents.	)	

APPELLANT'S SUBSTITUTE REPLY BRIEF

Appeal from the Labor and Industrial Relations Commission

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Remarkably, the Respondents believe Section 287.200.4(3) is a paragon of legislative clarity which allows for only one possible reading. The Respondents argue that "the legislature's intent is clear and unambiguous" and "permits only one reasonable interpretation, namely, an employer must affirmatively elect to accept optional liability for enhanced mesothelioma benefits" by purchasing a new claims-made policy. *See* Respondents' Brief at pg. 9. However, if this language is so unambiguous, how is there room for an "interpretation" at all? Although the Respondents claim the statute is so abundantly clear that the Court "cannot resort to any statutory construction in interpreting the statute," they paradoxically go on to conduct their own construction by inserting various words into the text such as "express," "affirmative," "prospective," "action," "conduct," "purchase," "procure," "choose," "optional," "new," etc.

Although the Respondents repeatedly read these words into the strictly construed statute, ***this language simply is not there***. A fleeting overview of Section 287.200.4(3) quickly reveals that its language does not "clearly and unambiguously" require an employer to take an "affirmative action" of "procuring new insurance" in order to elect to accept. If this was really the legislature's "obvious" intent, then the Respondents would not need to continually resort to reading non-existent language into the statute. If the legislature intended to require employers to purchase new insurance in order to regain the exclusivity protection of the Workers' Compensation Law, it would have simply said so.

The legislature is presumed to be aware of the state of the law when it enacts a statute. *See Robertson v. State*, 392 S.W.3d 1, 6 (Mo. App. 2012). The legislature knew

that policies from the time of last exposure, such as the Respondents' policies, provide coverage for an employer's entire liability by law.[1] By defining an election to accept in terms of the open-ended phrase "insuring their liability," the legislature knew—and intended—that policies from the time of last exposure would provide coverage for increased mesothelioma benefits, just as these policies provide increased benefit coverage for the other occupational diseases due to toxic exposure in Section 287.200.4(2).[2] There is no "clear and unambiguous" language in Section 287.200.4(3) that evidences a legislative intent to force employers to affirmatively purchase new insurance in order to regain workers' compensation exclusivity.

A. The Respondents Ignore The Statutory Definition Of "Elect To Accept" And Misconstrue Other Language Within Section 287.200.4(3).

The phrase "elect to accept" is a term of art which is given a special legislative meaning within Section 287.200.4(3). It is initially introduced in the subdivision's first

[1] The Respondents do not dispute that their insurance policies contain language which purports to insure the employer's entire workers' compensation liability if the last exposure to the hazard of the disease occurred during the policy period. *See* Respondents' Brief at pg. 26.

[2] The Respondents do not dispute that their insurance policies would have provided coverage for increased benefits had Mr. Hegger suffered from one of the less severe occupational diseases due to toxic exposure under Section 287.200.4(2), such as the non-malignant disease asbestosis. *See* Respondents' Brief at pgs. 27-28.

sentence and then specifically defined in the second sentence to encompass three scenarios. This definition states that "[e]mployers that ***elect to accept*** mesothelioma liability under this subsection may ***do so by*** either ***insuring their liability***, by qualifying as a self-insurer, or by becoming a member of a group insurance pool." *See* Section 287.200.4(3) RSMo. (emphasis added).

In their brief, the Respondents do not dispute that the phrase "elect to accept" is a term of art with its own legislative definition.[3] Instead, the Respondents simply ignore this definition and proceed to consult the dictionary. This is improper. It is well-established that "when the legislature construes its own language by providing definitions, that construction ***supersedes the commonly accepted dictionary or judicial definition***, and it is binding on the courts." *Ivie v. Smith*, 439 S.W.3d 189, 203 (Mo. banc 2014) (emphasis added). Because the legislature gave the language "elect to accept" a specific meaning in Section 287.200.4(3), that legislative definition governs. If the dictionary definitions of "elect" and "accept" conflict with the legislative definition, those definitions are superseded and must be disregarded by the Court. The individual words "elect" and "accept" cannot be given a subtext at odds with the distinct meaning the phrase "elect to accept" was assigned in the statute.

[3] Indeed, the Respondents openly acknowledge that there are "three ***defined*** ways for employers to provide coverage for the election[.]" *See* Respondents' Brief at pg. 27 (emphasis added).

Although the Respondents attempt to analogize the "elect to accept" language in Section 287.200.4(3) with other "election" language that has historically been used in the Workers' Compensation Act, this effort is unavailing. Again, the phrase "elect to accept" was given a distinct definition ***within Section 287.200.4(3) itself***. If this definition differs from other uses of "election" in the Act, it supersedes those other uses just as it supersedes common dictionary definitions.

Furthermore, even if these other uses of "election" could be consulted, they do not aid the Respondents' argument—in fact, they cut directly against it. Unlike the "elect to accept" language in Section 287.200.4(3), the language in Section 287.090.2 states that an employer "may elect coverage. . . by ***purchasing*** and accepting a valid workers' compensation insurance policy[.]" *See* Respondent' Brief at pg. 21 (emphasis added). The word "purchasing," which implies the need for an affirmative action of procuring new insurance, is absent from Section 287.200.4(3). The lack of equivalent language establishes that purchasing a new policy is not necessary. *See Anani v. Griep*, 406 S.W.3d 479, 482 (Mo. App. 2013) (holding that "[i]f a phrase or term is included in one section of a statute but the same language is omitted from another, we presume that the disparate language was enacted purposefully.").

Similarly, unlike the "elect to accept" language in Section 287.200.4(3), Section 287.020.4 (1949) expressly required that the employer "***shall file*** with the commission a written notice that he elects to bring himself with respect to occupational diseases within the provisions of this chapter." *See* Respondents' Brief at pg. 20 n.4 (emphasis added). The

other references to an "election" in the Workers' Compensation Act are inapplicable to Section 287.200.4(3) and do not support the Respondents' argument in any event.

Nothing about the verb tense of "insuring" in the phrase "by. . . insuring their liability" suggests an employer must purchase new insurance either. The Respondents note that the word "insuring" acts as a "gerund" because it is the object of the preposition "by." However, this is exactly why the Respondents' interpretation is erroneous. A "gerund" is defined as "[a] verb form ***which functions as a noun***." *See Gerund*, Lexico Online Dictionary, Powered By Oxford University Press. 2019. (emphasis added). A noun does not imply a need for affirmative action—it simply gives a name to something that exists.

Another example of a gerund would be "The moon exerts a gravitational pull ***by orbiting*** the earth." The word "orbiting" in this sentence is not functioning as a verb to imply a specific action in the past, present or future. Rather, the word "orbiting" is functioning as a noun to designate that a gravitational pull is exerted ***by the existence*** of the orbit. In Section 287.200.4(3), the word "insuring" is being used in the same manner. Rather than implying an affirmative action of purchasing insurance, it is functioning as a noun to designate that employers "elect to accept" ***by the existence*** of insurance that covers "their liability."

Here, Valley Farm is "insuring their liability" because an occurrence-based policy exists that reads to cover their entire workers' compensation liability if the last exposure occurred during the policy period. It is the fact that Valley Farm's occurrence-based policies were in effect and were "insur***ing*** their liability" in 2015 that resulted in Valley Farm's election, not the fact that Valley Farm previously "insur***ed*** their liability" when it

purchased these policies in 1984. It is not as if these policies only "insur***ed***" Valley Farm's liability in the past tense—in fact, Valley Farm's solvent policies will still be "insur***ing*** their liability" in the future should workers continue to develop occupational diseases where their last exposure occurred during the policy period.

The Respondents further argue that the language "under this subsection" in Section 287.200.4(3) defeats Appellant's interpretation. However, the Respondents fail to explain how a policy insuring Valley Farm's "entire liability" would fail to cover a subset of liability "under [a particular] subsection" of the Workers' Compensation Act. If the Respondents could point to a latent disease case which holds that coverage for an employer's "entire liability" is limited to workers' compensation statutes in existence when the policy was written, there might be some merit to this argument. However, the Respondents cite to no such case.[4]

[4] The Respondents' citation to *Desai v. Seneca Specialty Insurance Co.*, 581 S.W.3d 596 (Mo. banc 2019) is off point. In *Desai*, the question was whether a contract could have been "***entered into***. . . under [a statutory] section" that did not exist when the contract was written. 581 S.W.3d at 602 (emphasis added). Here, the question is whether the terms in these in-force policies read to cover the benefits under Section 287.200.4(3). There is no further requirement in Section 287.200.4(3) that the insurance policy must also have been "***entered into***. . . under [Section 287.200.4(3)]" before the policy is capable of providing coverage.

Instead, the Respondents pointedly ignore *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 452 (Mo. App. 2010), which already addressed this issue. In *McGhee*, the statutory provision that increased the insurer's liability did not exist at the time of last exposure in 1977, when the policy was written. 312 S.W.3d at 452. Nevertheless, the insurer was liable to cover the increased benefit amount in place when the employee was diagnosed with asbestosis in 2001 and suffered an injury. *Id.* at 456, 460.

McGhee demonstrates that workers' compensation policies for latent disease must be written to cover benefit amounts in existence under the Workers' Compensation Act at ***the time of injury***, not those in existence at the time of last exposure. Nothing in Section 287.200.4(3) explicitly or implicitly changed this—in fact, the legislature is presumed to have enacted Section 287.200.4(3) knowing that this was the law. Contrary to the Respondents' accusations, Appellant is not attempting to modify any contractual terms. "Entire liability" means, and has always meant, entire liability under all sections of the Workers' Compensation Act at the time of injury. It is the Respondents who are attempting to retroactively re-write the contracts to cap their level of coverage.

B. An Election to Accept Does Not Require An "Affirmative Action" To "Choose" Liability When The Employer Has A Policy Insuring This Liability.

The Respondents' argument hinges on the faulty premise that an employer must first take an "affirmative action" to "choose" liability for increased benefits before a policy can provide coverage because this liability is "optional." However, the liability is only "optional" if the "elect to accept" language operates in a manner that makes the liability optional. Under the facts of this case, it does not.

The strictly construed statute simply states that an employer has "elected to accept" liability for these benefits by "insuring their liability" for them. The only way to interpret such broadly worded language—without otherwise making presumptions not expressed in the text—is that an employer is "insuring their liability" if there is a viable insurance policy which reads to cover the benefits. If there is, then the employer is classified as having "elected to accept." ***Nowhere*** does Section 287.200.4(3) expressly provide that an employer must first "choose" this liability by "affirmatively procuring" or "purchasing" new insurance.

In essence, the Respondents presuppose that the "elect to accept" language modifies and expands upon the "insuring their liability" language by adding an "affirmatively purchase" requirement. However, the Respondents have the analysis backwards—the phrase "insuring their liability" is what ***defines the phrase "elect to accept,"*** not the other way around. An employer does not need to affirmatively "choose" this so-called "optional" liability before an insurance policy holds coverage—rather, the fact that the insurance policy reads to provide coverage ***is what results in an employer's election to accept this liability***. The phrase being defined cannot circularly be used to modify and expand upon that phrase's own statutory definition. There is no express requirement that the "insuring their liability" criterion is only met through an employer's "affirmative choice" to "procure new insurance."

If there were some reason Valley Farm might have wanted the "affirmative choice" to disclaim liability for increased mesothelioma benefits, the Respondents' interpretation might be more persuasive. However, as Appellant pointed out in his initial brief (with no

reply from the Respondents), there is no logical reason an employer would ***ever*** choose to reject this liability when they already have insurance covering it. Why on earth would they? The employer's election through pre-paid insurance coverage ***does not result in any actual liability to the employer***—it only results in increased benefits to the insurer, while the employer is protected from the threat of civil liability they otherwise would have faced under Section 287.200.4(3)(b).[5]

Unlike an employer under Section 287.200.4(2), which might find itself directly liable for increased benefits if the policy of last exposure is lost or insolvent, the legislature ensured that an employer under Section 287.200.4(3) can never be directly liable for the much greater amount of increased mesothelioma benefits because this liability is conditioned upon the existence of insurance coverage in the first place. If there is no coverage, there is no liability. Conversely, if there is coverage, there is liability—but in reality only to the insurer, not the employer. Consequently, there is no discernible reason

[5] The Respondents claim Section 287.200.4(3)(b) would be meaningless under Appellant's interpretation. *See* Respondents' Brief at pgs. 22-23. That is mistaken. Without this provision, the statute would not indicate that employers are subject to civil liability if they do not meet one of "elect to accept" criteria. However, there is no language in Section 287.200.4(3)(b) suggesting that employers must have the "affirmative option" or "choice" to reject liability when they already meet the strictly construed definition of "elect to accept," nor is there any tangible reason an employer would ever want to do so.

an employer would ever want to reject this liability if the employer already has coverage for it.

In contrast, there is a very valid reason why an employer would want to accept this covered liability—the real danger of significant civil liability. Why would any rational employer, or anyone at all, ever voluntarily renounce their own fully paid-for, in-force insurance coverage and gladly invite themselves to be sued in civil court, where they could potentially be liable for millions of dollars out-of-pocket? The Respondents do not address this question because the answer is obvious. ***No employer ever would***. If Section 287.200.4(3) required an "affirmative choice" by an employer, it would be a false choice when the employer already has a policy that covers their entire liability.

Appellant questions whether the Respondents even have standing to raise this argument regarding Valley Farm's supposed need for an "affirmative choice." If Valley Farm existed out-of-state today, and therefore did not purchase a new policy, then Valley Farm would ***unquestionably*** support Appellant's position. Do the Respondents seriously expect this Court to believe that if Valley Farm existed today, they would be urging the Court to find their own pre-paid insurance policies—which are still in effect—do not protect them from unlimited civil liability?[6] Although the Respondents' counsel profess to represent Valley Farm, it is difficult to see how they can claim to speak for this defunct

[6] Indeed, Appellant's counsel is currently handling asbestos cases on behalf of plaintiffs in civil court where the ***defendant employers*** are raising the exact same argument that Appellant makes in the present case.

entity, particularly when the position they advocate would operate to the severe detriment of Valley Farm if they still existed. The employer of last exposure and the insurer of last exposure are not in privity regarding this "elect to accept" issue. They are diametrically opposed.

Not only would Valley Farm never "choose" to reject these benefits when they already have coverage for them, but here Valley Farm clearly did not make a "choice" to reject. If the employer ***must*** make an affirmative choice to either accept or reject liability under Section 287.200.4(3), then why are the Respondents focused solely on an employer's "affirmative" acceptance of the increased benefits as opposed to an employer's "affirmative" rejection of them? Obviously, a non-existent employer cannot make an affirmative choice either way. If the employer ***must*** take an "affirmative action," then why isn't the fact that Valley Farm did not take some "affirmative action" to reject these benefits the more important issue, particularly when there is a viable policy that reads to cover their entire mesothelioma liability?

This is one of the central fallacies of the Respondents' argument, which, at its core, is simply the question of "how can an employer elect to accept if they do not exist?" While at first glance this may seem compelling, this glib observation is devoid of substance—it simply invites the equivalent question of "how can an employer ***elect to reject*** if they do not exist?" If the statute truly ***required*** an "affirmative action" to either accept or reject in all cases—including the many cases involving non-existent employers—then the statute would be an ineffectual paradox. Section 287.200.4(3)'s statutory scheme does not, and logically cannot, require an affirmative action. In its awareness that there would be

innumerable employers who are incapable of making an affirmative choice in cases involving a 30 to 40-year latency period, the legislature defined "elect to accept" in a manner that does not require one.

While the Respondents accuse Appellant of reading an improper "default" rule into Section 287.200.4(3) by which an employer has automatically accepted increased benefits if they are already "insuring their liability" for them, their position simply creates an equivalent "default" rule by which an employer has automatically rejected workers' compensation exclusivity if they do not take an "affirmative action." While this may not matter to the non-existent Valley Farm, the Respondents' default rule would be of great concern to the out-of-state Valley Farm discussed in Appellant's initial brief. *See* Appellant's Brief at pgs. 17-19.

Under the Respondents' default rule, the out-of-state Valley Farm would be deemed to have automatically rejected workers' compensation exclusivity even though they would have undoubtedly wanted to invoke their viable occurrence-based insurance policy to avoid a multi-million dollar civil verdict.[7] Accordingly, there is a ***very*** compelling reason why employers would want to avoid a "default" rejection rule, while there is no reason whatsoever why employers would ***ever care*** about avoiding a "default" acceptance rule. If the employer already has insurance coverage for their mesothelioma liability under Section

[7] Notably, the Respondents do not deny that their interpretation would result in this outcome for many currently existing employers.

287.200.4(3), then they regain the valuable protection of workers' compensation exclusivity while no actual workers' compensation liability is imposed on them.

When employers do not take an affirmative action, there is an unavoidable "default" rule inherent within the structure of Section 287.200.4(3) either way. This "default" will routinely occur when the employer does not exist, when the employer exists out-of-state, and when the employer has not employed any workers for years. The key distinction between these "default" rules is that Appellant's rule actually follows the statutory definition of "elect to accept" and furthers the public policy underlying the January 1, 2014 amendments and the Workers' Compensation Act in general.

Appellant's default rule extends increased benefits to the largest class of workers suffering from mesothelioma while protecting as many employers from civil liability as possible. In contrast—as the Respondents do not dispute—their default rule would deny these increased benefits to the majority of workers suffering from the most severe occupational disease due to toxic exposure (even though the worker would have ironically received increased benefits for lesser non-malignant diseases such as asbestosis) while subjecting many employers to unlimited liability in civil court.

The Respondents' statutory interpretation results in the ***exact opposite*** scenario of what the legislature was obviously trying to accomplish. The legislature's clear intent cannot just be disregarded. The Court must consider "the whole statute and its legislative history and, if necessary, consider[] also the circumstances and usages of the time, the result to be accomplished thereby, and to promote the purpose and objects of the statute, and to avoid any strained or absurd meaning. Further, the lawmaking body's own

construction of its language by means of definition of the terms employed should be followed in the interpretation of the statute to which it relates and is intended to apply and ***supersedes the commonly accepted dictionary or judicial definition and is binding on the courts***." *In re Hough's Estate*, 457 S.W.2d 687, 691 (Mo. banc 1970) (internal citations omitted, emphasis added).

Appellant's interpretation of Section 287.200.4(3) checks all these boxes—it follows the legislature's own construction of the "elect to accept" language as opposed to dictionary definitions, it promotes the purposes of the statute (exclusivity and increased benefits), and it avoids the absurd result that victims of the most devastating occupational disease due to toxic exposure receive no increased benefits when they would have received significant increased benefits for one of the lesser diseases under Section 287.200.4(2).

C. The Court's Decision In *Casey* Does Not Foreclose Appellant's Interpretation.

The Respondents make several bold claims regarding this Court's ruling in *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo. banc 2018), including that:

> "[T]he Court ***made plain*** that absent an ***express election*** by the employer to accept liability for enhanced mesothelioma benefits and the employer's ***purchase of insurance*** to cover its liability for these ***optional benefits***, Section 287.200.4(3) has no application."

See Respondents' Brief at pg. 13 (emphasis added).

> "The Court's decision shows that the statute ***requires action*** by the employer through an ***express*** election to accept liability under the statute and the ***express procurement*** of insurance coverage to cover that liability."

See Respondents' Brief at pg. 14 (emphasis added).

> "[T]he Court's decision in *Casey* ***forecloses*** subjecting a long-defunct employer and its insurers to liability for ***optional mesothelioma benefits*** under Section 287.200.4(3) absent the requisite election and insurance coverage mandated by the statute."

See Respondents' Brief at pg. 15 (emphasis added).

Unsurprisingly, not a single one of these unsupported assertions bears ***any citation*** to this Court's actual opinion in *Casey*. The reason for this is simple—the Court did not make any of these supposed holdings. The Court was not confronted with the present issue and only addressed the narrow question of whether the last exposure rule codified in Section 287.063.2 prevented a new claims-made policy from holding coverage. *Casey*, 550 S.W.3d at 80. The Court rightly rejected that proposition, noting that "[t]he relevant inquiry in this matter is not under whose employment Mr. Casey was last exposed, ***but whether the terms of Employer's policy provide coverage***." *Id.* at 81 (emphasis added). This holding is entirely consistent with Appellant's position. Here, the relevant inquiry is whether ***the terms in Valley Farm's occurrence-based policies***—which were still in effect when Mr. Hegger filed his claim in 2015—***provide coverage***.

In *Casey*, the Court examined the terms in the claims-made policy at hand and found that it provided coverage because it contained a mesothelioma endorsement that "adopt[ed] [Section 287.200.4's] provision of enhanced benefits for occupational disease claims filed on or after January 1, 2014—modifying the policy with respect to these additional mesothelioma benefits. . . Insurer provided coverage to Employer by expressly adopting

section 287.200.4 into its endorsement." *Id.* at 80-81. In other words, the Court found that the ***insurance policy's*** liberally construed language ***expressly provided*** coverage because it directly referenced the provision of coverage for the benefits in Section 287.200.4(3). Contrary to the Respondents' misrepresentation, the Court did not further hold that the ***statute's*** strictly construed language ***expressly required*** the purchase of a new insurance policy with this precise language.

The Court did not make such a holding because (1) it was not confronted with that issue and (2) that is not how Section 287.200.4(3) reads—the statute does not expressly delineate what particular language must be in an insurance policy for that policy to provide coverage and thereby constitute an election. Section 287.200.4(3) instead leaves an election up to the language of the insurance policies themselves. The statute—and this Court's interpretation of it in *Casey*—naturally leaves open the possibility that multiple insurers may provide coverage for the increased benefits in Section 287.200.4(3) as long as "the terms of [the policy] provide coverage." *Id.* at 81.

The Respondents note that under Appellant's interpretation, in some cases there may be both a viable claims-made policy that reads to provide coverage and a viable occurrence-based policy that reads to provide coverage. Although the Respondents find such an outcome "absurd," Appellant is at a loss to see what is so strange about multiple insurers providing coverage for the same harm. Overlapping levels of health insurance coverage are routine. For car insurance, it is common to have underinsured motorist coverage for the same liability that another policy would initially cover. When there is

damage to property, there are often questions of whether a homeowner's policy, an automotive owner's policy, or a general liability policy provides primary coverage.

Furthermore, as the Commission recognized, policies at the time of last exposure remain liable for so-called "traditional" benefits in workers' compensation cases for mesothelioma. L.F. at 60-61. Thus, there ***will already be two insurers*** when a claimant seeks both "traditional" benefits and the increased benefits in Section 287.200.4(3). However, an insurer cannot carry coverage for only a subset of the employer's liability for benefits—they either have coverage for all benefits, or no benefits. An insurer "must be held to insure the employer's 'entire liability [under the Workers' Compensation Act]'" and "an insurer cannot avoid certain liabilities by constructing its policy to exclude certain provisions of the workers' compensation statute and only cover the provisions it prefers." *See Allen v. Raftery*, 174 S.W.2d 345, 350 (Mo. App. 1943); and *Casey*, 550 S.W.3d at 80.

How is having overlapping coverage for the employer's liability a more "absurd" result than having the claims-made policy cover one subpart of the employer's liability and having the occurrence-based policy cover another subpart of the employer's liability, when Missouri law clearly requires that an insurer holding ***any*** level of coverage must further cover ***all*** of the employer's liability? Such an outcome finds no support under Missouri law.[8]

[8] The Respondents assert that Section 287.200.4(3) represents "an exception to the general rule in Section 287.280." See Respondents' Brief at pg. 27. This is incorrect. The legislature is presumed to be aware of the state of the law when it enacts a statute and an

The question of which insurer would hold priority is not in front of the Court and need not be addressed at this time. At any rate, finding that two insurers have coverage is hardly a more "absurd" result than finding that Respondents' policies do not provide increased benefits for Mr. Hegger's fatal mesothelioma even though they would have provided increased benefits had he suffered from non-malignant asbestosis. It is hardly more "absurd" than ignoring the legislature's very purpose in passing the law—to protect employers from civil lability and to increase workers' compensation benefits for most mesothelioma victims. It is hardly more "absurd" than preventing the legislature's clear purpose from taking effect on the ridiculous basis that Valley Farm may have wanted the "affirmative choice" to renounce its own pre-paid insurance coverage and voluntarily expose itself to a civil lawsuit. Any issue with overlapping insurance coverage pales in comparison to this litany of absurdities.

Act's provisions must be read in *pari materia* and harmonized with one another. *Robertson*, 392 S.W.3d at 6; and *Oberreiter v. Fullbright Trucking Co.*, 117 S.W.3d 710, 714 (Mo. App. 2003). When it enacted Section 287.200.4(3), the legislature knew Section 287.280 requires an insurer to cover the employer's entire liability. If the legislature wanted to create an exception to that rule, then it would have had to explicitly create an exception. It did not do so. Under strict construction, such an "exception" cannot be presumed in the absence of any textual support.

D. Retroactivity And The Constitution.

The Respondents contend that "[c]ontrary to Employee's argument, the statute cannot be interpreted to eliminate the election requirement based on the Employer's ***antecedent conduct*** in maintaining workers' compensation insurance in 1984" and that "[a] ***retrospective*** construction—one extending to insurance policies ***in effect in 1984***. . . cannot be reconciled with the statute's language." *See* Respondents' Brief at pgs. 17-18 (emphasis added). This misstates Appellant's argument. Appellant does not contend that Valley Farm's "antecedent conduct" of purchasing insurance policies in 1984 resulted in an election. Rather, Appellant contends that the ***continued viability*** of Valley Farm's insurance policies ***in effect in 2015***—when Mr. Hegger filed his claim—resulted in an election.

It is not as if the Respondents' policies written in 1984 simply went out of effect the next year and stopped providing coverage. These are not claims-made policies—they are occurrence-based policies which ***will continue to remain in effect*** as long as the Respondents remain solvent and as long as workers who were last exposed during the policy period keep getting sick. It is the fact that the policies were ***in effect and read to provide coverage in 2015***, not that they were purchased in 1984, which resulted in Valley Farm's status as an employer that "elected to accept." Had the Respondents become insolvent or had proof of coverage been lost prior to the claim's filing, then Valley Farm would not have "elected to accept" because they would not have had a viable policy in effect "insuring their liability." This is consistent with *Casey*, where the insurance policy

the employer purchased in 1990 was no longer in effect and could not provide coverage. 550 S.W.3d at 78 n.3.

The Respondents' tired assertion that Appellant's interpretation constitutes an unconstitutional "retrospective construction" of the statute which relies upon Valley Farm's "antecedent conduct" to constitute an election is a classic strawman argument. Appellant's interpretation is not reliant on any "antecedent conduct" because the "elect to accept" language is defined in a manner that ***does not require any conduct***. The existence of a viable policy with terms "insuring [Valley Farm's] liability" in itself constitutes an election to accept.

If the statute does not require any "conduct" at all, then Appellant's interpretation is not a "retrospective construction." All that has occurred is an increase in the amount of benefits that must be paid—not by the employer—but by the insurer who, by law, was always liable to cover the employer's "entire liability." Applying Section 287.200.4(3) to this fact pattern yields the exact same result that occurred in *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447 (Mo. App. 2010), and the exact same result that would have occurred under Section 287.200.4(2) had Mr. Hegger suffered from non-malignant asbestosis instead of the terminal cancer mesothelioma.

Because the Respondents' "retroactivity" argument under Mo. Const. art. V, § 13 is inextricably linked to the notion that Section 287.200.4(3) requires an "affirmative action" by the employer to either "accept" or "reject," their constitutional argument is nothing more than an extension of their statutory interpretation. Appellant does not contend—and never has contended—that if an affirmative action is mandatory under Section 287.200.4(3), then

Valley Farm's "action" of purchasing these policies back in 1984 would retrospectively fulfill that requirement. The Respondents' constitutional argument is wholly contingent upon the accuracy of their statutory interpretation. It is otherwise irrelevant.

In his initial brief, Appellant assumed the Respondents' constitutional argument would be that increasing the amount of benefits owed by an entity in between the time of last exposure and the time the claim accrues is unconstitutionally retroactive. This appeared to be how the Respondents had framed their argument during the initial hearing before the ALJ, where they stated that their constitutional objection was based on "applying [Section 287.200.4] retroactively to exposure that last occurred either in 1984 or 1990 when [Mr. Hegger] last worked for any entity." Tr. at 21. Evidently, this is not the nature of the Respondents' argument after all—their constitutional objection is instead a strawman aimed at an argument Appellant does not advance.

When it comes to the separate (and more germane) issue of whether an increase in benefits between the time of last exposure and the time of accrual is retroactive, the Respondents make no attempt to distinguish—or even acknowledge—the outcomes in *McGhee* and *State ex rel. KCP&L Greater Missouri Operations Company v. Cook*, 353 S.W.3d 14 (Mo. App. 2011). In these cases, an increase in an entity's liability for benefits or damages between the time of last exposure and the time the claim accrued (i.e., when the asbestos-related disease was diagnosed) was clearly imposed without any retroactivity concerns raised. Perhaps the Respondents realized that taking such a position would represent a stark break from how this issue has been treated under Missouri law and the law of sister states, or perhaps they realized that taking this position might mean Section

287.200.4(3) should be liberally construed in favor of finding benefits for Appellant (after all, liberal construction was the substantive law in place when Mr. Hegger was last exposed to asbestos in 1984).

Whatever the reason, the Respondents clearly fail to dispute that the substantive law in place when the claim accrues is the law that governs a claim. Accordingly, the Respondents' extended discussion of whether Section 287.200.4(3) is "substantive" or "remedial" is immaterial. Rather than examine whether they even have a vested right to application of law that existed prior to the enactment of Section 287.200.4(3), the Respondents skip this stage of the analysis and proceed to focus on whether application of Section 287.200.4(3) to these facts constitutes a "substantive" change in the law.[9] *See* Respondents' Brief at pg. 31.

[9] The Respondents find the law substantive because it expands the class of beneficiaries to an employee's adult children. This is untrue. Adult children were already beneficiaries before the January 1, 2014 amendments because they could recover unpaid benefits that had accrued to the employee prior to his death through the deceased employee's estate. Furthermore, in *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758 (Mo. banc 2007), a case where real retroactivity concerns were actually implicated, this Court held that the class of plaintiffs who can recover damages may be retroactively expanded without violating the constitution because this constitutes a remedial change in the law. *See Hess*, 220 S.W.3d at 778 (holding that the new law applied retroactively even though it "increased the

However, this focus is pointless—even if Section 287.200.4(3) were considered substantive as applied here, there is ***nothing retroactive*** about its application because it was already in effect when Mr. Hegger was diagnosed with mesothelioma in March 2014. For comparison, the change in the law in *Cook* was obviously substantive and far more extreme—it applied the 2005 enactment of strict construction to exposure which had last occurred in 1988, which had the consequence of eliminating the employer's workers' compensation exclusivity and subjecting them to unlimited liability in a different forum with a potentially different class of plaintiffs. 353 S.W.3d at 16, 20, 29-30. Nevertheless, this substantive change in the law was not ***retroactively*** applied in *Cook* because the change to strict construction occurred in 2005—prior to the claim's accrual in February 2010 when the employee was diagnosed with mesothelioma. *Id.* at 16, 20.

The same principle holds true here. The Respondents have not shown that Appellant's statutory interpretation is retroactive at all (much less ***unconstitutionally*** retroactive) because they have failed to establish that they have any vested right to application of law that existed prior to this claim's accrual in March 2014.[10]

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defendant's potential liability by subjecting them to suit from ***both*** the government ***and*** the new class of plaintiffs.") (emphasis added).

[10] As Appellant noted in his initial brief, there is a strong argument that even if Section 287.200.4 was retroactively applied to a claim (i.e., if the claim accrued before January 1, 2014), its application would still not be ***unconstitutionally*** retroactive because the legislature has indicated an intent for the law to apply to all claims ***filed*** on or after January

The Respondents' constitutional argument lives and dies by the validity of their statutory interpretation. If no affirmative action is required by employers, then there is nothing retroactive about application of Section 287.200.4(3) to this claim. When Mr. Hegger was diagnosed with mesothelioma and this claim accrued in March 2014, Section 287.200.4(3) was already in effect. When Mr. Hegger filed his claim in 2015, the Respondents' occurrence-based insurance policies were in effect and read to provide coverage for Valley Farm's entire workers' compensation liability, including the subset of liability under Section 287.200.4(3). As the policies were "insuring [Valley Farm's] liability" for this claim, they resulted in Valley Farm's classification as an employer that has "elected to accept." Because Missouri law recognizes that increases in benefits between the time of last exposure and the time the claim accrues are not retroactive in latent disease cases, there is nothing retroactive about this increase in benefits.

The Court's disposition of the constitutional issue in *Casey* is not material. There, the Court was confronted with the separate question of whether it was unconstitutionally retroactive to hold a new claims-made insurer liable when the employee was last exposed to asbestos in 1990. 550 S.W.3d at 78-79. This was a relatively straightforward question to

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1, 2014 (regardless of whether the claim accrued before this date) and the new law simply substitutes a more appropriate remedy for the enforcement of an existing right. *See* Appellant's Brief at pgs. 60-71. However, because the Respondents fail to dispute that a latent disease claim accrues—and rights become vested—when the injured party is diagnosed with a disease, this issue need not be examined.

answer, because this liability was not being outright imposed upon the insurer—rather, the insurer had openly agreed to hold liability for these benefits by selling its policy after the new law went into effect. *Id.* at 81-82.

Contrary to the Respondents' sweeping reading of *Casey*, however, the Court never held that all insurers ***must*** "affirmatively assent" to provide the increased benefits lest Mo. Const. art. V, § 13 be violated. Not only was that issue not before the Court, but such a statement would have been contrary to the outcomes in *McGhee* and *Cook*, where an increase in benefits or damages was clearly imposed upon entities from the time of last exposure without any retroactivity concerns raised. Unlike in *McGhee*, *Cook*, claims under Section 287.200.4(2), and the present case—where the liable entity from the time of last exposure would already be liable for some level of benefits or damages regardless of the increase—the claims-made insurer in *Casey* would not have held ***any liability at all*** had it not been for the enactment of Section 287.200.4(3) in 2014. The same issue is not implicated here.

E. The "Notice" Provision In Section 287.200.4(3).

Regarding the "notice" provision in the last sentence of Section 287.200.4(3)(a), the Respondents fail to explain why the legislature only referred to "***such*** an election" as opposed to "an election" generally. If the word "such" has any meaning at all, it can only refer to the third election type. *See Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. 2007) (holding that "each word. . . ***should be given meaning***.") (emphasis added). Otherwise, the use of this word would have been wholly unnecessary because the sentence would have meant the ***exact same thing*** without it—the sentence

would have read "[i]n order for an employer to make [] an election, the employer shall provide the department with notice of [] an election in a manner established by the department." *See* Section 287.200.4(3) RSMo. If "such" means anything—as it must—then it must refer back to the third election type which, by no mere coincidence, had just been described as "***such*** group" in the preceding two sentences.

The analysis need not proceed any further. Even if the Division had set up a notification system for the first type of election (it has not), it would be irrelevant. Under a strict construction of the statute that gives meaning to every word used, "***such*** an election" only refers to group insurance pools. The Court's interpretation of Section 287.200.4(3) is performed *de novo* without any deference to how administrative agencies may have interpreted or applied it. *McGhee*, 312 S.W.3d at 451.

At any rate, such a notification system has not been set up "in a manner established by the department." The Respondents concede that the two "notice" forms cited by the Commission *sua sponte*—forms WC-304-I and WC-304-G—do not relate to employers who elect through third-party insurance policies. Instead, the Respondents further obfuscate this issue by referring to two other "forms" which are not in the record.

The Respondents fail to comprehend the nature of these other forms. Unlike forms WC-304-I and WC-304-G, which are directly received by the Division, the forms "WC 24 03 02" and "WC 24 03 03" are merely "acceptance" and "rejection" endorsements within a claims-made insurance policy. Just because the Division may have tacitly approved of the language in these endorsements drafted by National Council of Compensation Insurance ("NCCI") does not mean the Division has also been taking "notice" of them in

policies held by particular employers. While the Division verifies an employer's ***proof of coverage*** through the NCCI, the Division does not receive a copy of ***the actual insurance policy*** containing either of these endorsements. The "proof of coverage" the Division receives is just a brief form noting that the employer is insured by a particular insurance company for a particular date range. It is not a copy of the insurance policy itself, with all its attendant terms and endorsements.

As an officer of the Court who has handled many mesothelioma cases under the new law, Appellant's counsel can attest that the Division has ***no idea*** whether a particular claims-made policy has an "acceptance" or "rejection" endorsement in it—all the Division knows is whether an employer is insured by a particular company for a particular period of time. The Division consistently represents that they do not know whether a particular claims-made policy contains a "WC 24 03 02" acceptance or a "WC 24 03 03" rejection because they are not in possession of the actual insurance policy or any endorsements therein. To find out, a claimant's only option is to hope that the employer or insurer voluntarily reveals this information in their answer to the claim or to subpoena them for it.

To add insult to injury, the Respondents go on to erroneously interpret language in the "WC 03 02" endorsement which states that "you must notify us of [an] election" to reject mesothelioma benefits ("notice" language which notably does not appear in the other endorsement). The Respondents take this language to mean that the Division has established a system for taking "notice" of rejections in claims-made policies. This is

simply inaccurate—the language in "WC 03 02" is in reference to the employer notifying ***the insurance company*** of a rejection, not notifying the Division.[11]

While the Commission may have erred in *sua sponte* citing and misconstruing forms WC-304-I and WC-304-G, at least those forms are actually received by the Division for the purpose of taking notice of elections from self-insurers and members of group insurance pools. In contrast, the endorsements cited by the Respondents are not received by the Division from employers at all. There is no evidence that a notification system for elections by third-party insurance has been instituted "in a manner established by the department." Even if the "notice" requirement were applicable to the first type of election, it cannot be a bar to this claim.

[11] Interestingly, there is a "default" position in the claims-made policy endorsements by which an employer ***automatically accepts*** coverage for the increased benefits unless they take an ***affirmative action to reject*** such coverage by notifying their insurance company. Thus, even with claims-made policies, the employer is never given an option to take an "affirmative action" to accept—they only have an option to take an "affirmative action" to reject. Even insurance companies realize an employer's default position would surely be to avoid civil liability.

CONCLUSION

The award denying compensation should be reversed. This case should be remanded to the Commission with instructions to determine which Respondent held coverage when Mr. Hegger was last exposed to asbestos.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on October 30, 2019.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,749, excluding the cover, signature block and this certificate.

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