IN THE SUPREME COURT OF MISSOURI

DEBORAH GERVICH, as surviving spouse of GARY GERVICH (Decedent),	)	
Appellant,	)	
vs.	)	**Appeal No. SC91727**
CONDAIRE, INC.	)	
and	)	
TREASURER OF MISSOURI, Custodian of the Second Injury Fund,	)	
Respondents.	)	

Appeal from the Labor and Industrial Relations Commission of Missouri
Injury No. 06-030063
Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED94726

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

The Respondent Second Injury Fund's Sole Argument for Denying Appellant Her Statutory Survivor Benefits Is Incorrect, Because the Fund Misinterprets the Term "Vest" and Misapplies It Across the Entire Spectrum of Workers' Compensation Benefits.

The Respondent Second Injury Fund ("Fund")'s attempted "vesting" analysis of this case fails for many reasons, but most of all it fails because the Fund doesn't seem to understand the word "vest" in the law of Workers' Compensation. To the extent that benefits "vest" under the law of Workers' Compensation, they vest at the time of an employee's injury, not at the time the employee – or his dependent, like Appellant in this case – is eventually entitled to receive them. The Fund simply misunderstands that fundamental concept.

After going through the Eastern District of the Court of Appeals with barely a whisper of comment on the issue, the Fund is finally willing to embrace in this Court – incorrectly – the Labor and Industrial Relations Commission ("LIRC")'s mistaken argument that Appellant's right to benefits did not "vest" until after the 2008 amendment to § 287.230, R.S.Mo., thereby denying Appellant the right to those benefits. The Fund's tortured rationale for its contention is difficult to follow. But it is in any event a straw man, since the entire concept of "vesting" is unnecessary to determine Appellant's rights under the applicable statutes in this case.

First, the Fund asserts that the Court of Appeals commingled inapplicable definitions

of dependents' property rights from domestic relations law with Appellant's rights as a dependent in this Workers' Compensation proceeding. But, as Appellant noted in her Suggestions in Opposition to Respondent's Application for Transfer, that was not the holding of the Court of Appeals. It was simply *dictum* inserted into the Court of Appeals's opinion in order to explain how the result in this case is consistent with the law of this state generally. There was never an application of domestic relations law to the facts of this case.[1]

Second, the Fund contends that Appellant's benefits, like many other benefits under the Workers' Compensation statutes, do not "vest" until the moment a worker (or his dependent) is entitled to receive them. Thus, under the Fund's analysis, a worker has no "vested" right to receive temporary total disability ("TTD") benefits until the moment he has missed at least 14 days of work due to the injury; and a worker has no "vested" right in permanent partial disability ("PPD") benefits until the worker has reached maximum medical improvement. (Substitute Brief of Respondent, page 9.) With regard to the present case, the Fund asserts that Appellant wasn't entitled to receive any benefits pursuant to § 287.230, R.S.Mo., until the time her husband died in 2009, after the statute was amended, so there is supposedly no retrospective application of the amendment; since her benefits were never "vested", the Fund claims, the new statute did not "divest" her of the benefits to which she

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[1]And, in passing, Appellant would point out that the law of domestic relations is a statutory creature as well, not "common law" as the Fund incorrectly claims at page 6 of its Substitute Brief. *See* Chapter 452, R.S.Mo.

would have been entitled.[2] (Substitute Brief of Respondent, pages 10-11.) All of these contentions are simply and unequivocally a misstatement of the law.

Missouri courts have repeatedly held that a Workers' Compensation claimant's rights to benefits are determined by the statute in effect at the time the claimant was injured. This principle was most clearly demonstrated after the 1993 changes to the Workers' Compensation laws. In 1993 the legislature amended Section 287.220.1, R.S.Mo., to require that a claimant meet minimum PPD thresholds in order to recover from the Second Injury Fund. The Eastern, Western and Southern Districts of the Court of Appeals all held in quick succession that such a claimant "had a vested right of recovery when he was injured that cannot be taken away by the retrospective application of the 1993 amendments to the statute." *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, at 408 (Mo.App.W.D. 1996). *See also Smart v. Missouri State Treasurer*, 916 S.W.2d 367, at 369 (Mo.App.S.D. 1996) and *Faulkner v. Chrysler Corporation*, 924 S.W.2d 866, at 867 (Mo.App.E.D. 1996): ("[A] right to compensation from the Second Injury Fund may not be divested by retroactive legislation" and the new "1993 fifty week 15% threshold is not applicable to cases involving injuries which occurred before the amendment took effect").

In reality, the misuse of the "vesting" concept in this case was simply another trial

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[2]This is exactly the opposite argument to the one the Fund took initially on appeal, when it argued that Appellant's rights as a dependent were subject to *divestment* upon the enactment of § 287.230.3. *See* Respondent's Brief to Court of Appeals at page 6.

balloon floated by the LIRC, and now the Fund, as a haphazard and apparently random attempt to avoid the law stated by this Court in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007).[3]

It is important to note "vesting" is not a concept mentioned anywhere in the relevant statutes cited by the Fund (and, before it, the LIRC). The "vesting" concept was wholly volunteered by the LIRC in its Award based on unrelated case law, without any relevant statutory reference to Chapter 287. (L.F. 43-44.)[4] As Appellant has stated in both her Suggestions in Opposition to Respondent's Application for Transfer and her principal Substitute Brief, and as the Court of Appeals held, a dependent's rights are determined--in effect, vested – at the time of the employee's injury. The statute itself, § 287.240(4), R.S.Mo., determines a dependent's status based on the facts which existed "*at the time of the injury.*" The Fund argues that *Schoemehl*, *supra*, does not stand for the proposition that

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[3] For example, the LIRC awarded *Schoemehl* benefits in the claims of *Daniel Gruendler* (A12 – A23), *Kenneth Tilley* (A24 – A43), *Michael Webb* (A44 – A59) and *Willie White* (A60 – A61), while denying those same benefits in *Cheryl Goad* (A1 – A11) and the present case. Copies of these other, inconsistent LIRC awards can be found in the Appendix to Appellant's Substitute Reply Brief filed herewith.

[4] *Cf. Carr v. North Kansas City Beverage Co.*, 49 S.W.3d 205, at 207 (Mo.App.W.D. 2001): "an administrative agency has only such jurisdiction or authority as may be granted by the legislature."

Appellant's rights and status as a dependent were determined at the time of the injury, but only at the time of Gary Gervich's death. (Substitute Brief of Respondent, page 8.) But *Schoemehl,* at 217 S.W.3d 902, makes specific reference to § 287.240.4 as the provision for determining dependency as being determined "*at the time of the injury.*" [Emphasis in original.] The Courts of Appeals have consistently held that the statutory amendments abrogating *Schoemehl* are not retroactive, and will only apply to claims initiated after the effective date of those amendments. *See Bennett v. Treasurer of the State of Missouri*, 271 S.W.3d 49 (Mo.App.W.D. 2008), and *Tilley v. USF Holland*,325 S.W.3d 487 (Mo.App.E.D. 2010).

Finally, and most convincing of all, is the simple fact that this Court, in *Strait v. Treasurer of Missouri*, 257 S.W.3d 600 (Mo.banc 2008), took the opportunity to restate the holding in *Schoemehl* ***after*** the amendments to the statute became effective. This Court could easily have taken the opportunity afforded it by *Strait* to close the door to all future dependents seeking benefits under the law as stated in *Schoemehl*. But this Court, recognizing the restrictions imposed by Article 1, Section 13 of the Constitution of Missouri, properly chose not to apply the amendments retroactively. This is not a novel position. *See, e.g. Fletcher v. Peck*, 10 U.S. 87 (6 Cranch 87), at 135 (1810)**:** "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest [*sic*] those rights".

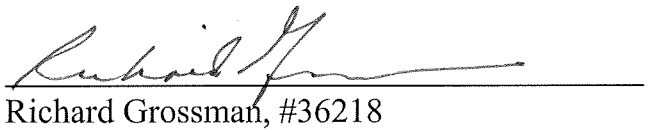
The Fund did not request, either in its Application for Transfer or in its Substitute Brief, that this Court overrule or even re-examine the law set out in *Strait*, *Schoemehl*,

Taylor, *Bennett*, or *Tilley*. Indeed, it appeared to accept the results of *Strait* and *Schoemehl*, albeit misinterpreting their meaning and implications for the present case. Therefore, this Court should follow precedent, the statutes and logic, and end the Fund's and the LIRC's continuing *ad hoc* efforts to undermine them.

CONCLUSION

Appellant requests this Court to reverse the Labor and Industrial Commission's Award as a matter of law and thereby find in favor of Appellant on her claim for an award of continuing permanent and total disability benefits against the Second Injury Fund during Appellant's lifetime.

Respectfully submitted,



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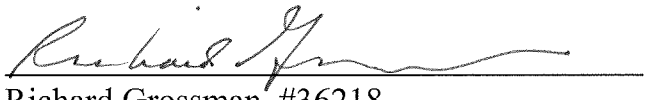
Certificate of Rule 84.06(c) Compliance

The undersigned counsel for Appellant hereby certifies that this brief consists of 1657 words (excluding the cover, Certificate of Service, signature block, and this Certificate of Compliance) and was prepared using Corel WordPerfect X3 for Windows, utilizing Times New Roman Font, 13-point type, in full compliance with the limitations and guidelines established under Rules 55.03, Rule 84.06(c), and Local Rule 360.

The undersigned further certifies that the electronically filed documents forwarded to the Court and to opposing counsel have been scanned for viruses utilizing Symantec Endpoint Protection for Windows, Program Version 11.0.6200.754, and have been found to be virus-free.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that opposing counsel has agreed to accept service in this matter by e-mail, and that an accurate copy of the above and foregoing was served electronically this 7th day of September, 2011, to:

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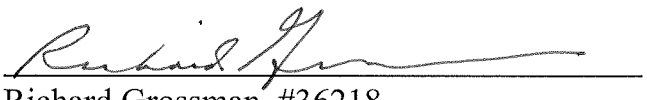

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