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“Split-Recovery” Survives: The Missouri Supreme Court Upholds the State’s Power to Collect One-Half of Punitive Damage Awards

*Fust v. Attorney General of Missouri*¹

I. INTRODUCTION

Rapidly increasing rates of tort litigation across the United States recently have been paralleled by astronomical increases in punitive damages awards.² These increases have led many commentators to call for tort reform generally,³ and for reform in the area of punitive damages specifically.⁴ Proposed solutions have ranged from absolute bans on punitive damage awards to punitive damage “caps” which are proportional to compensatory damage awards.⁵ “Split-recovery”⁶ statutes represent an increasingly popular method of mitigating the

1. 947 S.W.2d 424 (Mo. 1997).

2. “Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal.” *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part and dissenting in part); *but see* Theodore Eisenberg, et. al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) (an empirical study contending that punitive damages are substantially proportional to compensatory damage awards); Steven L. Hobson, *Recent Developments Affecting Punitive Damages*, 50 J. MO. B. 225, 229 (1994) (“[T]here is no empirical data demonstrating [an increase in frequency or size of punitive damage awards] to be a problem in Missouri.”); Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 74 (1992) (asserting that there is little empirical evidence for the proposition that punitive damage awards have increased greatly in size and frequency in recent years).

3. *See, e.g.*, Matthew J. Klaben, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 105 (1994) (citing David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1 (reporting on Quayle’s proposals for reforming the civil litigation system)).

4. *See* Klaben, *supra* note 3, at 105, for “[t]wo fundamental problems [which] caused reformers to focus their efforts on punitive damages.” For a different perspective, *see* Hobson, *supra* note 2, at 228 (“[S]ome commentators have suggested that opponents of exemplary damages have politicized the debate over punitive damages as part of an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefitting themselves.”).

5. Klaben, *supra* note 3, at 108.

6. *See* *Recent Case, Eight Amendment Punitive Damages—Florida Supreme Court Upholds “Split-Recovery” Statute—Gordon v. State*, 106 HARV. L. REV. 1691 (1993)

problem.⁷ These statutes allow a state to collect a portion of an award of punitive damages, typically for deposit into the state's general revenue or into a fund specified by, and often created by, the statute.⁸

To date, eleven states, including Missouri, have enacted split-recovery statutes,⁹ which have been hailed as an effective way to deal with many of the problems presented by punitive damage awards.¹⁰ However, much litigation has arisen regarding the constitutionality of split-recovery statutes. These challenges have been initiated both by plaintiffs, who lose part of their punitive damages awards to the state,¹¹ and defendants, who must pay a portion of the damages assessed against them to the state.¹² Although most split-recovery statutes have survived such constitutional attacks,¹³ the statutes still are heavily debated among legal commentators and scholars.

In *Fust v. Attorney General of Missouri*, the Supreme Court of Missouri upheld the validity of Missouri's split-recovery statute. Missouri's statute deems fifty percent of any punitive damage award to be rendered in favor of the State of Missouri to be deposited into the "Tort Victims' Compensation Fund" created

(using the label "split recovery" to describe these statutes); Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damages Dilemma*, 21 PEPP. L. REV. 857 (1994) (same); Klaben, *supra* note 3 (same). These statutes are also labeled "state-allocation" statutes. See Paul F. Kirgis, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843 (1993).

7. For a comprehensive overview of the validity, construction, and application of split-recovery statutes, see Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damage Awards be Paid Directly to State or Court Administered Funds*, 16 A.L.R. 5th. 129 (1994).

8. *E.g.*, Missouri's split-recovery statute provides for collected monies to be deposited in the "Tort Victims' Compensation Fund," which was created by the statute. MO. REV. STAT. § 537.675(1) (1988).

9. See COLO. REV. STAT. ANN. § 13-21-102 (West 1997) (repealed); FLA. STAT. ANN. § 768.73 (West 1997) (repealed); GA. CODE ANN. § 51-12-5.1(e) (Supp. 1994); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1992); IND. CODE ANN. § 34-4-34-6 (West 1997); IOWA CODE ANN. § 668A.1 (West 1996); KAN. STAT. ANN. § 60-3402 (1996); MO. REV. STAT. § 537.675 (1994); N.Y. CIV. PRAC. L. & R. 8701 (McKinney Supp. 1994) (statute expired by virtue of its sunset clause); OR. REV. STAT. § 18.540(1) (1991 & Supp. 1993); UTAH CODE ANN. § 78-18-1(3) (1992).

10. See, *e.g.*, Klaben, *supra* note 3, at 157; Stevens, *supra* note 6, at 908; Kirgis, *supra* note 6, at 873.

11. See, *e.g.*, *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Kirk v. Denver Pub'g Co.*, 818 P.2d 262 (Colo. 1991); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991).

12. See, *e.g.*, *Spaar v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413 (Or. Ct. App. 1994).

13. Only two courts have found a state's split-recovery statute to be unconstitutional. See *McBride*, 737 F. Supp. at 1579; *Kirk*, 818 P.2d at 264.

by the statute.¹⁴ In rejecting the plaintiffs' arguments that the statute was unconstitutional, the court reached the same result as a majority of other jurisdictions presented with the same issue.¹⁵ In doing so, the court has upheld the validity of a statute that ostensibly ameliorates some of the problems associated with punitive damage awards. Two questions, however, remain at issue. The first is whether the Missouri government will begin enforcing the statute and promulgate rules providing for disbursement from the Tort Victims' Compensation Fund, thereby benefitting the class of persons to be served by the split-recovery statute. The second is whether Missouri's split-recovery statute can survive future constitutional attacks, based upon grounds other than those raised in *Fust*.

II. FACTS AND HOLDING

In April 1994, a jury returned a verdict in favor of Carl and Rita Fust at the conclusion of their malicious prosecution action against David Francois and Butler Hill Investment, Inc.¹⁶ After a bifurcated punitive damages phase of the trial, Carl Fust was awarded \$375,000 in punitive damages against each defendant, and Rita Fust was awarded \$450,000 in punitive damages against each defendant.¹⁷ This award, as well as the award of compensatory damages, subsequently was reduced at a post-trial remittitur.¹⁸ Defendant Francois

14. Section 537.675 of the Missouri Revised Statutes provides, in full:

1. There is created the "Tort Victims' Compensation Fund." Unexpended moneys in the fund shall not lapse at the end of the biennium as provided in Section 33.080 of Missouri's Revised Statutes.

2. Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the state of Missouri. The circuit clerks shall notify the attorney general of any final judgment awarding punitive damages rendered in their circuits. With respect to such fifty percent, the attorney general shall collect upon such judgment, and may execute or make settlements with respect thereto as he deems appropriate for deposit into the fund.

3. The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding under this section.

4. No disbursement shall be made from the tort victims' compensation fund until procedures for disbursement are established by further action of the general assembly.

15. See *supra* note 13 and accompanying text.

16. *Fust v. Francois*, 913 S.W.2d 38, 43 (Mo. Ct. App. 1995).

17. *Id.*

18. *Id.* Although the opinion in *Fust v. Attorney General* states that the Fusts' final, combined punitive damages award totaled \$330,000, the actual post-remittitur award entitled Carl Fust to collect \$150,000 from *each* defendant, and entitled Rita Fust to collect \$180,000 from *each* defendant, for a combined punitive damages award of \$660,000. *Francois*, 913 S.W.2d at 43-44. As for post-remittitur compensatory

appealed to the Court of Appeals for the Eastern District of Missouri, which affirmed the judgment of the trial court.¹⁹

The Fusts then initiated the present action in the Circuit Court of Cole County, Missouri.²⁰ The Fusts sought a declaratory judgment that Section 573.675 of the Revised Statutes of Missouri was unconstitutional.²¹ That statute provides, in part, that “[f]ifty percent of any final judgment awarding punitive damages . . . shall be deemed rendered in favor of the state of Missouri,”²² to be deposited in the “Tort Victims’ Compensation Fund” created by the statute.²³ After both parties moved for summary judgment, the circuit court denied the Fusts’ motion and granted the defendants’ motion.²⁴

Appealing to the Supreme Court of Missouri,²⁵ the Fusts made a multi-pronged attack as to the constitutionality of Section 537.675. First, they argued that House Bill 700, which was the basis for Section 537.675, contained more than one subject,²⁶ and that the subject matter of the statute was not contained in the title of the bill,²⁷ in contravention of article III, section 23²⁸ of the Constitution of the State of Missouri. Second, they contended that the statute attempts to grant public monies to private persons,²⁹ in violation of article III, Section 38(a)³⁰ of the Missouri Constitution. Third, the Fusts asserted that the statute directs that monies received by Missouri go into a fund other than the state treasury, and authorizes disbursement without appropriation,³¹ thus violating article III, section 36³² of the Missouri Constitution. Fourth, they

damages, Carl Fust was awarded \$200,000 jointly and severally, and Rita Fust was awarded \$240,000 jointly and severally. *Id.* at 43.

19. *Francois*, 913 S.W.2d at 42.

20. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 427 (Mo. 1997).

21. *Id.*

22. MO. REV. STAT. § 573.675(2) (Supp. 1997).

23. MO. REV. STAT. § 537.675(1) (Supp. 1997).

24. Statement, Brief and Argument of Appellants at 1, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 424 (Mo. 1997) (79416).

25. “The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state” MO. CONST. art.V, § 3.

26. Statement, Brief and Argument of Appellants at 12-31, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 427 (Mo. 1997) (79416).

27. *Id.*

28. “No bill shall contain more than one subject which shall be clearly expressed in its title” MO. CONST. art. III, § 23.

29. Statement, Brief and Argument of Appellants at 43-44, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 429 (Mo. 1997) (79416).

30. “The general assembly shall have no power to grant public money or property . . . to any private person. . . .” MO. CONST. art. III, § 38(a).

31. Statement, Brief and Argument of Appellants at 44-47, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 430 (Mo. 1997) (79416).

32. “All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the

argued that the statute violates the separation of powers³³ prescribed by article II, section 1,³⁴ and article V, section 1,³⁵ of the Missouri Constitution. Fifth, the Fusts claimed that the statute violates the “certain remedy”³⁶ provision of article I, section 14³⁷ of the Missouri Constitution. Sixth, they argued that the statute denied them the natural right to the enjoyment of the gains of their own industry,³⁸ in contravention of article I, section 2³⁹ of the Missouri Constitution. Seventh, the Fusts contended that the statute deprived them of their property without due process of law,⁴⁰ in violation of article I, section 10⁴¹ of the Missouri Constitution. Finally, the Fusts asserted that the statute violates the Equal Protection Clause⁴² of the Constitution of the United States,⁴³ and, similarly, is

withdrawal of money from the treasury, except in pursuance of appropriations made by law.” MO. CONST. art. III, § 36.

33. Statement, Brief and Argument of Appellants at 47-51, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 430 (Mo. 1997) (79416).

34. “The powers of government shall be divided into three distinct departments—the legislature, executive and judicial—each of which shall be confided to a separate magistracy, and no person . . . shall exercise any power properly belonging to either of the others . . .” MO. CONST. art. II, § 1.

35. “The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.” MO. CONST. art. V, § 1.

36. Statement, Brief and Argument of Appellants at 55-56, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (79416).

37. “That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character . . .” MO. CONST. art. I, § 14.

38. Statement, Brief and Argument of Appellants at 56-57, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (79416).

39. “[T]hat all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry . . .” MO. CONST. art. I, § 2.

40. Statement, Brief and Argument of Appellants at 51-54, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (79416).

41. “That no person shall be deprived of life, liberty or property without due process of law.” MO. CONST. art. I, § 10.

42. Statement, Brief and Argument of Appellants at 54-55, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (79416).

43. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. Amend. XIV, § 1.

a “special law”⁴⁴ prohibited by article III, section 40⁴⁵ of the Missouri Constitution.

The Supreme Court of Missouri, in a unanimous opinion written by Chief Justice Holstein, rejected each of the Fusts’ arguments, holding that Section 537.675 of the Revised Statutes of Missouri is constitutional, thereby upholding the power of the State of Missouri to collect one-half of punitive damage awards.⁴⁶

III. LEGAL BACKGROUND

A. Policy Considerations of Punitive Damage Awards

As the rate of tort litigation increased in the United States over the last few decades, cries for tort reform resounded across the nation.⁴⁷ Those advocating such reform often seized upon the issue of punitive damages, citing the exponential growth, in both frequency and individual size, of such awards.⁴⁸ Many of the arguments advanced and solutions proposed by scholars and commentators have merit. However, the concept of punitive damage awards appears to be far from altogether abandoned, and most scholars concede that such awards serve desirable ends.⁴⁹

The existence of punitive damages may be traced through history for thousands of years.⁵⁰ The concept of allowing a plaintiff to recover beyond damages actually sustained was certainly alive and well at English common law,⁵¹ and survives today in almost every American state.⁵² Although there is

44. Statement, Brief and Argument of Appellants at 54-55, *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (79416).

45. “The general assembly shall not pass any local or special law: . . . (4) . . . providing or changing methods for the . . . enforcing of judgments . . .” MO. CONST. art. III, § 40. A special law “includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Fust*, 947 S.W.2d at 432 (citing *Batek v. Curators of the Univ. of Mo.*, 920 S.W.2d 895, 899 (Mo. 1996) (omission in original)).

46. *Fust*, 947 S.W.2d at 433.

47. See, e.g., Margolick, *supra* note 3.

48. See *supra* note 2; Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

49. One author has even suggested that “without punitive damages, the people of America could find themselves driving repainted, exploding Ford Pintos while washing down unsafe drugs with scalding coffee.” Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 468 (1998).

50. Shores, *supra* note 2, at 62-63 (tracing punitive damages back to the Covenant Code, or Law of Moses, and the Code of Hammurabi of ancient Babylon).

51. JAMES D. GHIRARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW & PRAC.

some disagreement, most commentators concur on the basic principles and goals justifying such non-compensatory awards. Of these rationales, the most often cited are: 1) punishment and deterrence of defendants and others prone to engage in the tortious conduct;⁵³ 2) providing plaintiffs with incentive to bring suit in cases which would otherwise be too costly or which hold little potential recovery;⁵⁴ 3) compensating plaintiffs for their non-pecuniary losses, which are often difficult to determine and quantify;⁵⁵ and 4) compensating plaintiffs for litigation expenses, particularly attorney's fees.⁵⁶

The most common argument for punitive damages is that they serve to punish the defendant for his conduct, and deter him and others from engaging in the undesirable conduct in the future.⁵⁷ Compensatory awards are viewed by some as insufficient to achieve these goals; punitive damages are required so as to greater "hurt" the defendant.⁵⁸ Punishment, in turn, is viewed as desirable, as the effects include giving the plaintiff the satisfaction of seeing the defendant suffer the punishment, benefitting the public at large, rewarding law-abiders by reinforcing their confidence in the legal system, and re-educating the wrongdoer and allowing her to atone for her wrongs.⁵⁹ Deterrence of future wrongdoings, both by the original tortfeasor and others, is similarly desirable, and is promoted by punitive damages and the consequential negative publicity.⁶⁰

The potential for an award of punitive damages also may give some plaintiffs, whose costs would otherwise be too great or potential recovery too

§ 1.01 (1997). (comprehensive survey of punitive damage awards, including the historical perspective, rationale, and constitutionality of such awards).

52. However, some states do not allow punitive damages to be assessed against certain defendants, or in certain situations. *See, e.g.*, ALA. CODE § 6-11-26 (1997) (prohibiting punitive damages against any state agency); COLO. REV. STAT. § 13-21-102 (1997) (prohibiting punitive damages in administrative proceedings or arbitration). Other states do not allow punitive damage awards at all, or only when punitives are specifically authorized by statute. *See, e.g.*, *Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960) ("It has been a fundamental rule of law in this state [Nebraska] that punitive, vindictive, or exemplary damages will not be allowed . . ."); N.H. REV. STAT. ANN. § 507:16 (1986) (prohibiting punitive damage awards unless authorized by statute).

53. *See* GHIARDI, *supra* note 51, at §§ 2.01-2.09; Stevens, *supra* note 6, at 861-62.

54. Stevens, *supra* note 6, at 862-64.

55. *Id.* at 864-86.

56. *Id.* at 866-67.

57. *But see* LINDA L. SCHLUETTER & KENNETH R. REDDEN, PUNITIVE DAMAGES, § 2.2(A)(2) (3d. ed. 1995) (asserting that the purpose of civil law is compensation, not punishment); GHIARDI, *supra* note 51, § 2.09 (stating that it is "highly unlikely" that punitive damages have a general deterrent effect except as to those with legal knowledge).

58. Stevens, *supra* note 6, at 861.

59. Hobson, *supra* note 2, at 225-26.

60. Stevens, *supra* note 6, at 861-62.

small, an incentive to bring suit against those who have wronged them.⁶¹ As a corollary, punitive damages are seen as a “reward” for plaintiffs who have expended time and money in the litigation process.⁶² However, although society certainly has an interest in “preventing those who recklessly injure others or who commit socially unacceptable acts from escaping punishment,”⁶³ a major criticism of punitive damages is that the incentive to litigate is so great that undesirable levels of litigation result.⁶⁴

Beyond these “universally recognized”⁶⁵ policy considerations, some commentators suggest that punitive damages serve to compensate plaintiffs for non-pecuniary injuries that are often difficult to determine and that remain unaccounted for in an award of compensatory damages.⁶⁶ Likewise, punitive damages may be viewed as a way to compensate plaintiffs for litigation expenses, particularly attorneys’ fees.⁶⁷ Because these expenses usually are quite substantial, a plaintiff who is “made whole” by an award of compensatory damages is still likely to sustain a pecuniary loss.⁶⁸ Nonetheless, most legal scholars have disavowed these as legitimate purposes of punitive damage awards,⁶⁹ and the United States Supreme Court has expressly rejected the former.⁷⁰

The Supreme Court of Missouri recently reiterated the purpose of punitive damages in Missouri, which is “to inflict punishment and to serve as an example and a deterrent to similar conduct.”⁷¹ An award of punitive damages in Missouri is appropriate if a defendant “showed complete indifference to or a conscious disregard for the safety of others;”⁷² such conduct must be proven by “clear and convincing” evidence.⁷³ As the purpose of punitive damages in Missouri is not to compensate the plaintiff, no particular relationship between the amount of compensatory damages and the amount of punitive damages is required, although the relationship must, at minimum, be “reasonable.”⁷⁴ A jury in Missouri therefore has great discretion in awarding punitive damages, and may consider such factors as: the degree of the defendant’s malice; the age, sex, health, character, and financial worth of the plaintiff; the injury the plaintiff has

61. Stevens, *supra* note 6, at 862.

62. Stevens, *supra* note 6, at 863.

63. Stevens, *supra* note 6, at 862.

64. Stevens, *supra* note 6, at 864.

65. Stevens, *supra* note 6, at 861.

66. Stevens, *supra* note 6, at 864-66.

67. Stevens, *supra* note 6, at 866-67; *but see* GHIARDI, *supra* note 51, § 2.11.

68. Stevens, *supra* note 6, at 866.

69. Stevens, *supra* note 6, at 865.

70. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

71. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. 1996).

72. *Id.*; MAI 10.02 [1996 Revision].

73. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1997).

74. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 365 (Mo. Ct. App. 1993).

suffered; the intelligence, affluence, financial worth, and character of the defendant; and any other circumstances surrounding the defendant's act, including mitigating and aggravating circumstances.⁷⁵

B. Policy Considerations of Split-Recovery Statutes

Punitive damages have been criticized for a myriad of reasons. Some critics believe that the two major justifications of such damages, punishment and deterrence, should have no home in the civil law.⁷⁶ Others, citing the great discretion afforded a jury in determining such an award,⁷⁷ contend that punitive damages are used to unjustly redistribute wealth, particularly when the defendant is a corporation.⁷⁸ The most common argument against punitive damages, however, is that they allow a plaintiff who has already been compensated for his actual losses to receive a large windfall.⁷⁹ Advocates of tort reform in this area argue that such a windfall does little, if anything, to promote the goals espoused by defenders of punitive damages.⁸⁰

As noted, the most compelling argument for the existence of punitive damages in today's legal system is the two-fold effect of punishment and deterrence.⁸¹ However, allowing a plaintiff to retain a massive punitive damage award would appear to do little to further these considerations. While some commentators see such windfalls as necessary and inevitable consequences of punitive damages,⁸² others urge a more "judicious allocation of resources."⁸³ Split-recovery statutes directly address this issue. Under such a statute, the state collects a portion of a punitive damage award; this portion is typically deposited either in the state treasury or in a fund, often created by the statute, for the benefit of a certain class of persons. Thus, split-recovery statutes have been embraced as effective mechanisms for addressing the concerns of critics, without

75. *Id.*

76. *See supra* note 57.

77. *See supra* note 75 and accompanying text.

78. *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 377 (Mo. 1993).

79. "It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by the exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished." Gregory Nathan Hoole, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages: Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 464 (1996). *See Klaben, supra* note 3, at 105; Stevens, *supra* note 6, at 869.

80. *See generally* Hoole, *supra* note 79; Klaben, *supra* note 3, at 105; Stevens, *supra* note 6, at 869.

81. *See supra* notes 57-60 and accompanying text.

82. Stevens, *supra* note 6, at 869.

83. Stevens, *supra* note 6, at 869-70.

jeopardizing the interests to be served by awarding punitive damages in the first place.⁸⁴

As an additional benefit, split-recovery statutes may have the effect of discouraging unnecessary, excessive, and frivolous litigation.⁸⁵ Although one of the justifications for punitive damages cited by proponents is that they provide plaintiffs with an incentive to sue, this stimulus is viewed by some as having become far too great.⁸⁶ Particularly in today's legal system, where contingency fees may convince plaintiffs that they have little to lose by filing suit, the potential for a substantial recovery of punitive damages may invite such litigation.⁸⁷ Split-recovery statutes work to diminish this incentive, because any award recovered by the plaintiff must be shared with the state.

C. Constitutional Attacks on Split-Recovery Statutes

The constitutionality of split-recovery statutes has come into question in a number of states, under a multitude of theories, and with differing results in the courts. These attacks have come from both plaintiffs, who are allowed to collect only a portion of their punitive damage award,⁸⁸ and defendants, who must pay a portion of the punitive damages assessed against them to the state.⁸⁹ The arguments proffered in other jurisdictions have been numerous and of various efficacy. For the purposes of this Note, the issues discussed will be limited to the most common or compelling, as well as those "lesser" arguments that were also raised in *Fust*.

A recurring argument against split-recovery statutes is that they deny plaintiffs a property right without due process of law,⁹⁰ in contravention of the Fourteenth Amendment to the Constitution of the United States. One's right to due process prior to being deprived of life, liberty, or property consists of both substantive and procedural components.⁹¹ Unfortunately, the courts often fail to

84. Stevens, *supra* note 6, at 861-62.

85. Stevens, *supra* note 6, at 870-71.

86. Stevens, *supra* note 6, at 862-64.

87. E. Jeffrey Grube, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 858 (1993)

88. See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991); *Gordon v. State*, 603 So. 2d 800 (Fla. 1992); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612 (Iowa 1991).

89. See, e.g., *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413 (Or. Ct. App. 1994).

90. See, e.g., *Gordon*, 608 So. 2d at 802; *McBride*, 737 F. Supp. at 1569-70.

91. See WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1076-77 (10th ed. 1997) (explaining the "relationship between 'fair substance' and 'fair procedure'").

clarify whether they are concerned with the former or latter component.⁹² An examination of the cases will nonetheless help to elucidate the issues involved in determining whether a right to either substantive or procedural due process has been violated.

Plaintiffs challenging split-recovery statutes on substantive due process grounds have done so under both the Fourteenth Amendment to the United States Constitution⁹³ and the due process clauses of their respective state constitutions.⁹⁴ In both instances, courts have applied rational-basis review in analyzing the constitutionality of the particular split-recovery statute.⁹⁵ Under such review, the statute need only be rationally related to a legitimate state purpose.⁹⁶ Most statutes will survive such scrutiny because under rational-basis review, a statute is presumed to be constitutional, and the plaintiff has the burden of proving the contrary.⁹⁷

The results of substantive due process challenges to split-recovery statutes in other jurisdictions have differed. For example, in *Gordon v. State*⁹⁸ the Supreme Court of Florida upheld that state's split-recovery statute in the face of such a challenge.⁹⁹ The court held that the statute bore a rational relationship to the legitimate objectives of "allot[ing] to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims"¹⁰⁰ On the other hand, in *McBride v. General Motors Corp.*¹⁰¹ a Georgia federal district court did not think that the state's split-recovery statute furthered a legitimate governmental interest in raising revenue and declared the statute unconstitutional.¹⁰²

Distinct from substantive due process, procedural due process is a principle that serves to reduce the "mistakes" created by big government vis-à-vis one's property rights.¹⁰³ The doctrine requires that persons be afforded certain processes, such as notice and the opportunity for a fair hearing, before being deprived of liberty or a vested property right.¹⁰⁴ However, before reaching the

92. See, e.g., *McBride*, 737 F. Supp. at 1566.

93. "No State shall . . . deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV, § 1, cl.1.

94. See, e.g., Statement, Brief and Argument of Appellants at 51-54, *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo. 1997) (79416).

95. See, e.g., *Gordon*, 608 S.W.2d at 802; *McBride*, 737 F. Supp. at 1569-70.

96. Stevens, *supra* note 6, at 878.

97. *National. R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985).

98. 608 So. 2d 800 (Fla. 1992).

99. *Id.* at 802.

100. *Id.*

101. 737 F. Supp. 1563 (N.D. Ga. 1990).

102. *Id.* at 1569-70.

103. See COHEN & VARAT, *supra* note 91, at 1076.

104. See COHEN & VARAT, *supra* note 91, at 1076.

issue of exactly what process is due a person, it is necessary to establish that a liberty or property right is indeed implicated.¹⁰⁵ It is at this initial analytical level that procedural due process attacks on split-recovery statutes have failed or prevailed.¹⁰⁶

The United States Constitution does not create property rights.¹⁰⁷ "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ."¹⁰⁸ Thus, states that have confronted this issue have examined their own state law to determine whether punitive damages are a property right vested in a plaintiff throughout her cause of action. In *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates*,¹⁰⁹ the Supreme Court of Iowa answered that question in the negative and upheld its state's split-recovery statute.¹¹⁰ The court reiterated its position that punitive damages are not a matter of right but are merely discretionary.¹¹¹ Similarly, Missouri has long held the position that punitive damages awards, prior to entry of judgment, are not a property right vested in the plaintiff of a tort action.¹¹²

A theory similar to, and often blurred in the cases so as to be indistinguishable from, procedural due process is the idea that a split-recovery statute works an unconstitutional "taking" in contravention of the Fifth Amendment to the United States Constitution.¹¹³ The Fifth Amendment has long been held to apply to the states,¹¹⁴ thus, no state may take private property for public use without just compensation. However, most takings challenges have failed for the same reason that procedural due process arguments have failed: punitive damages are not a vested property right under state law.¹¹⁵ In *Mack Trucks, Inc. v. Conkle*,¹¹⁶ the Supreme Court of Georgia applied such an analysis

105. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property But the range of interests protected by procedural due process is not infinite [T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake." *Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972) (emphasis in original).

106. *See, e.g., Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997).

107. *Roth*, 408 U.S. at 577.

108. *Id.*

109. 473 N.W.2d 612 (Iowa 1991).

110. *Id.* at 619.

111. *Id.*

112. *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. Ct. App. 1983).

113. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST., amend V.

114. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

115. *See supra* notes 109-12 and accompanying text.

116. 436 S.E.2d 635 (Ga. 1993).

in upholding its state's split-recovery statute.¹¹⁷ On the other hand, in *Kirk v. Denver Publishing Co.*¹¹⁸ the Supreme Court of Colorado declared that "there is no question that under Colorado law a judgment for exemplary damages qualifies as a property interest," and struck down the state's split-recovery statute.¹¹⁹ As noted in the discussion on procedural due process, in Missouri, a plaintiff has no vested right in an award of punitive damages.¹²⁰

Challengers of split-recovery statutes also have attempted to strike down such legislation by employing equal protection arguments.¹²¹ Split-recovery statutes may discriminate in a number of ways, such as between state-court litigants and federal-court litigants,¹²² between plaintiffs who litigate and plaintiffs who settle out of court,¹²³ and between plaintiffs with differing causes of action, such as products liability plaintiffs and all other plaintiffs.¹²⁴ However, split-recovery statutes neither burden fundamental rights nor discriminate based upon race or any other suspect class, and as such are merely subject to rational-basis review.¹²⁵ Under such review, a discriminatory classification is valid if it bears a rational relation to a legitimate state interest.¹²⁶

As with due process attacks, the results of equal protection challenges to split-recovery statutes in other jurisdictions have been contradictory. In *Conkle*, the Supreme Court of Georgia found that the Georgia statute's distinction between products liability plaintiffs and all other tort plaintiffs was reasonable, in light of the state's interest in punishing products liability defendants without imposing unlimited liability and creating a multitude of plaintiff windfalls.¹²⁷ Likewise, in *Gordon* the Supreme Court of Florida held that the state's split-recovery statute did not violate equal protection.¹²⁸ In *McBride*, however, the

117. *Id.* at 639.

118. 818 P.2d 262 (Co. 1991).

119. *Id.* at 267.

120. See *supra* note 112 and accompanying text.

121. See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1576-77 (M.D. Ga. 1990); *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993);

122. This issue was raised, and rejected, in *Fust v. Attorney General*. Any argument as to this kind of discrimination would presumably fail, as the *Erie* doctrine would require a federal court to apply a state's substantive law, including a split-recovery statute.

123. No state's split-recovery statute attempts to collect a portion of an out-of-court settlement.

124. See, e.g., GA. CODE ANN. § 51-12-5.1(e) (Supp. 1994) (applying only to products liability actions); KAN. STAT. ANN. § 60-3402 (1996) (applying only to medical malpractice actions).

125. *Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997).

126. *Id.*

127. *Mack Truck, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993).

128. *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992).

court found such a classification to be “arbitrary and unreasonable,” and declared the statute unconstitutional.¹²⁹ Upon examination of Missouri’s split-recovery statute, it is clear that no distinction is made between plaintiffs with differing tort actions. However, the statute does discriminate between plaintiffs who fully litigate their cause of action and those who settle, as the statute applies only to “final judgments.”¹³⁰

Challenges to split-recovery statutes also have been pursued on the grounds that such statutes violate various provisions of state constitutions prohibiting a statute from dealing with more than a single subject or containing subject matter different from that expressed in the statute’s title.¹³¹ These arguments have been addressed in only a few jurisdictions; however, they are worth a brief examination because both claims also were raised in *Fust*.¹³²

The *McBride* court agreed that Georgia’s split-recovery statute violated that state’s constitution by containing subject matter different from that found elsewhere in the statute and different from that expressed in the title. The court held, without explanation, that the statute contained matter “different from what is expressed in the title of the Tort Reform Act,”¹³³ and that the subject matter of the statute was “matter other than that relating to torts.”¹³⁴ The Supreme Court of Georgia disagreed with the former point, however, and held in *Conkle* that the subject matter of the statute was not different from that expressed in the title of the statute.¹³⁵

Similar subject-matter and title requirements are imposed by the Missouri Constitution.¹³⁶ In Missouri, the single-subject-matter requirement is satisfied if each provision of the bill “fairly relates to the subject described in the title of a bill, has a natural connection to the subject, or is a means to accomplish the law’s purpose.”¹³⁷ As to the “clearly expressed” title requirement, this may be violated in only two ways: the title may be too “general or amorphous”¹³⁸ or the title may be so restrictive that a particular provision is rejected because it falls outside the scope of the subject.¹³⁹

129. *McBride v. General Motor’s Corp.*, 737 F. Supp. 1563, 1576-77 (M.D. Ga. 1990).

130. MO. REV. STAT. § 537.675(2) (1994).

131. *See, e.g., McBride*, 737 F. Supp. at 1578; *Conkle*, 436 S.E.2d at 639.

132. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 427-29 (Mo. 1997).

133. *McBride*, 737 F. Supp. at 1569.

134. *Id.*

135. *Conkle*, 436 S.E.2d at 639.

136. *See supra* note 28.

137. *Fust*, 947 S.W.2d at 428.

138. *Id.* (citing *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 n.3 (Mo. 1994)).

139. *Id.* (citing *Carmack v. Director*, Mo. Dept. of Agriculture, 945 S.W.2d 956 (Mo. 1997)).

Split-recovery statutes have been challenged on a number of theories beyond those discussed above. The purpose of this Note is not to discuss every one of these arguments at length. However, two additional theories, often raised by the defendant of the prior tort action, are common and worth mention. First, split-recovery statutes have been challenged as allowing excessive fines¹⁴⁰ in contravention of the Eighth Amendment to the United States Constitution.¹⁴¹ Second, defendants have argued that paying the punitive damages assessed against them to the state may raise double jeopardy implications,¹⁴² thereby violating the Fifth Amendment to the United States Constitution.¹⁴³ A brief survey of these issues will show that the constitutionality of Missouri's split-recovery statute has yet to be completely resolved.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,¹⁴⁴ the United States Supreme Court held that the "Excessive Fines [C]ause does not apply to awards of punitive damages between private parties."¹⁴⁵ However, the Court "left open the question whether a qui tam action, in which a private party brings suit in the name of the United States and shares in any award of damages would implicate" the Excessive Fines Clause.¹⁴⁶ Although under a split-recovery statute the state does not become a named party in the action, many commentators believe that the Court implicitly was stating that such a sharing of a punitive damage award with the government would trigger the Excessive Fines Clause.¹⁴⁷ However, these commentators often overlook other important language in *Browning-Ferris*: the Court expressly declined to decide whether the Eighth Amendment even applies to the states through the incorporation doctrine.¹⁴⁸ A number of courts have analyzed the constitutionality

140. See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1577-78 (M.D. Ga. 1990); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868-69 (Iowa 1994); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413, 423 (Or. Ct. App. 1994).

141. "Excessive bail shall not be required, nor excessive fines imposed . . ." U.S. CONST. amend. VIII.

142. See, e.g., *Burke v. Deer*, 780 F. Supp. 1225, 1242 (W.D. Iowa 1991); *Spaur*, 510 N.W.2d at 868-69.

143. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

144. 492 U.S. 257 (1989).

145. *Id.* at 263-64.

146. *Id.* at 276.

147. See *Stevens*, *supra* note 6, at 888-89.

148. 492 U.S. at 276. "[W]e need not answer several questions that otherwise might be necessarily antecedent to finding the Eighth Amendment's Excessive Fines Clause applicable to an award of punitive damages We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment"

of split-recovery statutes under the Excessive Fines Clause without even addressing this critical issue.¹⁴⁹

Only one court has cited a violation of the Excessive Fines Clause in striking down a state's split-recovery statute. In *McBride*, the court felt that Georgia's split-recovery statute "convert[ed] the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State"¹⁵⁰ Beyond the fact that incorporation was not discussed in *McBride*, two other issues are noteworthy. First, the decision is clearly contradictory to the majority of courts: *Burke v. Deere*,¹⁵¹ *Spaur v. Owens-Corning Fiberglas Corp.*,¹⁵² and *Tenold v. Weyerhaeuser*¹⁵³ all addressed this issue and found no constitutional violation. Second, whatever the court believed the nature of the statute had become, the Excessive Fines Clause was not an appropriate tool for striking down the statute as facially invalid. Regardless of whether the statute exacted a fine on persons for the benefit of the state, only *excessive* fines are prohibited. Such excessiveness can be determined only by a case-by-case analysis.¹⁵⁴ Nonetheless, *McBride* is useful in showing that there are other arguments, unaddressed in *Fust*, that may convince a court to strike down a split-recovery statute.

Split-recovery statutes also have been challenged as violating the Double Jeopardy Clause of the United States Constitution. In *United States v. Halper*,¹⁵⁵ the United States Supreme Court recognized that the imposition of punitive damages in a civil suit may subject a defendant to double jeopardy if the person already has been criminally convicted for his offense.¹⁵⁶ The Court held that if the civil action was punitive, rather than remedial in nature, the action qualifies as punishment and triggers the Double Jeopardy Clause.¹⁵⁷ Indeed, the purpose

149. See *supra* note 140. None of these cases specifically addressed the issue of whether the Excessive Fines Clause applies to the states.

150. *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990).

151. 780 F. Supp. 1225, 1242 (W.D. Iowa 1991) *rev'd on other grounds*, 6 F.3d 497 (8th. Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

152. 510 N.W.2d 854, 868-69 (Iowa 1994).

153. 873 P.2d 413, 423 (Or. Ct. App. 1994).

154. See *Recent Case*, *supra* note 6, at 1696.

155. 490 U.S. 435 (1989).

156. *Id.* at 452. But see Kirgis, *supra* note 6, at 867. "If the decision stands as written, it raises almost insurmountable practical problems. If a criminal prosecution bars a subsequent civil punitive recovery, then a punitive recovery must bar a subsequent criminal prosecution. Because the regulatory branches of the government do not act in concert with the criminal branch, that proposition raises the prospect of a penalty imposed by the Internal Revenue Service barring a criminal prosecution for the same conduct. A rule requiring such a result seems unlikely to survive." Kirgis, *supra* note 6, at 867.

157. *Id.* at 449-50.

of punitive damages in most states, including Missouri, is to punish and deter the defendant.¹⁵⁸

It remains unclear whether a split-recovery statute, under which a state does not prosecute nor is named in the action, but merely shares in the award of punitive damages, implicates the Double Jeopardy Clause.¹⁵⁹ Two courts, however, have answered that question in the negative. In *Spaur*, the Iowa Supreme Court focused on the fact that the state had neither prosecuted the action nor attempted to raise revenue via fines, and held that the limited nature of the state's interest was insufficient to render the statute criminal in nature so as to trigger the Double Jeopardy Clause.¹⁶⁰ Likewise, the *Burke* court rejected a double jeopardy claim, stating only that the defendant "fail[ed] to put forward any meaningful argument in this area"¹⁶¹

IV. INSTANT DECISION

In a unanimous decision, the Supreme Court of Missouri rejected each argument advanced by the Fusts as to the unconstitutionality of Section 537.675 of the Revised Statutes of Missouri. The Court was presented with three issues that have been the bases of constitutional challenges to split-recovery statutes in other jurisdictions: procedural due process, equal protection, and the single-subject/clear title provisions of state constitutions.

The procedural due process challenge by the Fusts was easily disposed of by the court. The court held that when the Fusts' claim against the defendants in the original action arose, "they acquired no more than a 50% interest in such judgment as would be entered for punitive damages."¹⁶² Also, the court noted that the "Constitution does not forbid the . . . abolition of old [rights] recognized by the common law."¹⁶³ The court distinguished the case from the one presented in *Kirk*, noting that the Colorado statute attempted to take away property "once vested by a judgment."¹⁶⁴ In Missouri, on the other hand, a plaintiff *never* has a greater interest in more than one-half of a punitive damages judgment.¹⁶⁵ The

158. *See supra* notes 57-60 and accompanying text.

159. "Central to the theory of double jeopardy is the idea that the government should not use its power and resources to subject a defendant to repeated prosecutions. Therefore, a court may find that the mere diversion of money to the government does not by itself distinguish that type of action from a private civil action immune from double jeopardy analysis." Kirgis, *supra* note 6, at 866.

160. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868-69 (Iowa 1994).

161. *Burke v. Deer*, 780 F. Supp. 1225, 1242 (W.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th. Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994)

162. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997).

163. *Id.*

164. *Id.*

165. *Id.*

court also disagreed with the implication of the *Kirk* court “that a plaintiff has a greater property interest in a judgment upon a tort claim than the interest recognized by law when the claim accrued.”¹⁶⁶ As a punitive damages award does not constitute a property interest in Missouri, the court did not need to inquire further as to whether the Fusts had been denied due process of law.

Similarly, the court rejected the Fusts’ contention that Section 537.675 violates equal protection of the law, and is similarly a “special law” prohibited by article III, section 40 of the Missouri Constitution. The Fusts argued a violation of equal protection principles under two theories. First, they claimed that the statute unconstitutionally discriminates between those plaintiffs who fully litigate their tort actions and those who settle out of court.¹⁶⁷ Second, they contended that the statute unconstitutionally discriminates between those plaintiffs who sue in federal court and those who sue in state court.¹⁶⁸

As to the first claim, the court declared that since the legislation did not “employ suspect classifications or impinge on fundamental rights,”¹⁶⁹ a rational basis standard of review was appropriate. The court stated that such legislation is presumed to be rational and that the Fusts had failed to meet their burden to prove otherwise.¹⁷⁰ The court intimated various reasons as to why such distinctions by the statute are rational, including that the legislature may have wished to encourage settlement, the legislature may have believed it would be simpler to collect its portion if the award was pursuant to a final judgment, or the legislature may have wished to avoid enforcement difficulties.¹⁷¹ As to the Fusts’ contention that the statute unconstitutionally discriminates between federal and state litigants, the court noted that the statute itself makes no such distinction, and that the one case relied upon by the Fusts in drawing this distinction had been erroneously interpreted by the Fusts.¹⁷²

Likewise, the court held that the statute was not a “special law” prohibited by article III, section 40 of the Missouri Constitution.¹⁷³ The court stated that a “special law” is one that “includes less than all who are similarly situated . . . but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.”¹⁷⁴ Again, the court held that the legislature acted reasonably in discriminating between plaintiffs who litigate and plaintiffs who settle.¹⁷⁵

166. *Id.*

167. *Id.* at 431-32.

168. *Id.* at 432.

169. *Fust*, 947 S.W.2d at 432.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* (citing *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996) (omission in original)).

175. *Fust*, 947 S.W.2d at 432.

The court also dismissed a two-pronged attack on House Bill 700, which was the basis for Section 537.675. As to both of these contentions, the court held that the Fusts had failed to sustain the burden necessary to prove the unconstitutionality of a statute.¹⁷⁶

The first prong of this assault claimed that the bill contravened article III, section 23 of the Missouri Constitution, in that the bill contained more than one subject.¹⁷⁷ The Fusts argued that the fact that the bill contained a variety of provisions, ranging from the regulation of liability insurance carriers to the establishment of the Tort Victims' Compensation Fund, clearly contravened this constitutional mandate.¹⁷⁸ However, the court made it clear that the single-subject requirement would be satisfied if "all provisions of the bill fairly relate to the same subject, have a natural connection therewith, or are incidents or means to accomplish its purpose."¹⁷⁹ The court emphasized that the test focuses on the subject of the bill as set out in the title and whether each individual provision fairly relates to the subject in the title.¹⁸⁰ Because the title of House Bill 700 explicitly stated that it was enacted "for the purpose of assuring just compensation for certain persons' damages,"¹⁸¹ the court held that this constitutional provision was satisfied.¹⁸²

The second prong of this attack on House Bill 700 argued that the subject of the bill was not "clearly expressed" in the bill's title.¹⁸³ The court discussed two ways in which this provision may be violated: the subject may either be so general as to violate the single subject requirement, or may be so restrictive that certain provisions fall outside the scope of the subject as expressed in the title.¹⁸⁴ The Fusts claimed that the latter of these situations existed with regard to House Bill 700. However, the court noted that nothing in the title restricted the subject in such a way that the statute could not apply to punitive damages rather than actual damages, nor did the words "just compensation" necessarily exclude reference to tort cases where the plaintiff seeks punitive damages.¹⁸⁵ The court also briefly discussed the former argument, noting that the title of the bill was not so amorphous or general as to prevent it from being valid.¹⁸⁶

Beyond the preceding arguments, the court was presented with a number of arguments which have not been addressed in other jurisdictions with respect to split-recovery statutes. First, the Fusts contended that Missouri's split-

176. *Id.* at 429.

177. *Id.* at 427-28.

178. *Id.* at 428.

179. *Id.* (citing *Akin v. Director of Rev.*, 934 S.W.2d 295, 301 (Mo. 1996)).

180. *Fust*, 947 S.W.2d at 428.

181. *Id.* at 427.

182. *Id.* at 428.

183. *Id.*

184. *Id.*

185. *Id.* at 429.

186. *Id.*

recovery statute unconstitutionally attempts to grant public monies to private persons, in violation of article III, section 38(a) of the Missouri Constitution.¹⁸⁷ However, the court refuted this argument by noting that such a grant is constitutional if it serves a public purpose.¹⁸⁸ Because the creation of a fund to “compensate certain tort victims who might otherwise be forced to rely on public assistance” is a valid public purpose, the court held that the statute does not contravene article III, section 38(a).¹⁸⁹

Two further assertions by the Fusts were that Section 537.675 directs that monies go into a fund other than the treasury, and that the statute authorizes distribution of those monies without appropriation, both in violation of article III, section 3 of the Missouri Constitution.¹⁹⁰ The court summarily dismissed these assertions. First, the court declared that the Missouri Constitution does not prohibit the legislature from creating special funds within the treasury, and that absent such a prohibition, the power of the General Assembly is plenary.¹⁹¹ Second, the court noted that the Missouri legislature had yet to distribute monies from the Tort Victims’ Compensation Fund, and that there was no threat to do so without proper appropriation. Until such time, the court held, such a claim was not ripe for review.¹⁹²

The court next rejected the Fusts’ claim that Section 537.675 violates the Missouri Constitution’s separation of powers doctrine as prescribed by article II, section 1, and article V, section 1.¹⁹³ The argument advanced by the Fusts was that the statute “deprives the courts of the power to enforce judgments as they are rendered.”¹⁹⁴ However, the court points out that the statute merely limits a common law cause of action for punitive damages, rather than interfering with judicial functions. Therefore, the General Assembly was not unconstitutionally encroaching upon the judiciary in violation of the separation of powers doctrine.¹⁹⁵

The court used essentially the same rationale in rejecting the Fusts claim that the split-recovery statute violates the “certain remedy” provision of the Missouri Constitution, as prescribed in article I, section 14.¹⁹⁶ As with the separation of powers argument, the court held that the statute merely modifies a common law cause of action for punitive damages, and specifically cited cases

187. *Fust*, 947 S.W.2d at 429-30.

188. *Id.*

189. *Id.*

190. *Id.* at 430.

191. *Id.*

192. *Id.*

193. *Id.* at 430-31.

194. *Id.*

195. *Fust*, 947 S.W.2d at 430-31.

196. *Id.* at 431.

that have held that such modification is not prohibited under Missouri's "certain remedy" provision.¹⁹⁷

Next, the court addressed the Fusts' contention that Section 537.675 denies them their "natural right to . . . the enjoyment of the gains of their own industry," in contravention of article I, section 2 of the Missouri Constitution.¹⁹⁸ The court assumed, *arguendo*, that the efforts of the Fusts, including filing suits, giving depositions, and the like, constituted "industry." Nonetheless, the court denied this constitutional claim, stating that the Fusts cited no Missouri authority in support of this proposition.¹⁹⁹

For all the foregoing reasons, the Supreme Court of Missouri affirmed the judgment of the trial court, holding that Section 537.675 of the Revised Statutes of Missouri is constitutional.²⁰⁰

V. COMMENT

In upholding Section 537.675 of the Revised Statutes of Missouri, the Supreme Court of Missouri adhered to the reasoning followed in the majority of jurisdictions, and effectively addressed a few arguments previously unexplored with respect to split-recovery statutes. In so doing, the court upheld the state's power to collect one-half of all punitive damage awards, which is subsequently deposited in the Tort Victims' Compensation Fund.²⁰¹ The holding is consistent with the tenets of constitutional law, and reaffirms the state's plenary power, absent a constitutional prohibition, to enact legislation.²⁰² As a result, the court has upheld the validity of a statute that attempts to deal with some of the problems of punitive damage awards and put such awards to a more profitable and judicious use.²⁰³ The purposes justifying awards of punitive damages in Missouri are the punishment of the tortfeasor and deterrence of the wrongful conduct in the future. Allowing a plaintiff to retain a massive windfall does nothing to further this goal, and in fact has deleterious effects such as stimulating litigation to undesirable levels. Split-recovery statutes work to rectify these problems, without sacrificing the goals to be furthered by the punitive damages in the first place.

The court was presented in *Fust* with myriad arguments of varying persuasiveness. Three of these contentions—that such statutes violate

197. *Id.* (citing *Wheeler v. Briggs*, 941 S.W.2d 512, 514-15 (Mo. 1997), and *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905-06 (Mo. 1992), *cert. denied*, 506 U.S. 991 (1992)).

198. *Fust*, 947 S.W.2d at 431.

199. *Id.*

200. *Id.* at 433.

201. MO. REV. STAT. § 537.675(1), (2) (1994).

202. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 430 (Mo. 1997).

203. *See generally supra* notes 76-87.

procedural due process, equal protection, and state constitutional requirements of subject matter and title—were common to both *Fust* and cases addressing split-recovery statutes in other jurisdictions.

As to the first of these arguments, the dispositive factor for the court was that a potential recovery in a punitive damage award does not constitute a property right in the state of Missouri.²⁰⁴ Not only has this been the law in Missouri for years, it is a just and logical viewpoint. The major purposes of punitive damages are to punish the tortfeasor and to deter the tortfeasor and others from re-engaging in the wrongful conduct.²⁰⁵ Missouri has expressly declared that punishment and deterrence are the primary purposes of punitive damage awards.²⁰⁶ As punitive damages do not serve to compensate, a plaintiff awarded punitive damages receives a fortuitous windfall “simply because there is no one else to receive it.”²⁰⁷ It would not be logical to conclude that such a windfall, prior to collection, composed a property right. Also, the fact that some states have elected to cap or completely abolish punitive damages further indicates that a vested right has not been created.²⁰⁸ Because an award of punitive damages is not a property right in Missouri, the Fusts’ procedural due process claim failed.

As to the Fusts’ equal protection argument, the court approached the claim with a flexibility consonant with rational basis review. Missouri’s split-recovery statute does not implicate suspect classes; as such, the classification need only be rational.²⁰⁹ In light of the state’s interests in encouraging settlement and avoiding enforcement difficulties, the discrimination between those plaintiffs who fully litigate their cases and those who settle meets this threshold requirement of rationality.²¹⁰

The court also effectively disposed of the Fusts’ claim that Section 537.675 violates the single subject and clear title provisions of the Missouri Constitution. As to both claims, the Fusts failed to sustain their burden of proving the statute’s unconstitutionality.²¹¹ This is clearly the correct result. First, all sections of House Bill 700 purport to accomplish the same purpose: the promotion of compensation for certain tort victims.²¹² As the provisions of the bill “fairly

204. *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. Ct. App. 1983), *overruled on other grounds*, *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. 1988).

205. *See supra* notes 57-60 and accompanying text.

206. *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

207. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991).

208. *See, e.g., supra* note 52.

209. *Fust v. Attorney Gen.*, 947 S.W.2d 424, 432 (Mo. 1997).

210. *Id.*

211. *Id.* at 427-29.

212. *Id.* at 428.

relate” to each other, the single subject requirement is met.²¹³ Second, the title of the bill is neither so general as to violate the clear title requirement, nor is it so restrictive that the subject matter of Section 537.675 falls outside the scope of the title.²¹⁴

The Missouri Supreme Court also addressed a number of arguments which have not been addressed in other jurisdictions with respect to the constitutionality of split-recovery statutes. These arguments included, among others, that Section 537.675 attempts to grant public monies to private persons,²¹⁵ authorizes monies to be distributed from the Tort Victims’ Compensation Fund without proper appropriation,²¹⁶ and violates the separation of powers doctrine.²¹⁷ None of these contentions were particularly compelling, and the court easily disposed of each in upholding Missouri’s split-recovery.

Beyond these arguments asserted in *Fust*, there remain numerous other theories which have served as the foundation for challenges to split-recovery statutes in other jurisdictions. It remains to be seen whether Section 537.675 will be challenged, perhaps successfully, on substantive due process, takings, excessive fines, or double jeopardy grounds in the future. A substantive due process theory would likely fail, because, under rational-basis review, the statute need only be rationally related to a legitimate government interest.²¹⁸ Given this low level of scrutiny, and the fact that Section 537.675 survived such review under equal protection analysis,²¹⁹ it is improbable that a Missouri court would declare the statute unconstitutional on substantive due process grounds. Likewise, a takings challenge should fail in Missouri for the same reason that a procedural due process attack was rejected in *Fust*: punitive damages do not constitute a property interest in this state.²²⁰ More intriguing are the issues of whether Missouri’s split-recovery statute would survive excessive fines and double jeopardy challenges. The day may come when a defendant successfully invokes such a challenge; until that day, however, tort plaintiffs will be entitled to collect only one-half of the punitive damages awarded to them.

An entirely distinct question from the constitutionality of Missouri’s split-recovery statute is whether the Missouri government has faithfully adhered to the goals to be effectuated by the statute and put the monies collected to a use consistent with the purposes of split-recovery statutes. It is clear that enforcement of Section 537.675 by the Missouri attorney general has been lax in past years. As of 1997, ten years after the statute was enacted, the Tort

213. *Id.*

214. *Id.* at 428-29.

215. *Fust*, 947 S.W.2d at 429-30.

216. *Id.* at 430.

217. *Id.* at 430-31.

218. Stevens, *supra* note 6, at 878.

219. *Fust*, 947 S.W.2d at 431-32.

220. *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. Ct. App. 1983), *overruled on other grounds*, *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. 1988).

Victims' Compensation Fund was credited barely over fifty-five thousand dollars.²²¹ This figure certainly is not representative of one-half of all punitive damages awarded in Missouri in the last decade.²²² It is however a substantial amount of money that could greatly benefit the class of persons to be served by the statute. Nonetheless, the General Assembly has yet to promulgate disbursement procedures for the fund.

Ten years after the passage of a potentially beneficial piece of legislation, one of the statute's major purposes-to compensate tort victims who otherwise remain uncompensated-has been furthered in no way whatsoever. Hopefully, the publicity surrounding *Fust* will serve to renew interest in the statute and have some augmenting effects on the minimal enforcement and nonexistent disbursement procedures currently in effect. Regardless, judging the "wisdom" of the legislature in enacting legislation is not the duty of the judiciary.²²³ The decision of the Supreme Court of Missouri to uphold this state's split-recovery statute against the constitutional attacks propounded was a decidedly appropriate one.

VI. CONCLUSION

In upholding Missouri's split-recovery statute, Section 537.675 of the Revised Statutes of Missouri, the Missouri Supreme Court applied an analysis harmonious with the basic tenets of constitutional law. By upholding the statute, the court affirmed Missouri's power to collect one-half of all punitive damage awards for deposit in the Tort Victims' Compensation Fund. In doing so, the court upheld a statute which purports to ameliorate some of the problems associated with awards of punitive damages. It remains to be seen, however, whether the split-recovery statute will survive future constitutional attacks based upon principles other than those raised in *Fust*.

221. As of May 1997 (prior to the *Fust* decision), the balance of the Tort Victims' Compensation Fund was \$56,829.73. STATE TREASURER ACCT. & BANKING REP. (May 21, 1997).

222. According to one source, the lack of enforcement of Missouri's split-recovery statute has cost the Tort Victims' Compensation Fund over \$200 million in the last ten years. Telephone Interview with David Israelite, Chief of Staff and Head Counsel for United States Senator Kit Bond (Jan. 8, 1997).

223. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

Tort victims hoping to be benefitted by the Tort Victims' Compensation Fund will have to wait for legislators to promulgate disbursement procedures. Perhaps the publicity surrounding a Missouri Supreme Court decision such as *Fust* will renew interest in the statute, prompting stricter enforcement of the statute and disbursement from the Fund, thereby effectuating the purposes to be served by a split-recovery statute.

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