

**IN THE
MISSOURI SUPREME COURT**

No. 83186

**FOREST “DINO” HOSKINS, *et al.*,
Respondents,**

v.

**FEDERAL-MOGUL CORPORATION,
Appellants,**

v.

**STATE OF MISSOURI,
Respondent-Intervenor.**

BRIEF OF THE STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

The parties assert that Federal Mogul's claim that § 537.675, RSMo. Supp. 2001, is unconstitutional gives this court jurisdiction over this appeal. But that basis for jurisdiction is dubious. It presupposes that appellant can even raise that question. Missing from appellant's brief is any claim, and certainly any logical explanation, for appellant Federal Mogul's standing to challenge the statute. Federal Mogul argues the point as if it were aggrieved by section 537.675. In fact, if that law had never been passed, or had been repealed, or were stricken by this Court, Federal Mogul would owe precisely the amount that it owes today. Thus there is no colorable basis for appellant to claim injury from the law it challenges. The challenge appears to be an effort to manipulate this court's jurisdiction.

STATEMENT OF FACTS

In general, the facts of this case are irrelevant to the issues addressed by the State herein. Thus the State adopts the statements of facts of the defendant-appellant (Federal Mogul) and the plaintiff-respondent (Hoskins). There are certain procedural facts, relevant to the presentation of a constitutional issue, that are not included in their briefs.

In its answer, Federal Mogul raised a general claim of unconstitutionality regarding punitive damages as an affirmative defense. Legal File (L.F.) at 74-75. Just what Federal Mogul meant is unclear. But the claim appears to be an effort to preserve Federal Mogul's right to challenge a punitive award as constitutionally excessive – a claim that is possible under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Nothing in that claim suggests that appellant was challenging the constitutionality of § 537.675.

The constitutionality of § 537.675 was expressly challenged for the first time in Defendant's Motion for Judgment Notwithstanding Verdict or, in the Alternative for a New Trial, or, in the Alternative, for Remittitur. L.F. at 743-44, 748.

On May 17, 2002, this Court granted the State of Missouri's motion to intervene to defend the constitutionality of § 537.675.

ARGUMENT

The State of Missouri has intervened solely to defend the constitutionality of § 537.675, RSMo. Supp., 2001. As discussed below, the court should not even reach that issue, for it was not timely raised, and was raised by a party who has not been aggrieved by the statute it challenges. Should the court reach the issue, it should reject constitutional challenges to the statute. The state's sharing in a portion of a punitive damages award does not convert such an award into a "fine" subject to the Eighth Amendment, or its equivalent under the state constitution. And such sharing, which neither imposes the obligation to pay punitive damages, affects the amount that a defendant owes nor deprives a plaintiff of a vested right, does not constitute a "taking" subject to the Fifth Amendment. Directing a portion of punitive damages to the Tort Victims Compensation Fund is a constitutionally permissible method of reducing any windfall to plaintiffs and collecting funds that it can use to compensate otherwise uncompensated tort victims or to assist in providing legal services.

I. The court should not reach the constitutional issues raised.

As the cursory treatment of the constitutional issues in the parties' briefs shows, the question of the constitutionality of § 537.675 has never been the true subject of this litigation. That is not surprising, for two reasons.

First, the question of what impact the statute would have on either party in this case was – and still is – premature. The State has not appeared to assert a claim to any portion of the trial court's award. Nor could it; the statute delays enforcement of such claims until the case is resolved by a final judgment, and that will not occur at least until this court rules (assuming that the parties do not settle the matter before then). The only apparent reason that any party has raised a question about the constitutionality of the statute at this time would be to manipulate jurisdiction so as to bring this appeal to this court, rather than the court of appeals.

Second, the statute costs the appellants nothing. If the statute had never been adopted, or were stricken as unconstitutional, the only effect would be to eliminate the State's claim on part of the punitive damages portion of the final award. A liable defendant pays *precisely the amount decreed by the verdict at plaintiff's behest*, without regard to section 537.675. Thus Federal Mogul had no incentive to raise this question – until, of course, it saw the need for an appeal and some purported advantage in proceeding in this court.

Presumably, at the beginning of this suit Federal Mogul saw no benefit from the elimination of section 537.675, for it did not timely raise the constitutional question it now poses. In their answer, Federal Mogul made a generalized constitutional claim regarding punitive damages. But it included nothing – no factual allegation, no legal language – that could be construed to suggest that it was

asserting that section 537.675 is unconstitutional. Federal Mogul raised the issue specifically after the jury verdict, in its Defendant's Motion for Judgment Notwithstanding Verdict or, in the Alternative for a New Trial, or, in the Alternative, for Remittitur. L.F. at 743-44, 748. But that did not meet the long-established requirement that the question be raised at the "earliest possible moment":

It has long been considered as settled law that "in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived."

Securities Acceptance Corp. v. Hill, 326 S.W.2d 65, 66 (Mo. 1959), quoting *Lohmeyer v. St. Louis Cordage Co.*, 113 S.W. 1108, 1110 (Mo. 1908).

Whether the claim is premature, because the State's claim to any funds has not yet been asserted, or tardy, because the constitutional challenge was not raised at the earliest possible moment, it is certainly not a matter that the court must reach now.

II. Section 537.675 does not impose a fine subject to the Eighth Amendment.

If the court does reach the constitutional issue, it should reject constitutional claims. The statute violates neither the “excessive fines” clause of the Eighth Amendment nor the “takings” clause of the Fifth.

Certainly punitive damages do not generally implicate the Excessive Fines Clause. That is not because they have no punitive impact. As the U.S. Supreme Court has explained, “They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973). The key to differentiating between punitive damages and “fines” within the scope of the Eighth Amendment is the “private” nature of punitive damages.

In the case on which appellant principally relies, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (*Browning-Ferris*), the Supreme Court affirmed that punitive damages are normally outside the scope of Eighth Amendment concern. Thus the Court observed that it “has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case.” *Id.* at 259. In fact, the Court expressly rejected the argument that “the Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages.” *Id.* at 271. Instead, the Court explained that the key to determining the application of the Excessive Fines Clause is to recognize that it is a limit on the *government’s* action, not on action by private parties: “[O]ur concerns in applying the Eighth Amendment have been with the criminal process and with direct actions initiated by government to inflict punishment.” *Id.* at 259. The Court concluded that despite the involvement of the courts, as governmental actors, “[a]wards of

punitive damages do not implicate these concerns.” *Id.*

Federal Mogul’s argument is derived from a limitation on the *Browning-Ferris* holding – a limitation that was the necessary result of the facts presented. The Court said that the Excessive Fines Clause does not apply to punitive damages “when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” *Id.* at 264. The Court referred back to the original purpose of the Eighth Amendment, holding “that the framers were concerned with ‘the potential for governmental abuse of its “prosecutorial power” and that the Excessive Fines Clause was ‘intended to limit only those fines *directly imposed by*, and payable to, the government.’” *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413, 423 (Or. App. 1994), quoting *Browning-Ferris*, 492 U.S. at 266 (emphasis in *Tenold*). That conclusion was consistent with the conclusion, quoted above, that the Eighth Amendment is concerned with “direct actions initiated by the government.” *Browning-Ferris*, 492 U.S. at 259.

Because to do so would have drawn the Court beyond the scope of the case before it, in *Browning-Ferris* the Court did not reach the question posed here. Indeed, Federal Mogul concedes that the Court “expressly left unresolved the question whether the Clause applies where, as here, the government shares in the punitive damages award.” App. Br. at 98. The Court said nothing to suggest that a statute that moves a portion of a punitive damages award from a plaintiff to the State *after* judgment “has the effect of forcing a tort defendant to pay money to the state” and thus “converts an award of punitive damages into a penal fine.” Appellant’s Brief at 96.

To answer the question reserved in *Browning-Ferris* requires that the court look at the state’s role in the imposition of punitive damages. And that role is not affected – at all – by § 537.675.

The state does not initiate the proceedings. The state does not ask for, define the amount of, or otherwise affect the award of punitive damages. The state's *only* role is to prevent a plaintiff from obtaining a windfall. And the state takes that role in a statutory scheme that balances the interests of plaintiffs and defendants by allocating part of the punitive damages award in order to fund a state program that assists victims of torts who are unable to obtain relief.¹

Courts considering whether the states' taxation of a portion of punitive damages changes the nature of those damages so as to implicate Eighth Amendment concerns have given differing answers. The better answer is, "No."

The Court of Appeals of Oregon has given that answer twice. In *Tenold v. Weyerhaeuser*, the court observed that when the state merely "becomes a beneficiary of a portion of a punitive damages award after a verdict has been entered," there is no need for Eighth Amendment analysis. 873 P.2d at 424. There, as here, "a private party brought an action against defendants, and the jury directly imposed the judgment against defendants to punish and to deter future misconduct. The government of [the state] did not initiate this action." *Id.* To apply the Eighth Amendment to the action would not further its purpose – *i.e.*, it would not deter or limit government prosecution or penalties, because the statute does not permit the government to prosecute a suit for punitive damages nor to impose any penalty beyond the damages that would be assessed regardless of whether the state later

¹ § 537.675 was part of a comprehensive "tort reform" package adopted by the General Assembly in 1987. Bill L. Thompson, *Legislative Tort Reform: Whither Lippard et al.?*, 44 J.Mo.B 147 (1988).

laid claim to a portion of the proceeds. The court reaffirmed that conclusion in *Axen v. American Home Products Corp.*, 981 P.2d 340, 342 (Or. App. 1999). The court reiterated that the Eighth Amendment is not implicated in “a civil case in which the government has no *prosecutorial* role.” *Id.* (emphasis in original).

Axen's holding is wholly consistent with the rationale articulated in *Browning-Ferris* where the court explored the history and reasoning behind the Eighth Amendment. The Amendment codifies a concept which pre-dates the formation of the United States and is intended as a check on the power of the sovereign to impose fines. *Browning-Ferris*, 492 U.S. at 272. There is no “basis for concluding that the Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages.” *Id.* at 271. Punitive damages are private damages imposed in a dispute between private parties and are not levied by the state, therefore the Eighth Amendment was never meant to apply. *Id.* at 272.

In the midst of a long list of infirmities it found in Florida's tort reform law, and without providing a rationale, a United States district court gave the opposite answer. *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990). There, the court quoted the Supreme Court's conclusion in *Browning-Ferris* that punitive damages do not implicate the Eighth Amendment, but then blithely concluded – as Federal Mogul asks here – that by reserving the question the Supreme Court was also answering it. The court held that merely directing part of the proceeds to the state “converted the pre-Tort Reform Act punitive damages statute of Georgia into a statute having the constitutional infirmity as set forth in *Browning-Ferris Industries*, because the State of Georgia would have a right to receive a share of the damages awarded.” *Id.* at 1577. But again, in *Browning-Ferris* the Supreme Court did not define the movement of punitive damage money to the

state as a “constitutional infirmity.”

The Court in *Browning-Ferris* did suggest that there may be some version of punitive damages that might incur Eighth Amendment scrutiny. But neither *Browning-Ferris*, nor *McBride*, nor appellant’s brief articulates any rationale for concluding that state action subsequent to a final verdict moves a punitive damages award from outside to inside Eighth Amendment scrutiny. Some kinds of state involvement might bring punitive damages close to “prosecution” – perhaps if the state were to encourage a suit, or by acting as a gatekeeper, as in the dram shop law addressed in *Kilmer v. Mun*, 17 S.W. 3d 545 (Mo. banc 2000), or if the jury were instructed that a portion of the award would inure to the state rather than to the plaintiff. We could also pose hypotheticals where the state is involved in defining the scope of a punitive damages award – perhaps by inserting some statutory minimum. But here, again, the state does nothing to affect the award.

The premise that a state is sufficiently involved to bring its actions within the Eighth Amendment merely because it takes part of the award after judgment in a private tort action goes well beyond anything the U.S. Supreme Court has ever suggested. And to conclude that taking a cent *after* judgment effects a constitutional transformation would threaten other means by which state’s obtain money and property, such as taxes and forfeitures. There is, to date, no bar on states taxing punitive damage awards. And that is, in effect, what section 537.675 does: it imposes a 50% tax on punitive damage awards.² Appellants have articulated no constitutional bar on a state tax in the amount of 50%

² Actually, the 50% figure used consistently by appellant dramatically overstates the amount that the state collects. Before the state’s share is determined, the court subtracts fees (including

of the punitive damages paid to a plaintiff. And again, there is no Eighth Amendment bar to such exaction – and it does not modify a defendant’s liability in any event.

III. Section 537.675 does not take property without due process in violation of the Fifth Amendment.

Only in Oregon has a tort *defendant* suggested that statutes splitting punitive damage awards are unconstitutional. *Plaintiffs* have challenged such laws repeatedly, arguing that they constitute “taking” of successful plaintiffs’ property. Here, plaintiffs have never made such a claim – which they point out in their brief, while also asserting (using the same authority cited by appellant) that the statute *is* unconstitutional for that reason. Respondent’s Brief at 126.

It seems odd that a *defendant* would suggest that by this law, a state “takes” its property. What property is the defendant losing? What the defendant must pay is defined by a verdict, obtained by a plaintiff without state involvement. The state’s claim adds nothing to that verdict. But neither does the plaintiff lose property without due process of law, in violation of the Fifth Amendment.

A. The State is not “taking” a vested right from a plaintiff.

The state and federal constitutions do not forbid the abolition of remedies to obtain permissible

contingency fees) and costs. *See* section 537.675.3 (the State’s “lien shall not be satisfied out of any recovery until the attorney’s claim for fees and expenses is paid”). Because attorneys in these cases are typically compensated with a contingent fee, the amount deducted before the State’s share is calculated is considerable.

legislative objectives so long as vested rights are not impaired. Thus statutes limiting liability are consistently upheld against challenges on “taking” grounds.

A person has no property, no vested interest, in any rule of common law . . . The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative objective . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978) (Price-Anderson Act setting aggregate liability ceiling or cap in nuclear accident cases abrogates common law rights of recovery) (internal quotation marks, brackets and citations omitted).

[T]here is no vested right in any remedy for a tort yet to happen which the Constitution protects. Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies.

Holder v. Elms Hotel Co., 92 S.W. 2d 620, 624 (Mo. 1936), quoted with approval in *Simpson v. Kilcher*, 749 S.W.2d 386, 390 (Mo. 1988). *See also* 749 S.W. 2d at 393-94.

Though neither side raises it here, in some instances parties challenging limits on tort remedies have invoked the state constitutions’ “certain remedies” clauses. But this court has held that our clause does no more than “assure Missourians of procedural due process.” *Adams v. Children’s Mercy Hosp.* 832 S.W.2d 898, 906 (Mo. banc 1992) (ceiling or cap on non-economic damages in medical malpractice cases does not violate the certain remedy or due process provisions). Therefore, statutes that impose procedural bars to access to the courts are impermissible (*see Kilmer v. Mun*, 17 S.W. 3d 545), but “statutes that change the common law by the elimination (or limitation of) a cause of action . . . are a valid exercise of a legislative prerogative” (*Adams*, 832 S.W. 2d at 905).

Section 537.675 fits well within the scope of tort reform statutes that are permissible under those doctrines. Similar to the ceiling or cap on non-economic damages in medical malpractice cases, the tort victims' compensation statute does not deny "a lawful remedy for a wrong done," but rather "simply redefines the substantive law by limiting the amount of . . . damages plaintiffs can recover." 832 S.W. 2d at 905-06. The legislature may define the substantive, legal limits of a plaintiff's damages remedy as part of its power to "abrogate a cause of action cognizable under common law completely." *Id.*

The typical challenge to this type of statute – a challenge that this court saw in *Fust v. Attorney General*, 947 S.W. 2d 424 (Mo. banc 1997) – is brought by a plaintiff. The Fusts argued that the tort victims' compensation statute took their vested right in the entire amount of the punitive damages judgment. But a plaintiff has no vested right to punitive damages prior to entry of final judgment. *Vaughan v. Taft Broadcasting Co.*, 708 S.W2d 656, 660 (Mo. banc 1986) (amendment to service letter statute prohibiting punitive damages based on content of letter applied to employee whose cause of action accrued and case was filed prior to effective date of amendment).

By allocating one-half of a final judgment awarding punitive damages to the state, the legislature limited a plaintiff's punitive damages remedy to one-half of what it otherwise would be. Therefore, the state and a plaintiff each acquire a vested right in one-half of a judgment awarding punitive damages at the time the judgment is rendered. The plaintiff does not have a property interest in the entire amount of the judgment. *Fust*, 947 S.W.2d at 431.

The state has not and will not take any of Hoskins' property or deprive him of any property. He has no property interest of any kind, let alone a vested interest, in one-half of the judgment awarding

punitive damages. The state has a vested interest in the judgment equal to that of Hoskins.

Other states have rejected efforts of plaintiffs to strike down similar statutes. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.* 473 N.W.2d 612, 619 (Iowa 1991); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (1993); *Gordon v. State*, 608 So.2d 800, 801-02 (Fla. 1992). One court, however, cited by both Federal Mogul and Hoskins, has gone the other way: *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991). The Colorado Supreme Court struck down a Colorado statute requiring “[o]ne third of all reasonable [exemplary] damages collected” to be paid into the state’s general revenue. But that decision is distinguishable.

Under Colorado law, unlike Missouri law, a plaintiff has a property interest in one hundred percent of the punitive damages judgment, and the state has no interest in the judgment itself. The Colorado plaintiff, unlike the Missouri plaintiff, must collect the entire punitive damages judgment and turn it over to the state. Colorado, unlike Missouri, has no interest until collection by the plaintiff. Missouri, unlike Colorado, has an interest in the judgment itself and may collect and execute on the judgment. This court pointed out in *Fust* that the two statutes are different. *Fust*, 947 S.W.2d at 431.

The better rationale is the one used by this state in *Fust* and in Iowa, Georgia, and Florida. Each of those sister-state courts recognized that punitive damages are not immune from the rule that plaintiffs have no vested right to tort damages. *Shepherd Components*, 473 N.W.2d 612, *Mack Trucks*, 436 S.E.2d 635, *Gordon*, 608 So.2d 800. Neither Federal Mogul nor Hoskins provides any persuasive argument why this court, having itself applied that rule as to other aspects of Missouri tort law in *Simpson v. Kilcher*, should veer from it now.

B. The State is not “taking” anything from the defendant.

The precedents created when plaintiffs have objected to statutes like § 537.675 do not, of course, answer the question posed by Federal Mogul as a defendant. Obviously, Federal Mogul has no claim of a “vested right” to some portion of a punitive damages award. Regardless of the constitutionality of § 537.675, Federal Mogul must pay precisely the same amount. Thus Federal Mogul argues that when there is a judgment, and the State is the ultimate recipient of some portion of the judgment obtained by and otherwise owed to a plaintiff, the State is unconstitutionally “taking” *defendant’s* funds. That position cannot be explained logically, in constitutional terms.

The constitutional provisions that Federal Mogul invokes do not, of course, bar the State from receiving funds. The “due process” clauses require due process before the funds are taken and just compensation if the funds are taken for public use:

No person shall . . . be deprived of life, liberty or property without due process of law;
nor shall private property be taken for public use without just compensation.

U.S. Constitution, Fifth Amendment.

That no person shall be deprived of life, liberty or property without due process of law.
Missouri Constitution, Art. I § 10. Here, Federal Mogul does not and cannot argue that it has been deprived of property without “due process”; its appeal is here, indeed, part of that “process.” Nor can Federal Mogul argue that the State has deprived it of property without “just compensation.” The State’s action (when it occurs – *i.e.*, once the punitive damages are paid) costs Federal Mogul precisely nothing. The State merely receives a share of what Federal Mogul must pay regardless of the state’s claim. No compensation is required where the defendant loses nothing by virtue of the State’s

action.

CONCLUSION

For the reasons stated above, the court should decline to reach the constitutional question by which appellant Federal Mogul invoked the court's jurisdiction. Should the court reach that question, it should hold that the statute does not violate any constitutional provision.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

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The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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