No. SC 84792

IN THE
SUPREME COURT OF MISSOURI

VINCE KARPIERZ and JAMES L. McMULLIN,

Appellants,

v.

STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON,

Attorney General, State of Missouri,

Respondent.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Thomas J. Brown, III

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF FACTS 8

ARGUMENT 15

I. The Circuit Court correctly determined that McMullin had an attorney's lien against Karpierz's asset, and pursuant to the Act, the State's claim for incarceration reimbursement has priority over McMullin's lien (Response to part of Appellants' point I). 15

A. Standard of Review 15

B. Argument 15

1. The money paid by the KCPD to Karpierz is not McMullin's property, but is Karpierz's property subject to McMullin's lien. McMullin's lien is subordinate to the State's claim. 15

2. McMullin's attorney's lien is subordinate to the State's claim for incarceration reimbursement. 20

II. The Act does not violate the Takings Clauses of the Missouri and United States Constitutions (Response to part of Appellants' point I). 23

A. Standard of Review 23

B. Argument 23

III. The Act does not violate the Contract Clauses of the Missouri and United States Constitutions (Response to part of Appellants' point I). 31

A. Standard of Review 31

B. Argument 31

IV. The common fund doctrine is inapplicable to Karpierz's asset (Response to Appellants' point II) 34

A. Standard of Review 34

B. Argument 34

CONCLUSION 38

CERTIFICATE OF SERVICE AND OF COMPLIANCE 39

APPENDIX 40

TABLE OF AUTHORITIES

Cases:

Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916). 29

Charlton v. Crocker, 665 S.W.2d 56 (Mo.App. S.D. 1984) 18

Cheatham v. Pohle, 764 N.W.2d 272 (Ind. Ct. App. 2002) 25, 30

DCW Enter., Inc. v. Terre Du Lac Assoc., Inc.,
953 S.W.2d 127 (Mo.App. W.D. 1997) 34

Dysart v. Dep't of Public Health and Welfare,
361 S.W.3d 347 (Mo.App. S.D. 1962) 18-19, 26

Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842 (8th Cir. 2002) 32

Ford Motor Credit Co. v. Allstate Ins. Co.,
2 S.W.3d 810 (Mo.App. W.D. 1999) 19

Ganaway v. Dep't of Social Servs.,
752 S.W.2d 12 (Mo.App. W.D. 1988) 17

Gaunt v. Shelter Mut. Ins. Co.,
808 S.W.2d 401 (Mo.App. S.D. 1991) 18

Glenn v. City of Grant City, Missouri,

69 S.W.3d 126 (Mo.App. W.D. 2002) 28

In re Marriage of Haggard,

585 S.W.2d 480 (Mo. 1979) 32

Jenkins v. Jenkins, 243 S.W.2d 804 (Mo.App. S.L. 1951) 17-20, 22

Jesser v. Mayfair Hotel, Inc.,

360 S.W.2d 652 (Mo. banc 1962) 35-36

Keystone Bituminous Coal Ass'n. v. DeBenedictis, Secretary, Pennsylvania Dep't of Env. Resources, 480 U.S. 470 (1987) 24

Koenig v. Leppert-Roos Fur Co., 260 S.W. 756 (Mo.App. 1924) 18

Linton v. Missouri Veterinary Medical Bd.,

988 S.W.2d 513 (Mo. banc 1999) 23, 31

Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 25-28

Pirsig Farms, Inc. v. John Deere Co.,

46 B.R. 237 (D. Minn. 1985) 30

President Riverboat Casino - Missouri, Inc. v. Missouri Gaming Comm'n, 13 S.W.3d 635 (Mo. 2000) 28

State ex rel. City of Macon v. Belt,

561 S.W.2d 117 (Mo. banc 1978) 28

State ex rel. Nixon v. Jewell,

70 S.W.3d 465 (Mo.App. E.D. 2002) 26

Stephens v. Metropolitan Streetrailway Co.,

138 S.W. 904 (Mo.App. K.C. 1911) 17, 22, 26

Taylor v. State of Missouri, ex rel. Nixon,

25 S.W.3d 566 (Mo.App. W.D. 2000) 29, 37

U.S. v. Eakes, 76 B.R. 681 (So. Iowa 1985) 29-30

Statutes:

Section 208.215.12 RSMo 21

Section 208.215.8 RSMo 20

Section 217.825 through 217.841 RSMo 10

Section 430.230 RSMo 20

Section 430.235 RSMo 20

Section 430.250 RSMo 20

Section 484.130 RSMo 17, 22

Other:

Article I, section 10 of the United States Constitution 31

Article I, section 13 of the Missouri Constitution 31

Article I, section 26, of the Missouri Constitution 24

Black's Law Dictionary 269 (7th Ed. 1999) 34

Daniel M. Levy, *Tense Times: The Past, Present and Future of Prisoner Reimbursement*, 77 Mich.B.J. 190 (1998) 8

George L. Blum, Annotation, *Validity, Construction, and Application of State Statute Requiring Inmate to Reimburse Government for Expense of Incarceration*, 13 A.L.R. 5th 872 (2001) 8, 36

John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Persons Access to Justice*,
42 Am. U.L. Rev. 1567 (1993) 35

S.P. Conboy, Note, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*,
44 Drake L. Rev. 325 (1996) 8, 37

STATEMENT OF FACTS

The Missouri Incarceration Reimbursement Act [the Act][1] authorizes the State, through the Office of the Attorney General, to seek to secure reimbursement from current or former offenders for the expenses incurred while they are maintained in a state correctional facility. Sec. 217.825 through 217.841 RSMo (2000).[2] The "cost of care" incurred by the State

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[1]For more general information regarding incarceration reimbursement statutes in the United States, *see* George L. Blum, Annotation, *Validity, Construction, and Application of State Statute Requiring Inmate to Reimburse Government for Expense of Incarceration*, 13 A.L.R. 5th 872 (2001); Daniel M. Levy, *Tense Times: The Past, Present and Future of Prisoner Reimbursement*, 77 Mich.B.J. 190 (1998); S.P. Conboy, Note, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*, 44 Drake L. Rev. 325 (1996).

[2]All citations to the Revised Statutes of Missouri are for 2000. A copy of the Act is included in this brief's Appendix at 1-4.

includes cost to the Missouri Department of Corrections [the Department] for providing an offender's transportion, room, board, clothing, security, medical, and other normal living expenses. Sec. 217.827.2 RSMo. A sworn statement by the State Treasurer for the cost of care of an offender is *prima facie* evidence of the amount due the State. Sec. 217.841.2 RSMo.

Pursuant to the Act, an offender's cost of care is reimbursed to the State from the offender's "assets." Sec. 217.827.1 RSMo. The assets of an offender include "property, tangible or intangible, real or personal, belonging to or due an offender or a former offender, including income or payments to such offender from social security, workers' compensation, veterans' compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever." Sec. 217.827.1 RSMo. The State may collect up to ninety-percent of the value of an offender's assets for the purposes of securing costs and reimbursement pursuant to the Act. Sec. 217.833.1 RSMo. The State's right to recover the cost of incarceration has priority over all other

liens, debts, or other incumbrances against the offender's assets. Sec. 217.837.4 RSMo.

On January 20, 2002, the State filed a petition for incarceration reimbursement in the Circuit Court of Cole County against Appellant Vince Karpierz. L.F. 5-27. Karpierz was sentenced to the Department's jurisdiction on December 17, 1998, by a Clay County Circuit Court judge, having been convicted of one count of Possession of a Controlled Substance, Except 35 Grams. L.F. 12-14. Karpierz was assigned to various state correctional facilities operated by the Department, including Fulton Reception and Diagnostic Center, Tipton Correctional Center, Ozark Correctional Center, Western Missouri Correctional Center, and Kansas City Community Release Center. L.F. 15-21.

Karpierz was released from the Department on December 6, 2001. L.F. 16. On February 5, 2002, the State Treasurer submitted a sworn statement to the Circuit Court calculating the cost of Karpierz's care, up to and including the date of his release, as $36,854.43. L.F. 62-77.

At the time of his arrest on April 17, 1998, $34,029.00 of Karpierz's money was seized by the Kansas City, Missouri, Police Department [the KCPD]. L.F. 27, 82-84. Karpierz retained Appellant James L. McMullin to represent him in an action filed in the Circuit Court of Clay County to recover his money from the KCPD. L.F. 85. The attorney-client fee agreement between Karpierz and McMullin was signed on December 17, 1998. L.F. 85. The agreement indicates that McMullin is to receive payment of an amount equal to fifty-percent of any recovery obtained from the KCPD, whether by judgment or settlement. L.F. 85. On January 5, 2001, the Circuit Court of Clay County issued a Final Judgment in Assumpsit in Karpierz's favor. L.F. 82-84. The Judgment states that Karpierz is entitled to payment from the KCPD in the amount of $34,029.00 plus statutory prejudgment interest. L.F. 82-84.

While the State's petition for incarceration reimbursement against Karpierz was pending, the KCPD paid Karpierz $46,470.04, the full amount due as a result of the Judgment in his favor. L.F. 43-45. This amount was sent to Rodney Kueffer, who, pursuant to sec. 217.837.2

RSMo, was previously appointed by the Cole County Circuit Court as Receiver for Karpierz's assets. L.F. 28-29, 43-45. McMullin also intervened as a defendant in the incarceration reimbursement action, L.F. 30-32, 42, and filed an unopposed motion to have the Receiver transfer to him $9,615.61 of the $46,470.04 paid by the KCPD.[3] L.F. 109-111. On June 13, 2002, the Circuit Court ordered the transfer to McMullin, and the Receiver thus retained $36,854.43, or the amount owed by Karpierz to the State as reimbursement for the expenses incurred for his incarceration. L.F. 139.

The parties filed cross-motions for summary judgment. L.F. 46-108, 115-127, 140-149, 150-152. The material facts, such as the amount incurred by the State in incarceration expenses for Karpierz, were not in dispute. Karpierz and McMullin argued, however, that McMullin was entitled to payment of his out-of-pocket expenses in the lawsuit against the

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[3]The $9,615.61 is the difference between the amount paid Karpierz by the KCPD and the amount Karpierz owed the State for incarceration expenses [$46,470.04 - $36,854.43 = $9,615.61].

KCPD of $1,473.00, as well as one-half of the remaining amount paid Karpierz by the KCPD, or $22,498.50. They further argued that payment to McMullin of a lesser amount would result in violations of the Takings and Contract Clauses of the Missouri and United States Constitutions, as well as the "common fund" doctrine. Karpierz and McMullin claimed that the State was entitled to only $22,498.50.

On August 9, 2002, the Circuit Court of Cole County heard oral arguments on the cross-motions for summary judgment. L.F. 3-4. On August 16, 2002, the Circuit Court issued a Findings of Fact, Conclusions of Law, and Judgment and Order, in favor of the State in the amount of $36,854.43, the full amount owed by Karpierz for the expenses associated with his incarceration.[4] L.F. 153-161. This amount was subsequently transferred to the State by the Receiver. L.F. 162-163. This appeal by Karpierz and McMullin followed.

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[4]The Findings of Fact, Conclusions of Law, and Judgment and Order is included in this brief's Appendix at 5-13.

ARGUMENT

I.

The Circuit Court correctly determined that McMullin had an attorney's lien against Karpierz's asset, and pursuant to the Act, the State's claim for incarceration reimbursement has priority over McMullin's lien (Response to part of Appellants' point I).

A. Standard of Review.

The State agrees with Appellants' assertion that the correct standard of review is *de novo*.

B. Argument.

1. The money paid by the KCPD to Karpierz is not McMullin's property, but is Karpierz's property subject to McMullin's lien. McMullin's lien is subordinate to the State's claim.

Missing from Appellants' brief is a critical element: any discussion of the Missouri Attorneys' Lien statute. Enacted in 1939, that statute defines a lawyer's claim as a lien:

The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whatsoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

Sec. 484.130 RSMo.[5] The subject matter of an action, including any judgment, settlement, or award of damages, remains the sole property of the client. *Stephens v. Metropolitan Streetrailway Co*., 138 S.W. 904, 907-08 (Mo.App. K.C. 1911).

The legal ownership status of the award and the fee amount were confirmed in *Jenkins v. Jenkins*, 243 S.W.2d 804 (Mo.App. S.L. 1951). There, the issue was whether a settlement, paid by a check made payable to both a party and his attorney, was a joint fund owned by the client and attorney. The court found that the attorney had no vested right of ownership or property interest in the settlement fund. Instead, all the attorney had, "by reason of his services as attorney, was a lien, and as [the

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[5]Although the Missouri Attorneys' Lien statute does not refer to an attorney's costs or expenses, the courts have found that an attorney's lien includes proper and legitimate out-of-pocket expenses for the costs of litigation. *See Ganaway v. Dep't of Social Servs*., 752 S.W.2d 12 (Mo.App. W.D. 1988). A copy of the full Missouri Attorneys' Lien statute is included in this brief's Appendix at 14.

court had] stated in *Koenig v. Leppert-Roos Fur Co*., 260 S.W. 756 [Mo.App. 1924]: 'A lien is not a property right in or to the thing itself, but constitutes a charge or security thereon." *Jenkins*, 243 S.W.2d at 807. Other Missouri cases also hold that an attorney does not have a property interest in her client's case, but instead has a lien for costs and fees. *See Gaunt v. Shelter Mut. Ins. Co*., 808 S.W.2d 401 (Mo.App. S.D. 1991).

The principle that an attorney has a lien for costs and fees - and not a property interest - is logical in light of the rule that the "effectiveness of a lien as a security device depends upon its nature as a charge on property" owned by another individual. *Charlton v. Crocker*, 665 S.W.2d 56, 62 (Mo.App. S.D. 1984). This concept was more fully explained in *Dysart v. Dep't of Public Health and Welfare*, 361 S.W.3d 347, 353 (Mo.App. S.D. 1962), where the court stated:

> In its most general significance, a lien is a charge upon property for the payment or discharge of a debt or duty. It is a qualified right, a proprietary interest, which, in a given case, may be exercised over the property of another. It is a right which the

> law gives to have a debt satisfied out of a particular thing. However, it confers no general right of property or title upon the holder; on the contrary, it necessarily supposes the title to be in some other person.

Dysart, 361 S.W.3d 347, 353 (Mo.App. S.D. 1962). *See also Ford Motor Credit Co. v. Allstate Ins. Co*., 2 S.W.3d 810 (Mo.App. W.D. 1999) (a lien is a charge on property--as opposed to a right to the property itself--for payment or discharge of a debt). In other words, an individual cannot have a lien against something in which they, themselves, have a property interest. *See Dysart*, 361 S.W.3d at 353.

Even where an attorney and client enter into a fee agreement, or contingency agreement, the attorney continues to have a lien, and not a property interest, in her client's case. For example, in *Jenkins*, the attorney and client agreed that the attorney would be paid a fee equal to fifty-percent of any amount recovered. But the court held that the attorney had a lien for the amount, and the settlement monies paid by the opposing party were not

the attorney's property. *Jenkins*, 243 S.W.2d at 806. Appellants provide no basis in law or logic for a different result here.

2. McMullin's attorney's lien is subordinate to the State's claim for incarceration reimbursement.

The State, by virtue of the Act, and McMullin, by virtue of his attorney's lien, have competing claims on the amount paid Karpierz by the KCPD. The priority of competing claims to an asset is commonly determined by statute.

For example, pursuant to sec. 430.230 RSMo and sec. 430.235 RSMo, a hospital may acquire a lien for the reasonable cost of healthcare services delivered to a patient. But the hospital's lien is subordinate to an attorney's lien, as well as federal and Missouri workers' compensation liens. Sec. 430.250 RSMo. Pursuant to sec. 208.215.8 RSMo, the Department of Social Services may assert a lien if a Medicaid recipient recovers from a third-party tortfeasor on any liability claim for an injury for which Medicaid has paid benefits. Section 208.215.12 RSMo, however, gives priority to an attorney's lien over the Medicaid lien.

Like the hospital and Medicaid lien statutes, the Act also contains a provision for determining priority of competing claims to an offender's assets. But unlike the hospital and Medicaid statutes, the Act subordinates "all other liens, debts, or other incumbrances" to the State's claim for incarceration reimbursement. Sec. 217.837.4 RSMo (emphasis added).

On December 17, 1998, Appellants signed an attorney-client fee agreement. L.F. 85. Karpierz retained McMullin to represent him in an action to recover his money, or $34,029.00, from the KCPD. L.F. 85. The KCPD seized Karpierz's money on April 17, 1998, at the time of his arrest. L.F. 27, 82-84. The attorney-client fee agreement between Appellants indicates that McMullin is to receive payment of an amount equal to fifty-percent of any recovery obtained from the KCPD, whether by judgment or settlement. L.F. 85. As discussed above, McMullin's representation of Karpierz in that lawsuit gave McMullin an attorney's lien for his costs and fees. *See* Sec. 484.130 RSMo; *Jenkins*, 243 S.W.2d at 807. The damages eventually paid by the KCPD remained the property of McMullin's client, Karpierz. *See Stephens*, 138 S.W. at 907-08. The

Circuit Court correctly determined that McMullin's attorney's lien is subordinate to the State's claim for incarceration reimbursement, *see* sec. 217.837.4 RSMo, and it did not err in entering judgment in favor of the State in the amount of $36,854.43.

II.

The Act does not violate the Takings Clauses of the Missouri and United States Constitutions (Response to part of Appellants' point I).

A. Standard of Review.

The State agrees with Appellants' assertion that the correct standard of review is *de novo*. Because statutes are presumed constitutional, and Appellants are challenging the Act, they bear the burden of proving the Act is unconstitutional. *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999).

B. Argument.

Appellants contend that the State's claim for reimbursement from Karpierz is a taking of McMullin's property without just compensation in violation of the Missouri and United States Constitutions, at least to the extent that the State was awarded in excess of $22,498.50.[6] But that claim founders at the outset: the State took no property from McMullin.

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[6]Appellants claim the State is entitled to only $22,498.50. The State was paid $36,854.43, the full amount owed by Karpierz for his incarceration expenses.

Both the Missouri and United States Constitutions prohibit the government from taking private property in some circumstances. Article I, section 26, of the Missouri Constitution states that "private property shall not be taken or damaged for public use" unless just compensation is paid. The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, likewise requires states to pay just compensation when taking private property for public use. A governmental taking of property may include an actual physical entry upon land, or in some cases, regulatory or zoning laws restricting or limiting the use of an individual's property. *See generally, Keystone Bituminous Coal Ass'n. v. DeBenedictis, Secretary, Pennsylvania Dep't of Env. Resources*, 480 U.S. 470 (1987).

Three distinct issues are implicated by a takings claim: whether the interest asserted is the complainant's property, whether the government has taken the property, and whether just compensation was paid for the taking. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) (Souter, J., dissenting). Appellants' takings claim does not proceed to the second

and third issues, however, because the money awarded to the State in the incarceration reimbursement action was not McMullin's property.[7]

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[7]An argument similar to Appellants' was raised in *Cheatham v. Pohle*, 764 N.W.2d 272 (Ind. Ct. App. 2002). There, the plaintiff argued that an Indiana statute requiring 75% of a punitive damages award be appropriated to the state, violates the Takings Clauses of the Indiana and United States Constitutions. The argument was rejected by the court, which found that Indiana law does not recognize a property interest in punitive damages. Thus, the Takings Clauses were not implicated. The court also stated that the Indiana statute at issue was enacted in 1995, but the plaintiff did not file her lawsuit until 1998. The Indiana "statute was in full force and effect from the inception of Cheatham's case, and she was charged with knowledge of its potential impact on her case." *Id*. at 276-77. The same is true for Appellants herein. The Act was enacted in 1988, and their attorney-client fee agreement was signed on December 17, 1998. L.F. 85.

Because the Constitution protects rather than creates property interests, the existence of a property interest for the purposes of a takings claim is determined by reference to existing rules or understandings that stem from an independent source, such as state law. *Id*. at 164. As explained above, Missouri courts have held that attorneys do not acquire a property interest in an award of damages paid to their client. *See Stephens*, 138 S.W. at 907-08. Instead, attorneys become lienholders, and liens confer no general right of property or title to the holder. *See Dysart*, 361 S.W.3d at 353.[8] Because the money paid to the State was not McMullin's

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[8]Appellants rely upon *State ex rel. Nixon v. Jewell*, 70 S.W.3d 465 (Mo.App. E.D. 2002), in support of their takings claim. The plaintiff in *Jewell* held a lien on cemetery property that was transferred to the City of St. Louis. The transfer completely extinguished his lien. The plaintiff was not refunded or paid any of the lien amount -- $50,000.00 -- and he argued that the transfer of the cemetery was an unlawful taking. The court agreed, finding transfer of the cemetery was, in light of the particular facts of the case, an unreasonable government action. It does not appear from the

property, the Act does not implicate the Takings Clauses of the Missouri and United States Constitutions. *See Phillips*, 524 U.S. at 164.

Even if this Court finds that McMullin's property was at issue in the State's claim under the Act, the Takings Clauses provide Appellants no relief, because not every taking of property rises to the level of a constitutional violation.[9] Missouri courts have long-held that

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opinion that the issue of whether the plaintiff even had a valid takings claim, because his lien was not a property interest, was even addressed by the parties or the court.

9In evaluating whether a governmental taking has occurred, Missouri and federal courts consider (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with distinctive investment-backed expectations; and (3) the character of the government action. *Glenn v. City of Grant City, Missouri*, 69 S.W.3d 126, 131 (Mo.App. W.D. 2002). Before evaluating these factors, however, the court must first find that the interest asserted is property. *See Phillips*, 524 U.S. at 172.

government's valid exercise of the police power is not a taking of private property for public use. *Glenn v. City of Grant City, Missouri*, 69 S.W.3d 126, 132 (Mo.App. W.D. 2002). *See also State ex rel. City of Macon v. Belt*, 561 S.W.2d 117, 118 (Mo. banc 1978) (an appropriate use of the government's police power does not offend the constitution, even though such actions may interfere with an individual's rights). The test of the validity of the police power, and of whether the government's actions rise to the level of a taking for constitutional purposes, is reasonableness. *Id*. For example, Missouri and federal courts have determined that taxes and fees imposed as reimbursement for public services is reasonable government action that does not implicate the Takings Clauses. *See President Riverboat Casino - Missouri, Inc. v. Missouri Gaming Comm'n*, 13 S.W.3d 635 (Mo. 2000); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25 (1916).

The Judgment against Karpierz satisfies the goal of the Act, namely, obtaining reimbursement for the State for its expenditures in caring for offenders. *See Taylor v. State of Missouri, ex rel. Nixon*, 25 S.W.3d 566,

568 (Mo.App. W.D. 2000). At the same time, McMullin was paid $9,615.61 for his efforts in representing Karpierz in his lawsuit against the KCPD. L.F. 109-111, 139. The Circuit Court's Judgment in favor of the State, and the State's petition requesting full reimbursement for Karpierz's expenses, were reasonable and thus not an actionable taking. L.F. 153-161.

Moreover, if this Court finds that McMullin's property was "taken," as that term is used in evaluating constitutional claims, Appellants' argument also fails because they were charged with notice of the terms of the Act as of the date of its enactment -- 1988. For example, in *U.S. v. Eakes*, 76 B.R. 681 (So. Iowa 1985), the federal bankruptcy court, relying upon numerous circuit court decisions, decided that a change in bankruptcy laws did not amount to a taking of a creditor's lien, regardless of whether the lien itself was or was not property, because the statutory changes occurred prior to the creation of the lien. *Id*. at 682. *See also Pirsig Farms, Inc. v. John Deere Co*., 46 B.R. 237, 244 (D. Minn. 1985) (same, and also finding that, under state law, creditor had no property interest in

an unperfected lien); *Cheatham v. Pohle*, 764 N.W.2d 272, 276-77 (Ind. Ct. App. 2002) (Indiana statute was in full force and effect, and the plaintiff had no takings claim, in-part, because she was charged with notice of the existing statute's impact).

Similarly, in this case, Appellants signed their attorney-client fee agreement on December 17, 1998, ten years after enactment of the Act. L.F. 85. Appellants were charged with notice of the Act's impact on their property. *See Eakes*, 76 B.R. at 682; *Cheatham*, 764 N.W.2d at 276-77. Thus, Appellants raised no valid takings claim, and the Circuit Court did not err in entering Judgment in favor of the State in the amount of $36,854.43.

III.

The Act does not violate the Contract Clauses of the Missouri and United States Constitutions (Response to part of Appellants' point I).

A. Standard of Review.

The State agrees with Appellants' assertion that the correct standard of review is *de novo*. Because statutes are presumed constitutional, and

Appellants are challenging the Act, they bear the burden of proving the Act is unconstitutional. *Linton v. Missouri Veterinary Medical Bd.*, 988 S.W.2d 513, 515 (Mo. banc 1999).

B. Argument.

Article I, section 13 of the Missouri Constitution bars any ex post facto law, law imparing the obligation of contracts, or law that is retrospective in its operation, or a law making any irrevocable grant of special privileges or immunities. Article I, section 10 of the United States Constitution, likewise, prohibits the passage of laws impairing the obligation of contracts.

But the Contract Clauses of both the Missouri and United States Constitutions only prohibit the passage of laws impairing the obligation of existing contracts. In other words, if a statute is enacted, and parties after-the-fact enter into a contract that is impaired by the existing statute, the statute does not run afoul of the Contract Clauses. *See In re Marriage of Haggard*, 585 S.W.2d 480 (Mo. 1979) (state statute is unconstitutional only when it impairs an individual's rights under an existing contract);

Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842 (8th Cir. 2002) (contract clause may invalidate a state statute substantially impairing existing contractual rights).

Appellants argue that the Act is unconstitutional because it impairs their contractual obligations in violation of the Contract Clauses of the Missouri and United States Constitutions. Their argument fails, however, because they entered into their attorney-client fee agreement on December 17, 1998, ten years after the Act's enactment in 1988.[10] L.F. 85. The Act did not substantially impair the rights and obligations of their fee agreement because, quite simply, there was no existing contract between Karpierz and McMullin in 1988. The Act is thus not unconstitutional pursuant to the Contract Clauses of the Missouri and United States

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[10]Appellants' reliance upon *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), is misplaced. That case involved a New Jersey statute that, by repealing a prior covenant between New Jersey and New York, impaired an existing contract between the state and bondholders owning over $1 million in bonds.

Constitutions, and the Circuit Court did not err in entering Judgment in favor of the State in the amount of $36,854.43.

IV.

The common fund doctrine is inapplicable to Karpierz's asset (Response to Appellants' point II).

A. Standard of Review.

The State agrees with Appellants' assertion that the correct standard of review is *de novo*.

B. Argument.

The common fund doctrine refers to the principle that if a plaintiff or his attorney creates, discovers, increases, or preserves a fund to which others have claim, then the plaintiff is entitled to recover from the fund the litigation costs and attorney's fees. Black's Law Dictionary 269 (7th Ed. 1999). The common fund doctrine is an equitable exception to the "American Rule," which states that, ordinarily, litigants must bear the expense of their own attorney's fees. *DCW Enter., Inc. v. Terre Du Lac Assoc., Inc.*, 953 S.W.2d 127, 132 (Mo.App. W.D. 1997). As an exception, then, the common fund doctrine is applied only in "special or very unusual circumstances." *Id*.

Missouri courts first recognized the common fund doctrine in *Jesser v. Mayfair Hotel, Inc*., 360 S.W.2d 652 (Mo. banc 1962). In *Jesser* the "common fund" at issue resulted from a class action lawsuit brought in equity against the trustees of certain property. The facts of *Jesser* are indicative of the types of cases in which the common fund doctrine applies: class action lawsuits, mass disaster torts, antitrust litigation, probate matters, and cases involving disputed trust funds. *See generally*, John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Persons Access to Justice*, 42 Am. U.L. Rev. 1567, 1580-81 (1993). These types of cases all involve a "fund" controlled by the court, and identifiable, non-litigant beneficiaries entitled to a share of the fund. *Id*. at 1581. For example, numerous individuals not named as parties benefitted from the class action lawsuit in *Jesser*, because the lawsuit prevented the possible wrongful disposition of trust assets of a company in which they held stock. *Jesser*, 360 S.W.2d at 659-61.

But this case is not analagous to *Jesser*, or any of the types of cases in which the doctrine applies. First, although many states have

incarceration reimbursement acts, and many reported decisions address their application and validity,[11] Appellants have failed to identify even one case in which a court indicated that the common fund doctrine prevents a state from recovering, in whole or part, reimbursement for an offender's cost of care. This makes sense inasmuch as incarceration reimbursement litigation does not fit into any of the categories in which the doctrine applies. Moreover, applying the common fund doctrine would conflict with the purpose of incarceration reimbursement statutes, namely, addressing the problem of financing increasingly expensive care and maintenance of correctional facilities and the convicts they house. *See Taylor*, 25 S.W.3d at 568; S.P. Conboy, *Prison Reimbursement Statutes: The Trend Toward Requiring Inmates to Pay Their Own Way*, 44 Drake L. Rev. 325, 327 (1995).

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[11]*See* George L. Blum, Annotation, *Validity, Construction, and Application of State Statute Requiring Inmate to Reimburse Government for Expense of Incarceration*, 13 A.L.R. 5th 872 (2001).

Second, if the KCPD had not seized Karpierz's money upon his arrest, the State could still have filed an incarceration reimbursement action against him because he is an offender, who owned an asset, and for whom the State incurred expense by maintaining him in a correctional facility. Contrary to Appellants' assertion, then, McMullin's efforts in Karpierz's lawsuit against the KCPD did not make it possible for the State to recover incarceration reimbursement from Karpierz, nor did it "create" an asset that was previously non-existent.

Third, as previously explained, the Act gives priority to the State's claim over "all other liens, debts, or other incumbrances." Sec. 217.837.4 RSMo. McMullin's costs and fees in the lawsuit against the KCPD are a lien that is subordinate to the State's claim for incarceration reimbursement. Karpierz is indebted to McMullin for the latter's costs and fees, and this debt is subordinate to the State's claim. As a result, the Circuit Court did not err in entering judgment in favor of the State in the amount of $36,854.43.

CONCLUSION

In view of the foregoing, the Circuit Court's Judgment in favor of the State of Missouri, in the amount of $36,854.43, should be affirmed.

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

The undersigned hereby certifies that on this 5th day of March, 2003, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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This undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,558 words. 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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APPENDIX

Cost of Care, Reimbursemnt by Prisoners A-1

Findings of Fact, Conclusions of Law, and Judgment and Order A-5

Compensation of Attorney A-14