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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,638

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA

ON REVIEW FROM THE THIRD DISTRICT COURT
OF APPEAL STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Respondent State of Florida accepts the Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The Tort Reform and Insurance Act of 1986 was a legislative effort towards tort and commercial insurance reform. This Court has previously and extensively reviewed this act finding the Legislature had a rational basis for its action. The particular provision of the act attacked here is entitled to a presumption of validity and must be upheld, unless Petitioner can clearly demonstrate its unconstitutionality. Petitioner has failed to do so. His attack amounts to nothing more than an emotive plea based on policy grounds.

If the premise that punitive damages are subject legislative direction and control is accepted as a principle of stare decisis, then the analyses offered by Petitioner under various constitutional provisions are wholly irrelevant, or in the words of the Third District Court of Appeal, "very insubstantial." The Petitioner's cause of action accrued, and his lawyer entered into the contract of representation, subsequent to the effective date of the punitive damage statute. Therefore, neither Petitioner nor his lawyer had a vested property right to a punitive damage award, except as dictated by

statute. At the time the jury returned a verdict for punitive damages the state's right to sixty (60%) percent of those damages vested. Entry of final judgment is a ministerial act which must be executed in accordance with the statute. The fact that the form of the judgment needed to be amended to bring it into compliance with the punitive damage statute does not operate to render the statute unconstitutional. To hold otherwise would subject the constitutionality of the statute to the whim of the trial court.

This court has extended the application of the constitutional principle of access to courts to statutory limitations on compensatory damages, both economic and noneconomic. However, no court in this state has ever questioned the Legislature's authority to limit, or even eliminate, punitive damages. To so rule would obviate settled law concerning the nature and social purposes of punitive damages; in effect, injecting into such damages a compensatory aspect heretofore absent in this jurisdiction.

Petitioner's other claims are without merit. If the Legislature may properly eliminate punitive damages, if in its policy-making discretion such action is warranted, then the Legislature, consequently, may limit such damages or re-direct their dispersal. Such action does not interfere with Petitioner's right to trial by jury. The statute is entitled to

a presumption of constitutionality and should be construed in a manner that is consistent with constitutional principles.

The provisions of Section 768.73(2), Florida Statutes, do not constitute an unlawful taking of Appellant's property. The entitlement to punitive damages does not vest until the entry of the Final Judgment. The fact that the trial judge mistakenly did not enter the original Final Judgment in accordance with the statute does not preclude the trial judge from correcting that mistake by amending the Final Judgment.

Punitive damages are subject to legislative direction and control. Prior to the accrual of Petitioner's cause of action, the Legislature enacted the tort reform act which changed the amount of punitive damages a plaintiff was entitled to receive in a civil action. The Petitioner and his lawyer took this case with this statute as the present law of the state. Neither the Petitioner nor his attorney ever had any right to receive any more than 40 percent of the punitive damage award or fees based upon this percentage. Therefore, neither Appellant nor his attorney has been deprived of any "property."

A R G U M E N T

I.

SECTION 768.73(2), FLORIDA STATUTES, IS CONSTITUTIONAL.

A. Introduction

In 1986, the Florida Legislature undertook a comprehensive effort to address a perceived compelling social problem pertaining to the availability of commercial liability insurance. The results of that effort are contained in the Tort Reform and Insurance Act of 1986, Ch. 86-160, Laws of Florida. The legislative efforts towards related tort reform is codified in Part II of Chapter 768, Florida Statues. The Tort Reform and Insurance Act received early and extensive review from this Court. See, Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). However, the particular provision at issue in the present case was tested only against the contention that it constituted judicial encroachment. Id. at 1092.

The concept of damages as a tool of social policy awarded above and beyond what is necessary to compensate a wronged party has an ancient history. Multiple damages directed to the nature of the wrongdoing and having a punitory character were first recorded in 2,000 B.C. in the Code of Hammurabi. Hittite Law in 1400 B.C. and the Hindu Code of Manu in 200 B.C. also provided for damages of a punitory nature in excess af actual harm. The Bible contains numerous examples of multiple damage remedies available under Mosaic Law for offenses such as stealing, adultery and usury.

English common law decisions early on established the concept of punitive or exemplary damages awardable in situations where a tortfeasor's conduct was particularly egregious. However, the English courts were somewhat equivocable about the philosophical underpinnings of punitive damages. Some of the English decisions emphasized that punitive or exemplary damages were awarded as a form of compensation. Nevertheless, the English decisions manifest a great deal of confusion about the compensatory versus punitory nature of damages which were in excess of the absolute pecuniary damage that a plaintiff could prove. See, e.g. Merest v. Harvey, 5 Taunt, 442, 128 Eng. Rep. 761 (C.P. 1814).

After the arrival of this damage theory in America it soon became settled doctrine that exemplary damages are non-compensatory in character.[1] The availability of actual damages to compensate for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, wounded feelings, indignity and embarrassment render awarding of exemplary damages on such bases redundant. In almost American jurisdictions the expressed purpose of punitive damages is non-remunerative.[2] This role flows counter to the normal reparative function of tort and contract remedies with the

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[1] See, Note, Exemplary Damages in the Law of Torts, 70 Harv.L.Rev. 517, 520 (1978).

In fact, only three states have assigned to punitive damages a compensatory function - Connecticut, Michigan and New Hampshire.

result that punitive damages have a long-standing controversial position among regular remedies available at law.

Under Florida law punitive damages have a long history and are awardable only when the acts complained of have been committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or with reckless indifference to the rights of others. See, Ross v. Gore, 48 So.2d 412 (Fla. 1950); Castlewood International Corp. v. La Fleur, 322 So.2d 520 (Fla. 1975); S.H. Kress & Co. v. Powell, 180 So. 757 (Fla. 1938); Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (Fla. 1936). This Court on a number of occasions has analogized the character of negligence necessary to support an award of punitive damages, as comparable to the standard of conduct necessary to sustain a conviction for manslaughter. See, Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986); White Construction Ca. v. Dupont, 455 So.2d 1026 (Fla. 1984); and Carraway v. Revell, 116 So.2d 16 (Fla. 1959).

It has long been established that punitive damages are reserved for those kinds of cases where the private injuries resulted from acts which rise to the level of a public wrong. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). Punitive damages go beyond the actual damages suffered from the tort and are imposed as a punishment of the wrongdoer and as a deterrent to him and to others, Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986); Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545 (Fla. 1981); Campbell v. Government Emp. Ins. Co., 306 So.2d 525 (Fla. 1974).

In Florida East Coast Ry. Co. v. McRoberts, 149 So. 631, 632 (Fla. 1933), the Supreme Court of Florida expounded on the nature and purpose of punitive damages:

> Punitive damages are damages over and above such sum as will compensate a person for his actual loss. And the law permits their imposition, in proper cases, at the discretion of the jury, not because the party injured is entitled under the law to recover punitive damages as a matter of right, but as punishment to the wrongdoer, for the purpose of deterring him and others committing similar violations of the law from such wrongdoing in the future. Therefore exemplary damages are, as it has been said, allowed by the law, not as a matter of compensation to the injured party, but because of the quality of the wrong done by the tort-feasor . . . .

It has, in fact, been stated that the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. See Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). The Florida Supreme Court in Ingram v. Pettit, regarding the nature of punitive damages, stated as follows:

> We believe that the potentiality of an adverse award of punitive damages is a suitable corollary to those criminal laws designed to discourage , , , , reckless disregard for the public safety.

Id. at 925

Thus, the first characteristic of punitive damages is that they are imposed in situations where, because of the defendant's egregious conduct, the private injuries constitute public wrongs.

Punitive damages, therefore, rest upon a principle of punishment and are in the nature of a civil penalty.

Under this theory punitive damages is a social, exemplary remedy, not a private, compensatory remedy. The imposition of punitive damages serves the function of punishment which may deter future public harm. In this view, punitive damages are imposed in the interest of society and for the public benefit. See generally, 22 Am.Jur.2d Damages, **8734**, and cases cited thereunder.

The second principle or characteristic of punitive damages for purposes of constitutional analysis or scrutiny is that such damages are subject to legislative control and direction and constitutionally may be disallowed entirely or may be subjected ta other limitations and alterations. Although punitive damages are recoverable under Florida law, such damages are not an absolute right. Ross v. Gore, **48** So.2d 412 (Fla. 1950); Fisher v. City of Miami, **172** So.2d **455** (Fla. 1965); **22 Am.Jur.2d** Damages §737. In Smith v. Hill, **147** N.E.2d 321 (Ill. 1958), the Illinois Supreme Court held that since punitive damages are allowed in the interest of society and not solely to recompense the individual, a statutory denial of them does not violate any constitutional right or encroach upon any judicial function or violate any constitutional guaranty of separation of powers. And see Louisville & Nashville R. Co. v. Street, 51 So. 306, 307 (Ala. 1909) (plaintiff is without legal right to punitive damages and

such damages may be forbidden or affirmatively withheld by legislative enactment.

The imposition of civil penalties is a valid exercise of the state's police power. The fact the state has historically allowed a plaintiff, as a reward for carrying out social policy, to receive all of the punitory award does not preclude the state from altering that policy or re-directing the distribution of the proceeds of the penalty. When analyzed from this perspective of social policy, punitive damages can be viewed as a variety of a qui tam action.[3] See generally, 36 Am.Jur.2d Forfeitures and Penalties, 867-69. In the absence an express constitutional restriction, the legislature has the authority to direct to whom a penalty imposed by statute shall be paid. The general purpose served by directing that all or a portion of an award be paid to an aggrieved party or to an informer is that it has the effect of stimulating prosecutions.

Against this historical and analytical backdrop we can review Petitioner's constitutional claims.

B. Taking of Property Without Due Process.

Petitioner first claims that the application of Section 768.73(2), Florida Statutes, to the jury verdict returned in his case violates the Due Process Clause of the United States Constitution and Article X, Section 6 of the Florida

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[3] **See,** e.g., Rivers and Harbors Appropriation Act of 1899, 816, 33 U.S.C.A §411, which provides that persons giving information leading to the conviction of violators of the Refuse Act shall be paid one-half of any fine collected.

Constitution. The fault with Petitioner's entire theory lies in the assumption of his faulty premise that he ever had a vested property right of which the State subsequently deprived him without just compensation. If this statute is to be given a presumption of validity and construed in a manner which is consistent with its constitutionality, then the only conclusion that can be reached is that the State's interest in sixty percent of the punitive damage award vested at the time the jury made its award, which is the same moment the Petitioner's interest in forty percent of that award vested. The only way the legislation could constitutionally run a foul an individual's property rights is if the statute in its application affected vested property rights or retroactively applied to final judgments, contracts or causes of action which were executed or accrued prior to the effective date of the law. See, Section 768.71(2), which provides that "[t]his part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date."

In Ross v. Gore, 48 So.2d 412 (Fla. 1950), this Court ruled that it was constitutionally permissible for the Legislature to place conditions under which punitive damages could be recovered, or to deny their recovery entirely. The Ross Court at 414 stated:

> As to question No. 1, plaintiff contends that the statute has "changed the amount of damages recoverable, and thus has unconstitutionally impaired appellant's

> rights." There is no merit to this contention. As to the denial of "punitive damages," such damages are allowed, not as compensation to a plaintiff, but as a deterrent to others inclined to commit a similar offense, and their allowance depends on malice, moral turpitude, wantonness or outrageousness of tort. [citations omitted] The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. [citations omitted] It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.

Petitioner's claim that he obtained a vested right to the entire punitive damage award because the original final judgment erroneously entered the entire amount in his favor is frivolous. The trial court made her error clear at the time of her ruling on the motion to amend the judgment.

> I don't think this is a clerical mistake. I think it's a mistake on my part but not a clerical one, in other words in typing. I did not miswrite anything or whoever prepared the order did no miswrite anything. It was my oversight in the sense that I did not realize that it was meant to be interpreted that it would exclude the statute, And that was not my intention in any way, shape or form, you know. So it was an oversight on my part in that regard.

585 So.2d at 1038 n.lO.

The district court dismissed Petitioner's contention on this point in the following manner.

> We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because that judgment was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

Gordon v. State of Florida, 585 So.2d at 1037 n.8.

C. **Access to Courts.**

Petitioner's contention that the 1986 amendment is an impermissible interference with his access to courts rests on the same faulty premise that his due process claim is based. Petitioner must argue that the Legislature lacks the plenary power to alter or abolish punitive damages.

Article I, Section 21 of the Florida Constitution, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court articulated its approach to access to court issues:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida or where such right has become a part of the common law of the State pursuant to Fla.Stat. 82.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the

> right of the people of the State to redress for injury, unless the Legislature can show an overpowering public necessity for the abolishment of such right and no alternative method of meeting such public necessity can be shown.

Id. at 4.

The take-off point for an analysis of an access to courts issue is the phrase "redress far any injury." Petitioner would have us hurry past this all-important preliminary determination and rush on to the assumption that a claim for punitive damages is his inviolable right. Legal jurists, historically, saw the constitutional provision's central focus, "redress of any injury," as directed towards substantive causes of action. However, the courts have made it clear in two recent decisions, Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) and University of Miami v. Echarte, 585 So.2d 213 (Fla. 3d DCA 1991) that legislative interference with compensatory damage measures may impermissibly impact on the constitutional right of access to the courts.

The extension of the constitutional principle to compensatory damages, however, provides no succor to Petitioner because, in the words of the Third District Court, "he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, . . . the allowance of punitive damages is based entirely upon considerations of public policy." Gordon v. State of Florida,

585 So.2d 1033 at 1035 (Fla. 3d DCA 1991). The Florida courts have made it clear that the Legislature can place conditions and limitations on the recovery of punitive damages or do away with such damages entirely without committing constitutional error. This Court back in 1950 anticipated Petitioner's dissatisfaction with the present statute in Ross v. Gore, 48 So.2d at 412 by stating: "We do not think, therefore, that the plaintiff can be heard to say that the statute [which precluded recovery of punitive damages] denies him recompense for his injury, since he is entitled to recover actual damages sufficient to compensate him for any harm sustained . . . "

In view of the fact that Florida allows recovery far such noneconomic losses to compensate for pain and suffering, inconvenience, mental anguish and loss of capacity for enjoyment of life, among others, one cannot be heard to say that reduction, redistribution or even elimination of punitive damages interferes with the right of access to courts.

D. Trial by jury.

Petitioner provides no analysis, nor cites any case law, in support of his position that a statute directing distribution of a punitive damage award violates his right to a jury trial. His naked contention is once again based on his persistent and incorrect premise that his right to all of a punitive damage award is absolute.

At the time Petitioner's cause of action accrued, the law allowed him to recover forty percent of any punitive damage verdict returned by the jury, Petitioner had the option of seeking a punitive damage award under these conditions.

Section 768.73(2), Fla.Stat., in no way interferes with Petitioner's right to a jury trial. The statute's effect is to re-distribute a portion of any punitive damage award, to which we have seen Petitioner had no fixed constitutional right. See, e.g., Lasky v. State Farm Insurance Company, 296 So.2d 9, at 22 (Fla. 1974) holding that the abolition of all right of recovery of specific items of damages in specific circumstances does not violate the right to trial by jury. Thus, if the statute does not violate Petitioner's due process rights or impermissibly interfere with his access to courts, similarly, no violation of his right to trial by jury is caused by the 1986 amendments.

E. Equal Protection

Petitioner contends that Section 768.73(2), Florida Statutes, violates equal protection guarantees by treating plaintiffs with punitive damage claims differently from plaintiffs with statutory treble damage claims, and secondly, by treating plaintiffs who settle their claims differently from plaintiffs who fully litigate their claim. In order to comply with the requirements of the equal protection clause, statutory classification must be reasonable and not arbitrary and all persons in the same class must be treated alike. See, Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).

The distribution requirement of subsection (2) of **768.73** applies to punitive damages awarded in "*any* civil action". This requirement applies across-the-board to all persons similarly situated. The fact that the state or some trust does not receive a portion of other types of damages is not an unreasonable classification. One of the underlying social policy functions of allowing private parties to receive excess damage awards is to promote aggressive prosecutions. Obviously, reducing the percentage of the award the private party is entitled to receive has the effect of reducing the degree of legislative encouragement to seek punitive damages. As the district court in this **case** stated:

> The legislative history indicates that one reason for the provision in question was to discourage punitive damages claims by making them less remunerative to the plaintiff and his attorneys. See §768.73(4), Fla.Stat. (Supp. 1986). Since the legislature had every right to conclude, as a matter of public policy, that such suits should be discouraged - even eliminated - this affords a perfectly legitimate ground for upholding the statute. (footnote omitted)

585 So.2d at **1087.**

The Legislature has wide discretion in making classifications and a presumption of validity is afforded to the statute. Lewis v. Mathis, 345 So.2d 1066 **(Fla. 1977).** The **pole** star for judging the validity of a particular classification is whether it is based on differences having fair and substantial relation to the purpose of the legislation, in order that all

persons similar situated will be treated like. Department of Revenue v. Amrep. Corp., 358 So.2d **1343** (Fla. **1978).** It can hardly be contended that a statute which applies to punitive damages in all civil action was narrowly drawn. The examples positioned by Petitioner invoking treble damages for such matters as RICO violations, hate crimes, and street terrorism have a different genesis, and present altogether unique social problems for which the Legislature is not constitutionally precluded from seeking solutions different from ordinary tort issues.

Petitioner's second equal protection issue hardly merits argument. The fact that parties who settle their **cases** are going to have different results from those who fully litigate their cases does not present a constitutional issue. Such differences are going to exist regardless of how punitive damages are distributed, or for that matter, whether punitive damages are abolished entirely. One of the collateral effects of the amended statute may be a higher percentage of settled cases, a result that is patently an auxiliary benefit of the Legislation. See, Ch. **86-160, §1,** Laws of Florida

F. Rational Basis

Petitioner contends that Section **768.73(2),** Fla.Stat., is unconstitutional, because the statute is not rationally related to the Legislature's goal and a legitimate state interest. In his opinion, problems related to availability and cost of

insurance are not reasonably and rationally related to damage awards in civil litigation. The Third District Court of Appeal in the decision below found that the statute bears a rational relation to a legitimate legislative interest or objective on at least two bases. Id. at 1036. The State concurs.

In Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987), this Court reviewed the provisions of the Tort Reform and Insurance Act of 1986, including the section that is under review in the present case, albeit on a separation of powers issue. In its conclusion this Court pronounced:

> The legislature was presented with the public concern that commercial liability insurance had become too expensive and, in some instances, unavailable. The legislature determined that a major problem existed and determined that, if a solution existed and determined that, if a solution was not found, claimants would be unduly restricted in their recovery of damages because there would be only limited insurance available to spread the risks of loss.
>
> Chapter 86-160 is the legislature's solution. Whether this is the best solution, or whether it will work, is not for this Court to determine. We do find that the legislature had a rational basis for its action, and that its work product, with the exception of section 59 and one portion of section 66, is entirely within constitutional parameters.

Id. at 1095.

G. Tax on Judgments

Petitioner asserts that the statute is a "60% assessment against Gordon's Judgment [and] is nothing more than a tax on Judgments and a revenue producing measure." Initial Brief, p.29. No case law is cited for this proposition and it suffers from the same fallacy of logic as the remainder of Petitioner's constitutional arguments. Again, his premise is that the State is making an assessment against "Gordon's Judgment.'' Petitioner never had a right to receive the sixty (60%) percent of the punitive damage award or to have judgment entered for that portion, and therefore, it is erroneous to characterize the application of the statute to a jury verdict as an assessment against a judgment.

The only way that any of Petitioner's constitutional claims have any substantiality is if the legal theorist blindly accepts Petitioner's initial premise - that he had a vested property right of which the State subsequently deprived him of sixty percent. However, this approach presupposes the unconstitutionality of the law. If the Legislature is given the presumption that it seeks to enact constitutional laws, then the statute can be construed in a constitutional manner.

H. Other Matters

1. State as a party and judgment creditor.

Another of Petitioner's naked assertions is that the State was not a party in the trial court, and therefore, cannot

be a judgment creditor. The reason the state intervened in the trial court was in order to be made a party and assert its right pursuant to Section 768.73(2), Fla.Stat. The Third District Court ruled that

> it is clear that the trial judge properly exercised her discretion, even after judgment, to permit the state to intervene as a plainly interested party plaintiff. Wags Transportation System v. City of Miami Beach, 82 So.2d 751, (Fla. 1956).

585 So.2d at 1038.

Petitioner's contention is without merit.

2. Other Decisions

Petitioner relies on two decisions from other jurisdictions in support of his argument. McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990), and Kirk v. The Denver Publishing Co., 818 P.2d 262 (Colo. 1991). These decisions are helpful to the extent Colorado's and Georgia's punitive damages statutes are similar to Florida's statute and the decisions provide discussion which illuminate the constitutional issues. Against that criteria, the discussion provided by these two decisions is disappointing.

The central focus of the federal district judge's conclusion in the McBride case that the Georgia statute did not pass constitutional muster - statute did not have a rational basis - has already been the subject of review as to Florida's legislation by this Court and the conclusion reached that the

Florida Legislature had a rational basis for its action. Smith v. Department of Insurance, 507 So.2d at 1095. And see, the discussion on this issue by the court below, 585 So.2d at 1036-37.

Second, the McBride court found that the Georgia punitive damage provision created an arbitrary and unreasonable classification between product liability tort plaintiffs and other tort plaintiffs. Florida's statute makes no such distinction, it applies across the board to all civil actions wherein punitive damages are awarded. Thus, this issue is not present in the Florida arena.

Third, the federal district court judge ruled that the Georgia statute was unconstitutional because it was subject to the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. This was a rather peculiar holding for at least two reasons. The federal courts have exclusively held the Eighth Amendment applicable only to criminal prasecutions and punishment. See, Browninq-Ferris Industries v. Kelco Disposal, Inc., 109 S.Ct. 2909 at 2912 (1989). Even if the analogy were made between a governmental fine and a punitive damage award where the state receives a portion of the award, it is not necessary ipso facto to reach the conclusion that the fine is criminal in nature, nor is it a foregone conclusion that such fine is excessive and therefore constitutionally infirm.[4] The

[4] See generally, J. Ghiardi, Punitive Damages: State Extraction Practice is Subject to Eighth Amendment Limitations, Tort & Insurance Law Journal (1990).

McBride, case was a declaratory judgment action and no award had been made. How then could the court say a punitive damage award not yet awarded under the statute was excessive? Although a plaintiff is not a proper party to propose application of an Excessive Fines Clause analysis to a punitive damage award made against a defendant, the analyst, if faced with the task soon arrives at the realization that an excessive punitive damage award is subject to judicial remittitur under Florida law long before it results in an unconstitutionally excessive fine.

The Colorado case likewise provides little solace for Petitioner. The Colorado Supreme Court fell prey to the same faulty reasoning from which Petitioner's argument suffers. The Colorado statute, in pertinent part, provides:

> One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

Section 13-21-102(4), Co. C.R.S. (1987).

The Colorado high court interpreted their statute as allowing a forced taking of a judgment creditor's property interest in a manner unrelated to any constitutionally permissible governmental interest. Kirk v. The Denver Publishing Co., 818 P.2d 262, at 264 (Col. 1991). The Colorado

court asserted the premise, based upon statutory language, that the statute allowed the punitive damage award to vest to the plaintiff who was then required to pay over to the state fund one-third of the exemplary damages. The Florida statute as we have seen, does not evince an intent to allow the punitive damage award to vest to the plaintiff. Plainly, such a premise pre-damns the statute to a constitutional inferno.

This Court is referred to the dissenting opinion, authored by the Colorado Chief Justice, as the better-reasoned analysis of the constitutional issues. The majority decision failed to give their statute a presumption of validity or to seek to construe the language of the statute in a manner that would comport with its constitutional validity. Furthermore, a review of the provisions of the two states' statutes reveals significant differences which safely steer the Florida law away from a preliminary conclusion that a plaintiff received a vested property right, which is then improperly taken from him.

II.

Section 768.73(4), Florida Statutes, requiring that Plaintiff's Attorney's Contingency Fee be calculated an what was recovered by Plaintiff, is constitutional.

Petition's attorney seeks to interject himself as a party on appeal in order to have his own interests litigated in the present proceeding. This he is precluded from doing. This Court is reviewing the constitutionality of subsection (2) of 8768.73, Fla.Stat. As an adjunct of that review, counsel for Petitioner seeks to have this Court review the constitutionality of another provision of the punitive damage sharing statute. Such review would be beyond the scope of the certified question.

Second, the District Court held that because he was not a party to the controversy, that the court would not consider the personal claim of the attorney. 585 So.2d at 1037 n.7. citing, Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1955). The State concurs with this position.

Even if Petitioner's attorney claim should be permitted to be heard, his fee contract would have to be based on present Florida law at the time he entered into the contract of representation. There is no dispute of fact that the statute was enacted prior to the accrual of the cause of action in this case and prior to the attorney entering into the contract with notice of, and subject to, the terms and condition's of the statute. Subsection (4) permits him to receive a fee based upon forty (40%)

of any punitive damages that a jury might award if the fees are based on the punitive damages, Contrary to his contention that "he (the attorney) did not agree to provide legal services to the State of Florida on a pro bono basis," having entered into the contract with notice of the statute, this is precisely his agreement. Furthermore, as cited by Petitioner's attorney, Gamble v. Wells, 450 So.2d 850 (Fla. 1984), held that the Legislature did not unconstitutionally impair a contractual obligation in violation of Article I, Section 10, Florida Constitution, by imposing a limitation on an attorney's fee that was substantially lower than the contingent fee he had negotiated.

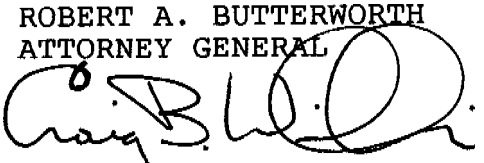
Therefore, this Court should refuse to hear Petitioner's attorney's argument; but if the Court agrees to entertain this issue, it should find that subsection (4) does not violate Article I, Section 10.

CONCLUSION

The decision of the Third District Court of Appeal upholding the constitutionality of the punitive damage statute should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA has been furnished to JACK W. SHAW, JR., Esquire, Suite 1400, 225 Water Street, Jacksonville, Florida 32202-5147; YVETTE RHODES PRESCOTT, Esquire, 600 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131-1691; BERNARD B. WEKSLER, Esquire, 522 Gables International Plaza, 2655 Le Jeune Road, Coral Gables, Florida 33134; and JOHN R. BERANEK, Esquire, Monroe-Park Tower, Suite 1000, 101 North Monroe Street, Tallahassee, Florida 32302, this 20th day of December, 1991.

CRAIG B. WILLIS