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MAY 31 2023

DEPT. OF JUSTICE

SUBJECT: Constitutionality of Legislation Authorizing the Award of Punitive Damages for the Support of the Common Schools (LB 25).

REQUESTED BY: Senator Teresa Ibach
Nebraska Legislature

WRITTEN BY: Mike Hilgers, Attorney General
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INTRODUCTION

LB 25 proposes to authorize the award of punitive damages in civil actions when a party "has displayed actual intent to cause harm or causes an injury through action taken in reckless disregard for the lives and safety of others." LB 25, § 3. "Punitive damages" are defined as "damages that a party in a civil action are ordered to pay (a) based on aggravating circumstances, (b) to penalize such party, or (c) to provide additional deterrence and discourage similar conduct in the future." LB 25, § 5(3). LB 25 includes legislative findings that "Article VII, section 5, of the Constitution of Nebraska provides in part that all fines, penalties, and license money arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed..." and that this constitutional provision "further provides that all such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." LB 25, § 1(1), (2). It further declares that "[p]unitive damages are in the nature of fines or penalties." LB 25, § 1(3). If punitive damages are awarded, the county attorney must be notified, and "may become a party solely to protect the interests of the common schools in such damages." LB 25, § 4(2). "Any award of punitive damages shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska." LB 25, § 6.

You request our opinion on the constitutionality of the bill's authorization of an award of punitive damages for the support of the common schools. You also ask us to address whether punitive damages are fines or penalties within the meaning of Neb. Const. art. VII, § 5, and, if so, may the county attorney be made a party to the civil action in which punitive damages are awarded to protect the interests of the common schools in such damages.

ANALYSIS

Neb. Const. art. VII, § 5 [the "Penalties Clause"], provides, with certain exceptions, that

all fines, penalties, and license money arising under the general laws of the state. . . shall belong and be paid over to the counties respectively where the same may be levied or imposed,.... All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue,....

LB 25 would allow the award of punitive damages in civil actions, with the damages treated as fines or penalties required to be distributed to the common schools as directed under art. VII, § 5. Before addressing your questions related to the bill, we begin with a summary of the Nebraska Supreme Court's caselaw addressing the constitutionality of punitive damages.

A. Nebraska Caselaw Addressing the Constitutionality of Punitive Damages.

The Nebraska Supreme Court has identified two separate bases for finding punitive damages unconstitutional under the Nebraska Constitution. The first is the due process clause; the second is the Penalties Clause. We discuss each in turn.

1. *The Court's first recognition of punitive damages as a violation of the due process clause.*

In *Boyer v. Barr*, 8 Neb. 68 (1878) [*Boyer*], the Nebraska Supreme Court considered whether punitive damages could be awarded in a civil action for assault and battery. The jury was instructed that, if it found the defendant acted deliberately and maliciously, it could award punitive or exemplary damages in addition to compensating the plaintiff for the actual injury. The Court noted that "the adjudicated cases" and "conclusions of eminent text writers of either this country or England" were "pretty evenly divided both in numbers and weight of authority" on whether "punitive or exemplary damages can be allowed in a civil action," and that this was "the first time" it had considered "the question of punitive, vindictive, or exemplary damages." *Id.* at 71, 73. Discussing authorities from other jurisdictions disapproving the practice of awarding punitive damages in civil actions, the Court, "[a]pproving...the law as laid down in" those cases, found the jury instruction on punitive damages improper. *Id.* at 75. While not

expressly citing the due process clause as the basis for its holding, the cases relied on by the Court in *Boyer* included a New Hampshire Supreme Court decision rejecting punitive damages in civil actions “to keep the civil and criminal process and practice distinct and separate” and characterizing such damages as “destroy[ing] every constitutional safeguard within their reach.” *Id.* at 72 (quoting *Fay v. Parker*, 53 N.H. 342, 397 (1872)).¹

The Court’s reliance on due process as the basis for rejecting the award of punitive damages to private parties in civil cases was repeated in *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881) [*Riewe*]. Finding a request “for instructions as to exemplary damages” was “properly refused” in a replevin action, the Court cited *Boyer* in holding “that in addition to full compensation for the injury sustained there cannot be added a further sum as a fine for the punishment of the defendant.” *Id.* at ____, 9 N.W. at 89. Explaining its rationale, the Court stated:

Damages should be equal in amount to the injury sustained; but upon what principle should they be given in excess of that amount? In law the injured party, upon being paid the damages sustained by the injury, has received full compensation therefor. Why then should the property of the party causing the injury be taken from him and given to another without compensation? Constitutional guarantees of the rights of private property amount to but little if courts sanction its practical confiscation under the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do, without regard to the amount of the injury. If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals. *Id.* at ____, 9 N.W. at 89-90.

The early decisions in *Boyer* and *Riewe* rejected punitive damages on due process grounds. Neither case relied on or mentioned the Penalties Clause in disapproving punitive damages.

2. *The Court’s first recognition of punitive damages as a violation of the Penalties Clause.*

Unlike *Boyer* and *Riewe*, one early case relied on the Penalties Clause in finding a punitive damage provision unconstitutional. In *Atchison & Nebraska R.R. Co. v. Baty*,

¹ *Boyer* did not mention or rely on the constitutional provision allocating penalties arising under the general laws to the school fund, but, rather, rested on the notion “that provisions for exemplary damages involved penalties so oppressive as to constitute violations of the due process clause of the Constitution.” Vold, Lawrence, *Constitutionality of Statutory Double or Treble Damages Provisions in Nebraska*, 19 Neb. Law Bull. 63, 84 (1940); see Neb. Const. of 1875, art. I, § 3 (“No person shall be deprived of life, liberty, or property without due process of law.”). The Nebraska Constitution currently provides: “No person shall be deprived of life, liberty, or property without due process of law, nor be denied equal protection of the laws.” Neb. Const. art. I, § 3.

6 Neb. 37 (1877) [*Baty*], the Court held a statute giving owners of livestock “double the value of the property injured, killed, or destroyed” on a railroad track was unconstitutional. After an extensive discussion of the constitutional right to due process, the Court stated it was “an established maxim in the polity of the state, that the legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of a crime, or when the sacrifice of his property is demanded by a just regard of the public welfare.” *Id.* at 45. The Court then noted:

Again, it seems clear that the statute in question is incompatible with another provision of the constitution. It will not be pretended that the act was intended to define a statutory criminal offense. Still, it is impossible to regard the excess beyond the value of the property in any other light than a penalty, not resting in contract, but a penalty or fine for the purpose of punishment; but this penalty or fine is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the constitution which declares that “‘all fines and penalties,’ etc., ‘shall be appropriated exclusively to the use and support of common schools.’” *Id.*

Two years after deciding *Baty*, the Court modified the rule in that case and upheld the constitutionality of a statute requiring officers charging fees greater than allowed by law to forfeit and pay the injured party fifty dollars. *Graham v. Kibble*, 9 Neb. 182, 2 N.W. 455 (1879) [*Graham*]. Discussing the constitutional provision requiring that “[a]ll fines, penalties, and license moneys arising under the general laws of the state...shall be appropriated for use exclusively to the usual support of common schools,” it stated that, “[o]n mature reflection we are not prepared to say, nor do we think it was intended by this provision of the constitution to deprive the legislature of the power to pass statutes like the one in question, whereby a fixed sum, in the nature of liquidated damages, is given to one who has suffered injury by the wrongful act or oppression of a public officer.” *Id.* at ___, 2 N.W. at 456. The Court further explained:

This section of the constitution, as we understand it, has no reference to those damages, whether limited in the amount recoverable or not, which a private person may sustain, but solely to such as under the law of the land are given to the public, and go into the public treasury. Its object, doubtless, was to correct what was considered abuses in the disposition of public moneys realized from the several sources therein mentioned, and to ensure their proper expenditure in the future. Its evident scope is to give direction to the distribution of the several funds belonging under the law to the public at large, or to a particular subdivision thereof, and thereby insure an equitable distribution, viz.: to the particular subdivision of the public upon whom rests the chief responsibility and expense of enforcing the criminal laws and police regulations of the people. *Id.* ___, 2 N.W. at 456-57.

While decided around the same time as *Boyer* and *Riewe*, *Baty* cited both the due process clause and the Penalties Clause in finding a punitive damage provision unconstitutional. Further, in *Graham*, the Court recognized that a reasonable amount fixed as liquidated damages was not a penalty subject to the Penalties Clause.

3. *Subsequent case law affirming that punitive damages are violations of both the due process clause and Penalties Clause.*

In *Sunderland Bros. Co. v. Chicago, B. & Q. R.R. Co.*, 104 Neb. 319, 177 N.W. 156 (1920), the Court considered the constitutionality of a statute allowing shippers to recover from railroads, in addition to actual damages, one dollar per day for delay in the shipment and delivery of goods. In its original opinion, the Court determined that, if the statute provided a fine or penalty in addition to actual damages, it violated the constitutional requirement that all fines and penalties arising under the general laws of the state go to the school fund. *Id.* at 321, 177 N.W. 157. "If treated as liquidated damages, the Legislature [was] acting beyond its authority in seeking to appropriate private property to private use." *Id.* Because the statute sought "to impose a greater liability in damages than compensatory damages," the Court found "it [was] taking private property for private use, which is unconstitutional." *Id.* at 322, 177 N.W. at 157.

On rehearing, the Court issued an opinion concluding that the statute imposed a fine or penalty recoverable by a private party in violation of the constitutional mandate that all fines and penalties arising under the state's general laws be used to support the common schools. *Sunderland Bros. Co. v. Chicago B. & Q. R.R. Co.*, 104 Neb. 319, 179 N.W. 546 (1920) [*Sunderland Bros.*"]. The Court noted its earlier decision in *Baty* holding a statute compelling a railroad company to pay double the value of livestock killed upon the track created an unconstitutional penalty. *Id.* at 324, 179 N.W. at 547. In response to the claim that the rule in *Baty* was "out of line with the general holding in other states," the Court disagreed, stating:

It is true that in other states penalties have been imposed for a violation of statutory duty, and these penalties have been, in many instances, recoverable by the individual, instead of by the state. Those states, however, do not, so far as our attention has been called, have such a constitutional provision as the one we have in this state, providing that all fines and penalties shall be appropriated exclusively to the use and support of the common schools. The cases in other jurisdictions discuss the validity of penalty statutes, as affected by general constitutional provisions, such as the requirement of due process of law and equal protection of the law, and under those constitutional provisions such penalty statutes are not prohibited. *Id.* 328, 179 N.W. at 548.²

² The dissenting opinion of Justice Letton noted that similar demurrage statutes had been upheld in a number of states, with courts concluding "the state has power to impose a penalty for a violation of a duty imposed by statute and that the disposition of the penalty, whether it shall go to the state or one of its subdivisions, to a private informer, or to the person actually damaged, is entirely within the discretion of the lawmaking power." 104 Neb. at 330-31, 179 N.W. at 549 (Letton, J., dissenting). He asserted the majority's reliance on *Baty* was improper, and that *Graham*, which modified *Baty*, recognized the constitutional provision requiring fines and penalties go to support the common schools "ha[d] no reference whatever to those damages whether limited in the amount recoverable or not, which a private party may sustain, but solely to such as, under the law of the land, are given to the public and go into the public treasury." *Id.* at 332, 179 N.W. at 549 (Letton, J., dissenting (quoting *Graham*, 9 Neb. at ____, 2 N.W. at 456)). Citing other

The Court later relied on *Sunderland Bros.* in holding unconstitutional a statute providing for the recovery of treble damages in an action against an attorney for deceit. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 926 (1960) [*Abel*]. Noting there was “confusion in the cases as to the meaning of the words ‘fines, penalties, and license money’ contained in Article VII, section 5 of the Constitution...,” the Court, citing *Sunderland Bros.*, explained:

The holdings of that case are: A statute which imposes a liability for actual damages and in addition thereto a penalty to be paid to the injured party is repugnant to section 5, Article VIII, now Article VII, of the Constitution, which requires all fines and penalties arising under the general laws to go exclusively to the school fund. A statute which imposes liability for actual damages and additional liability for the same act provides a penalty. 170 Neb. at 930, 104 N.W.2d at 688.

The Court drew a distinction between permissible legislation providing for “liquidated damages in favor of a private person, although in the form of a penalty, if the amount provided bears a reasonable relation to the actual damages,” and improper legislation providing “for the payment of an amount clearly in excess of compensatory damages,” which constituted “a penalty and violates the due process clause of the Constitution when considered with Art. VII, section 5.” *Id.* at 931, 104 N.W.2d at 689. While noting courts in other jurisdictions had upheld similar statutes against due process and equal protection clause challenges, it stated “such has not been the holding when the Constitution contains a provision similar to that in Article VII, section 5, of the Constitution.” *Id.* The Court concluded that,

[w]hether or not the granting of double or treble damages is a violation of the due process clause standing alone, it is a violation of such clause when considered with Article VII, section 5 of the Constitution. Since all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is violative of the cited constitutional provisions....The effect of the statute is to authorize the actual compensatory damages to be determined, and then arbitrarily requires the defendant to pay to the plaintiff three times that sum. It therefore exceeds compensatory damages three time over and is a penalty prohibited by the due process clause, Article I, section 3, and Article VII, section 5, of the Constitution of Nebraska. *Id.* at 932, 104 N.W.2d at 689.

Addressing what it called “[a]rguments...advanced by text writers and case reviewers that compensatory damages include not only the actual damages sustained,

state court decisions holding that similar penalty provisions did not fall within constitutional provisions requiring fines, penalties, and forfeitures to be paid to school funds, he asserted such provisions were properly read to “refer[] to penalties accruing to the public, and not to penalties recovered by private persons for their own use.” 104 Neb. at 334, 179 N.W. at 550 (Letton, J., dissenting).

but include actual cumulative harm and incentive liability...,” the Court stated:

The adoption of such a theory as reason for sustaining double and treble damages to private persons would inject into the law a recovery of damages for reasons that were purely speculative and conjectural. It would be an excuse for permitting punitive and exemplary damages, the recovery of which has been consistently condemned by the law of this state. We find no logic in the argument that a statute may properly permit the recovery of such damages in view of our cited constitutional provisions prohibiting penalties in favor of private persons. If any such damages could be established, they must be recovered as actual compensatory damages.

We necessarily conclude that penalties in favor of private persons are prohibited by the two cited sections of the Constitution. That necessarily requires us to hold that the recovery of double or treble damages, that is, damages which double or treble the actual compensatory damages established, are in contravention of the same sections of the Nebraska Constitution. *Id.* at 932-33, 104 N.W.2d at 690.

Abel recognized that “impos[ing] liability for actual damages and additional liability for the same act provides a penalty.” 170 Neb. at 930, 104 N.W.2d at 688. The *Abel* Court relied on *Sunderland Bros.* to reinforce the connection between the due process clause and Penalties Clause in striking down a treble damage statute as an impermissible penalty recoverable by a private party.

4. *Post-Abel decisions interpreting the Penalties Clause.*

The Court distinguished *Abel* in holding that damages above actual damages allowed under the Workers Compensation Act to compensate for delay in payment did not authorize recovery of a penalty by a private person in violation of art. VII, § 5 because “[t]he Compensation Act creates rights which did not exist at common law and the Legislature may place such restrictions thereon as it sees fit...Compensation under the act need bear no relationship to actual damages resulting from the injury.” *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 843-44, 212 N.W.2d 704, 706 (1973). Subsequently, the Court found that, because the parental liability statute imposed liability only for actual damages, it did not establish a fine or penalty prohibited by art. VII, § 5. *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). More recently, the Court held a Consumer Protection Act statute authorizing the Attorney General to seek civil penalties did not violate art. VII, § 5. *State ex rel. Stenberg v. American Midlands, Inc.*, 244 Neb. 887, 509 N.W.2d 633 (1994). While noting it held in *Abel* “that a statute which provides for a penalty in excess of actual damages paid to an injured party in a civil action violates” art. VII, § 5, the Court found that “[u]nlike *Abel*, the present case does not involve the payment of civil penalties to a private plaintiff.” *Id.* at 893, 509 N.W.2d at 637. The Court’s post-*Abel* decisions, however, do not address

punitive damages in relation to the due process clause in the Nebraska Constitution.³

B. Nature of Punitive Damages and the Constitutionality of the Award of Punitive Damages Under LB 25.

1. *LB 25 under the Penalties Clause.*

LB 25 would authorize the award of punitive damages in civil actions as penalties to be distributed to the common schools in accordance with art. VII, § 5. In light of the authority relating to the Penalties Clause discussed above, we will address whether the punitive damages proposed are “fines” or “penalties” within the meaning of this constitutional provision.

Punitive damages are defined in LB 25 as “damages that a party in a civil action are ordered to pay (a) based on aggravating circumstances, (b) to penalize such party, or (c) to provide additional deterrence and discourage similar conduct in the future.” LB 25, § 2(3). Punitive damages do “not include compensatory or nominal damages.” “Compensatory damages means damages intended to make whole the loss of an injured party and no more.” LB 25, § 2(1). “Nominal damages are damages that are not designed to compensate an injured party and are less than one thousand dollars.” LB 25, § 2(2). Under *Abel*, “[a] statute which imposes liability for actual damages and additional liability for the same act provides a penalty.” 170 Neb. at 930, 104 N.W.2d at 688. As the punitive damages authorized by LB 25 impose liability in addition to actual damages for the same act, they are a penalty under art. VII, § 5.⁴

While a penalty to a private litigant consistently has been held unconstitutional, that restriction does not create a *per se* bar to punitive damages under the Penalties Clause. Powers, Vincent M., *Punitive Damages in Nebraska*, The Nebraska Lawyer 18, 19 (June 2003) [“Powers”] (arguing that punitive damages are not prohibited but, because they are a penalty, they cannot be recovered by a private litigant and must be paid into the school fund).

Because LB 25 would not permit the award of punitive damages to private litigants, but instead to the common schools in accordance with art. VII, § 5, we think that LB 25

³ A Nebraska federal district court decision dismissed a bad faith counterclaim seeking to recover punitive damages for the schools in a civil action for declaratory judgment regarding insurance coverage and policy rescissions. *Factory Mutual Ins. Co. v. Nebraska Beef, Inc.*, 2009 WL 2886315 (D. Neb. 2009). Relying on *Abel*, the defendants argued they were “entitled to punitive damages if the money goes to the local county school district.” *Id.* at *1. The district court found no authorization in Nebraska law for defendants’ counterclaim, stating: “If the State of Nebraska wants to carve out an exception to allow private parties to pursue punitive damages on behalf of local school districts, it will have to explicitly say so.” *Id.*

⁴ Because they are a penalty, it is not necessary to consider if punitive damages may also be considered a “fine” under this constitutional provision.

would likely be constitutional under this constitutional provision.⁵

2. *LB 25 under the Due Process Clause.*

The other constitutional barrier to punitive damages is the due process clause. As noted previously, the decisions in *Boyer* and *Riewe* rejected punitive damages on due process grounds. Other decisions, however, cited both the due process clause and Penalties Clause in finding punitive damages unconstitutional. *Baty* discussed due process extensively but also mentioned the requirement that penalties be used to support the schools. The original opinion in *Sunderland Bros.* relied on both constitutional provisions, while on rehearing the Court emphasized the requirement that penalties be appropriated for the common schools. And *Abel* held the treble damage statute created a penalty which “violated the due process clause of the Constitution when considered with Art. VII, section 5.” 170 Neb. at 931, 104 N.W.2d at 689 (emphasis added). The Court has characterized such damages as “purely speculative and conjectural” (*Abel*, 170 Neb. at 933, 104 N.W.2d at 690), and has never expressly or impliedly overruled either *Boyer* or *Riewe*. Unless and until those precedents are overturned, we conclude that punitive damages are unconstitutional under the due process clause.

C. Role of the County Attorney Under LB 25.

Finally, you ask if there are “legal concerns” in “essentially [joining] the schools and county attorney as interested parties in a civil matter?”

LB 25 does not make school districts a party to any civil action asserting a claim for punitive damages. The question has been raised whether a claim for punitive damages to benefit the schools gives the school fund “an interest in the litigation that is protectable,” and, “[i]f so, how is that interest protected?” Introduction—Nebraska, 1 Punitive Damages: Law and Prac. 2d § 11:28 (2022). As the bill does not attempt to make the schools or school districts parties to civil cases where punitive damages are sought, however, it is not necessary to address this question.

The bill does provide that, “[u]pon an award of punitive damages,” the county attorney must be notified and “may become a party solely to protect the interests of the common schools in such damages.” LB 25, § 4(2). Under art. VII, § 5, fines and penalties must “be paid over to the counties” where they are levied or imposed, and “shall be apportioned exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue....” The committee records indicate the purpose

⁵ Consistent with this position, the Nebraska Wage Payment and Collection Act grants courts discretion to require employers found to be liable for nonpayment of wages to pay a penalty to the school fund equal to the judgment recovered by the employee or, if the nonpayment is willful, an amount up to two times the amount of unpaid wages. Neb. Rev. Stat. § 48-1232 (2021); see *Kinney v. H.P. Smith Ford, L.L.C.*, 266 Neb. 591, 600, 667 N.W.2d 529, 537 (2003) (“The amount of the penalty ordered to be paid to the fund to the common schools of the state [under § 48-1232] is a matter left to the discretion of the trial court.”).

of providing the county attorney party status after an award is made is primarily to represent the schools' interest in the award in the event of potential settlement. Committee Records on LB 25, 108th Leg., 1st Sess. 40, 42, 44 (Jan. 25, 2023).

There may well be practical concerns regarding whether the county attorney should be placed in this role or may be able to impact settlement in cases where punitive damages are awarded, and the reason for placing this duty on the county attorney is unclear. Under art. VII, § 5, penalties are to be paid over to the counties and appropriated for the use and support of the schools. Apparently, the county attorney was designated a party because the county where fines and penalties are imposed receives the funds which are distributed to the schools. County attorneys, however, have the duty "to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or county is a party or interested." Neb. Rev. Stat. § 23-1201(2) (2022). County attorneys do not advise or represent school districts, which are separate corporate bodies and political subdivisions. See Neb. Rev. Stat. § 79-405 (2014). Requiring county attorneys to represent the interests of the schools in punitive damage awards is thus not compatible with the duties currently placed on county attorneys. The statute, however, does not mandate that a county attorney serve this role, as it provides the county attorney "may" become a party to protect the interest of the schools. *Pepitone v. Winn*, 272 Neb. 443, 447, 722 N.W.2d 710, 713 (2006) ("[T]he word 'may,' when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.").

Other states have enacted statutes providing for a "split recovery" which allocates a portion of a claimant's punitive damage award to the state or an administrative fund.⁶ Some provisions expressly limit the state's status or right to the judgment.⁷ Rather than making the county attorney a "party" upon an award of damages, LB 25 could be

⁶ See Ga. Code Ann. § 51-12-5.1(e)(2) (Seventy-five percent of punitive damages award, less proportionate share of costs, including attorney's fees, paid to the state); Ind. Code § 34-51-3-6(a)(2) (Seventy-five percent of punitive damages award paid to state for deposit in the violent crime victims reparation fund); Iowa Code Ann. § 668A.1.2b. (Amount not to exceed twenty-five percent of punitive damages award may be ordered to the claimant, with the remainder to be paid into a civil reparations fund); Mo. Rev. Stat. § 537.675.3 (Fifty percent of punitive damages award to be deposited into the tort victims' compensation fund); Or. Rev. Stat. Ann. § 31.735(1) (Punitive damage award allocated with thirty percent to prevailing party, sixty percent for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section, and ten percent to the State Court Facilities and Security Account); Utah Code Ann. § 78B-8-201(3) (Punitive damage award amount over \$50,000 divided equally between the state and injured party).

⁷ *E.g.*, Ga. Code Ann. § 51-12-5.1(e)(2) (State not "a party in interest and the sole right of the state is to the proceeds."); Mo. Rev. Stat. § 537.675.4 ("The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding pursuant to this section, except to enforce its lien rights as provided in subsection 3 of this section."); *but see* Utah Code Ann. § 78B-8-201 ("The state shall have all rights due a judgment creditor to collect the full amounts of both punitive damage judgments until the judgements are fully satisfied).

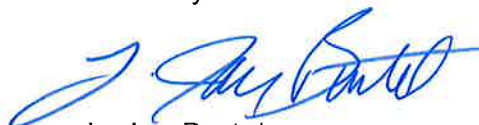
amended to give the county attorney or affected school districts the right to enforce the judgment or to collect the penalty required to be paid over to the county under art. VII, § 5.

CONCLUSION

Article VII, § 5, mandates that fines and penalties be appropriated solely for the use and support of the common schools. "A statute which imposes liability for actual damages and additional liability for the same act provides a penalty." *Abel*, 170 Neb. at 929, 104 N.W.2d at 688. Because the punitive damages authorized by LB 25 impose a liability in addition to actual damages for the same act, they are a penalty under art. VII, § 5. The Nebraska Supreme Court has held statutes imposing penalties in the form of punitive damages in favor of private parties unconstitutional relying on the due process clause alone or, in some cases, the due process clause and art. VII, § 5. While LB 25's directive that punitive damage awards be paid to support the common schools removes the constitutional barrier created by art. VII, § 5, under the Court's existing precedent we conclude that such damages violate due process given its long line of cases relying on the due process clause to hold punitive damages unconstitutional. Finally, while there may be no legal impediment to allowing the county attorney to become a party to a case in which punitive damages are awarded to protect the interests of the schools, this role does not fall within a county attorney's current statutory duties. The Legislature may wish to consider a more limited role, such as providing the county attorney or school districts with authority to enforce or collect a punitive damages judgment.

Very truly yours,

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Approved by:



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07-1521-30