

1979

Gerald E. Hulbert v. State of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GERALD E. HULBERT,
Plaintiff and Respondent,
vs.
THE STATE OF UTAH,
Defendant and Appellant.

Case No. 1000

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE CHRISTINE M.
DURHAM, JUDGE

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FILED

JUN 6 1979

IN THE SUPREME COURT
OF THE STATE OF UTAH

GERALD E. HULBERT,	:	
	:	
Plaintiff and Respondent,	:	
	:	
vs.	:	Case No. 16197
	:	
THE STATE OF UTAH,	:	
	:	
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IN THE SUPREME COURT
OF THE STATE OF UTAH

GERALD E. HULBERT,	:	
	:	
Plaintiff and Respondent,	:	
	:	
vs.	:	Case No. 16197
	:	
THE STATE OF UTAH,	:	
	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Respondent Gerald E. Hulbert brought the present action to recover attorneys fees and court costs incurred in his successful defense of a series of grand jury indictments, pursuant to the provisions of Utah Code Ann. § 63-30a-1-3 (Supp. 1977).

DISPOSITION IN THE LOWER COURT

Following a non-jury trial in the District Court, the Honorable Christine M. Durham granted judgment for the plaintiff-respondent in the amount of \$62,384.99.

RELIEF SOUGHT ON APPEAL

Respondent requests that the present appeal be dismissed or denied and the judgment of the lower court affirmed.

STATEMENT OF FACTS

The respondent adopts the Findings of Fact as they were entered by the court below (R. 109-113) and as set forth in appellant's brief. The undisputed facts can be summarized as follows:

In 1975, a Utah State Grand Jury over a period of several months issued 12 indictments against Gerald E. Hulbert for alleged acts and/or omissions committed by him in his capacity as Chairman and Director of the Utah State Liquor Control Commission. Mr. Hulbert retained the law firm of Rawlings, Roberts & Black to represent him in the defense of said indictments. During the ensuing two and one-half years that firm spent over 500 hours, made 65 court appearances, conducted two trials, and two appeals in the defense of Mr. Hulbert. The result was that Mr. Hulbert was exonerated on all 12 indictments.

In 1977, the Utah Legislature enacted Utah Code Annotated §63-30a-2 (Supp. 1977), which reads as follows:

If a state grand jury indicts an officer or employee in connection with or arising out of any act or omission of that officer or employee during the performance of his duties, within the scope of his employment or under color of his authority, and that indictment is quashed or dismissed or results in a judgment of acquittal, unless the indictment is quashed or dismissed upon application or motion of the prosecuting attorney, that officer or employee shall be entitled to recover from the state the reasonable attorney's fees and court costs necessarily incurred in the defense of that indictment.

A retroactive provision of the statute made it applicable to Mr. Hulbert's claim for reasonable attorney's fees.

Pursuant to said statute, Mr. Hulbert submitted to the Honorable Scott M. Matheson, the Honorable David S. Monson and the Honorable Robert B. Hansen a claim for attorney's fees and costs, itemizing and substantiating by affidavit a total sum of \$77,815.65. After the statutory 90-day period had elapsed without response from the State of Utah, and pursuant to the procedures outlined in the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1, et seq., (Supp. 1965), Mr. Hulbert filed an action against the State of Utah in the Third Judicial District Court in and for Salt Lake County, State of Utah, pursuant to the above referenced Utah statute for reimbursement for reasonable attorney's fees and costs. Said case was tried commencing on the 30th day of October, 1978, before the Honorable Christine M. Durham, District Judge, without a jury. Thereafter, on the 8th day of November, 1978, Judge Durham filed and entered a Memorandum Decision followed by a judgment in favor of Mr. Hulbert, entering findings that the reasonable fees and costs necessarily incurred by Mr. Hulbert in the defense of said grand jury indictments was the sum of \$62,384.99.

At the time of trial, Mr. Hulbert testified that his initial agreement with the firm in May of 1975 after his first indictment provided that he would pay \$5,000.00 as a retainer, with an additional \$5,000.00 to be due if the matter came to trial and \$2,000.00 more if an appeal was taken. (R. 143-44). Additional indictments were forthcoming, but there was no further discussion

or agreement regarding fees for the firm's representation of Mr. Hulbert in those matters until the fall of 1976, due to the state of Mr. Hulbert's mental and physical health during the course of the proceedings. (R. 146-49)

In the fall of 1976, Mr. Hulbert approached Mr. Wayne Black with regard to his additional fee obligation. He requested a bill because he needed it for his "own peace of mind." (R. 149) He subsequently received a letter from Mr. Wayne Black indicating that the firm would accept \$18,500.00 as a total fee for representing Mr. Hulbert on the various indictments. (Exhibit 4-P) Mr. Hulbert regarded this amount as nominal and a mere gesture. He felt indebted to the firm and promised to pay a proper amount when he obtained the means. (R. 153 and 324-26)

After the enactment of Utah Code Ann. §63-30a-1, et seq., (Supp. 1977), an itemization of the work done by the firm was compiled to assist Mr. Hulbert in presenting his claim for attorney's fees to the State. A claim for \$77,815.65 was presented to the members of the Board of Examiners.

Following the District Court trial, Mr. Hulbert amended this claim by substituting the Court's judgment, thereby reducing his original claim to the amount of the judgment, i.e., \$62,384.99.

After hearings before the Board of Examiners, Governor Matheson voted to approve the modified claim, and Lieutenant Governor David S. Monson and Attorney General Robert B. Hansen

voted to defer said claim based upon the representation of Attorney General Robert B. Hansen that he intended to appeal the judgment entered by Judge Durham and thus to await the outcome of said appeal.

The notice to the legislature with regard to the action taken by the Board of Examiners was submitted in a letter dated December 8, 1978. It made note of a specific recommendation by the Board of Examiners and submitted the claim to the legislature for further action.

The legislature, in H.B. 426, entitled Supplemental Appropriations Act, appropriated \$50,000 as settlement of the claim of Mr. Hulbert. H.B. 426 was signed into law by the Governor of the State of Utah on March 16, 1979.

A warrant for payment of this appropriation has been issued by the Department of Finance but is being withheld by the Attorney General, who refuses to honor either the specific appropriation of the legislature or the judgment rendered below.

ARGUMENT AND AUTHORITY

POINT I. THE DISTRICT COURT HAD JURISDICTION TO ENTER JUDGMENT ON RESPONDENT'S COMPLAINT.

The appellant is contending in this Court, as he did below, that the power vested in the Board of Examiners by the Constitution to examine all claims against the State deprives the courts of jurisdiction to enter judgment on such claims. Even a cursory reading of the constitutional provision in question, however, reveals that no such limitation is embodied

in its express terms. Art. VII, §13 of the Utah Constitution provides, in relevant part, that;

[The Governor, Attorney General and Secretary of State] shall, also, constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners. (emphasis added)

The obvious intent of this section is to provide a limitation on the disbursement of public funds by the legislature; a limitation which has never been questioned by the respondent. While the judgment rendered by the District Court necessarily had to be submitted to the Board of Examiners as a condition precedent to its satisfaction, such a restriction did not affect the jurisdiction of the District Court to hear this action and determine the state's liability under Utah Code Ann. § 63-30a-1 et seq. (Supp. 1977).

The narrow issue presented by the appellant's first point has been previously decided by this Court. In Campbell Bldg. Co. v. State Road Commission, 95 Utah 424, 70 P.2d 857 (1937), a case involving a suit against the Commission for damages and for the balance due on a contract, this Court pointed out that there is no provision in the Utah Constitution which prohibits the legislature from waiving the immunity of the state, and held that the legislature had effected just such a waiver with regard to written contracts entered into by the State Road Commission. In response to the Attorney General's contention that the

exclusive procedure for filing claims against the state was with the Board of Examiners, the identical claim raised in this case, the Court noted that any judgment obtained might have to be presented to the Board of Examiners before the plaintiff could receive payment, but stressed that the procedure for executing on a judgment did not affect the jurisdiction of a Court in rendering that judgment.

It is not now necessary for us to decide whether the only method by which plaintiff could satisfy any judgment it might obtain would be by filing the claim evidenced by the judgment with the Board of Examiners and, in the event there was no appropriation out of which it could be paid, to then go to the Legislature for such appropriation. How the judgment may be enforced, if one is obtained, is quite another matter from the problem for us to decide, which is, whether plaintiff may proceed in the Courts to have its claim liquidated. (citations omitted)

70 P.2d at 861. The Court held that the plaintiff could maintain his action for liabilities arising out of a written contract, because even though the state "may refuse to respond in damages and leave a claimant without any remedy, as it may refuse to pay its bonds, the obligation remains . . ." 70 P.2d at 862.

The respondent submits that this decision is dispositive of the Attorney General's contention that Article VII, Sec. 13 of the Utah Constitution is a direct limitation on the jurisdiction of Courts to hear claims and enter judgments against the State. The appellant's conclusion is a product of the failure to recognize the vital distinction, highlighted by the Court in Campbell, supra, between the two separate procedures of

obtaining a judgment on the one hand and successfully satisfying that judgment on the other. It is fundamental that any judgment entered against the State is not self-executing, and Article VII, § 13, is a limitation on how such a judgment can be satisfied. It has no bearing on how it is obtained.

While the appellant has offered a voluminous authority to show that the Board of Examiners has a broad and constitutionally based power to review all claims against the State prior to the legislature taking any action on such claims (a proposition with which the plaintiff does not take issue), only the case of Wilkinson v. State, 42 Utah 483, 143 P. 626 (1913), makes even an oblique reference to the effect of the Board's power on the jurisdiction of courts to hear claims against the State. That case, however, must be viewed in light of the conditions prevailing when it was written. Faced with a lower court decision which had found liability on the part of the State and sequestered particular state funds out of which the judgment was to be satisfied, the Court held that the State was immune from suit and that even in a case where immunity had been waived, a court could not designate how a judgment would be satisfied (if at all).

The Court went on to note that although the State was immune from suit, there was a procedure through which claims against the State could be heard, namely by filing claims with the Board of Examiners. The Court highlighted this procedure to show that the State "[has] not arbitrarily, as they might

have done, shielded the State from being sued in the courts, but they did so for good and sufficient reason." 134 P. at 631. So by way of dicta, the court suggested that there was no reason for the State to consent to being sued in the courts because a constitutional framework already existed for bringing claims against the State. The language suggesting a jurisdictional limitation, therefore, represents a judicial justification for adhering to the ancient doctrine of sovereign immunity. Now that the doctrine has lost its vitality by express decree of the legislature, the historical rationalization for its existence need not detain this court. The most that can be said of the Wilkinson decision is that it contained some language implying that there was a limitation on court jurisdiction contained in Article VII, Sec. 13. Clearly, any such implication was directly renounced twenty years later in Campbell, supra. Yet the Wilkinson case is the only authority offered by the appellant which even inferentially supports the argument that the District Court had no jurisdiction to hear a claim against the State. The remainder of the cases cited by appellant stand collectively for the proposition that the Legislature cannot pay claims which have not been first reviewed by the Board. This proposition is both unassailable and irrelevant to the issue at bar. Those cases mandate the procedure to be followed after judgment is obtained, but have no bearing on the question of the jurisdiction of courts to render a judgment.

Mr. Hulbert filed this action pursuant to Utah Code Ann. §63-30a-2 (Supp. 1977), which provides for attorney's fees

and court costs necessarily incurred in the successful defense of grand jury indictments.

Section 3 of the same act specifies that:

[t]his act shall apply to claims arising prior to the effective date of this act so long as those claims are filed in the manner provided in the Utah Governmental Immunity Act and within two years after the cause of action arises. (emphasis added)

It is the respondent's contention that this reference to the procedures outlined in the Governmental Immunity Act was intended by the legislature to incorporate not only the provision regarding notice, but all of the procedures set forth in the Immunity Act for processing claims against the State. Those procedures are as follows:

Any person having a claim for any injury to person or property against a governmental entity or its employee may petition said entity for any appropriate relief including the award of money damages. Utah Code Ann. §63-30-11 (Supp. 1965)

A claim against the state or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the attorney general of the State of Utah and the agency concerned within one year after the cause of action arises. Utah Code Ann. §63-30-12 (Supp. 1965)

If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances where immunity from suit has been waived as in this act provided. Said action must be commenced within one year after denial or the denial period as specified herein. Utah Code Ann. §63-30-15 (Supp. 1965)

The district courts shall have exclusive original jurisdiction over any action brought under this act and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this act. Utah Code

Any claim approved by the state as defined herein or any final judgment obtained against the state shall be presented to the office, agency, institution or other instrumentality involved for payment if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in section 63-6-10, Utah Code Annotated, 1953. Utah Code Ann. §63-30-23 (Supp. 1965) (emphasis added)

That it was the intent of the legislature to incorporate by reference all of the procedural aspects of the Immunity Act is clearly shown by the title of the Act under which the respondent claims, which recites the purposes of the bill as follows:

An act relating to governmental affairs; providing for the reimbursement to officers and employees of the state of legal fees and costs necessarily incurred in the successful defense of grand jury indictments; defining terms; and providing that the act shall apply to all claims submitted within the time limits and in the manner provided in the Utah Governmental Immunity Act. Laws of Utah 1977, ch. 245. (emphasis added)

The reference in section 63-30a-3 to filing claims "in the [same] manner" as is done under the Immunity Act has to include the procedures outlined in the Immunity Act for following the claims through to judgment if they are initially denied or ignored by the State. Otherwise the Act would be superfluous and without effect.

As we have seen, the appellant's only objection to accepting this procedure is that the Attorney General feels it would operate as an unconstitutional circumvention of the Board of Examiners. Yet, under the Immunity Act itself, the district

courts of the state are given exclusive jurisdiction to entertain actions against the state when a claim has been duly made upon the state and subsequently denied or ignored. Utah Code Ann. §63-30-15 & 16 (Supp. 1965). This jurisdiction is granted without regard to whether the legislature has made appropriations for payment of that claim. Utah Code Ann. §63-30-23 (Supp. 1965) provides the procedure to be followed when no appropriation is available, including submission of the judgment to the Board of Examiners.

The clear effect of this last provision is to insure that there is no conflict with Art. VII, Sec. 13 of the Constitution. While this procedure may be somewhat cumbersome, it is constitutional. As one writer has noted:

Article 7, Section 13, of the Utah Constitution provides that "a Board of Examiners . . . [shall have] power to examine all claims against the State." The Utah Supreme Court has given this provision a literal interpretation, thus granting the board almost unlimited power to make recommendations concerning the ultimate disposition of "claims" against the state. This power encompassed tort claims against the state prior to the Immunity Act and required that such claims be submitted to the board. The claims, together with recommendations from the board, were then passed upon by the legislature, generally in conformity with the board's recommendations.

In analyzing the court's broad interpretation of the power of the board in relation to the language of Section 23 of the Immunity Act, there appears to be an incongruous procedural system, which it has been argued, might make the Immunity Act unconstitutional by bypassing the board. Further consideration, however, would seem to indicate two ways in which any constitutional difficulties could be obviated.

First, section 23 of the Immunity Act provides that a "claim approved by the state . . . or any final judgment obtained against the state shall be presented . . . for payment if payment . . . is otherwise permitted by law." If payment is not authorized by law, then the claim must be "presented to the board of examiners . . ." It seems clear that if an approved claim or judgment cannot be satisfied under the constitution until it has been acted upon by the board of examiners, then no approved claim or judgment would be "otherwise permitted by law" within the meaning of the Immunity Act. Thus, even though all approved claims and judgments may have to be routed through the board of examiners, at the risk of delay in satisfaction by the board or by the legislature, the statute can easily be construed to be consistent with the constitution.

Note: The Utah Governmental Immunity Act:
An Analysis. 1967 Utah L. Review 120.

This statutory scheme vests jurisdiction in the district courts for all claims filed and denied under the provisions of the Immunity Act. It also makes it clear that the legislature envisioned the possibility of judgments being rendered which would have to be submitted to the Board of Examiners before they could be paid. The appellant has asserted that this section of the Immunity Act is unconstitutional because:

- (1) The constitutional and statutory powers of the board of examiners would thereby be reduced to a mere auditing;
- and (2) The constitutional power of the legislature to make appropriations of public funds would be usurped by the courts.

Both of these arguments are at odds with the facts. The section does not even imply any attempted direction to the Examiners

on how they should evaluate and vote on judgments obtained pursuant to the Act. The Examiners are left absolutely free to recommend or not recommend the claims for payment. While, pragmatically, the court action would undoubtedly facilitate a more expeditious review of the factual basis of any claim, thereby relieving the Board of Examiners of a burdensome duty, it is not suggested that the Board would be bound by any court findings. Certainly no usurpation of any legislative function is involved because even claims approved by the examiners would still have to be submitted to the legislature for payment, and their decision to pay or not would be final and binding. In short, granting jurisdiction to the courts to hear claims against the state does not involve any conflict with Article VII, Sec. 13, of the Constitution as long as the judgment rendered by such a court is ultimately submitted to the Board prior to being passed upon by the legislature.

The fundamental error that permeates the entire argument of the appellant is the failure to recognize the distinction between obtaining and satisfying a judgment. The Attorney General obfuscates the jurisdictional question with unnecessary recitation of the powers of the Examiners, which the respondent does not contest. He fails, however, to come to grips with the issue of a court's jurisdiction to hear claims against the state. The Supreme Court has resolved this issue in favor of court jurisdiction in Campbell, supra, forty years before. Respondent respectfully submits that this point on appeal is without merit.

POINT II. THE EVIDENCE PRESENTED AT TRIAL FULLY
SUPPORTS THE JUDGMENT ENTERED BELOW.

In considering the appellant's contention that the District Court judgment is not supported by the evidence, this Court should bear in mind that the appellant has not challenged the finding that \$62,384.69 represents a reasonable amount for fees and costs for the services provided in defending Mr. Hulbert, but is only taking issue with the finding that such reasonable fees and costs were "necessarily incurred" within the meaning of Utah Code Ann. §63-30a-2 (Supp. 1977). When stripped of its recurrent diatribe regarding the plight of taxpayers, the appellant's argument can be easily stated: the fees and costs awarded were not necessarily incurred because Mr. Hulbert's counsel offered to accept less. Such an argument fails to take into account the plain meaning of the term "incurred" and the most basic principles of law pertaining to fees "incurred" as a result of attorney-client relationships.

The trial court, in its memorandum decision, made the following observations concerning the fee arrangement in Mr. Hulbert's prosecutions:

After the first group of indictments was issued in May of 1975, the Black firm suggested a \$5,000 retainer in connection with the research and preparation of plaintiff's defense of the indictments, which plaintiff paid. An additional \$5,000 was estimated for trial of the matter if necessary, and \$2,000 for appeal.

A second and later a third set of indictments were handed down in July and August of 1975. Rawlings, Roberts and Black continued to represent plaintiff

on all of the issued counts. The matter was vigorously prosecuted by special attorneys general appointed by the State and by the Salt Lake County Attorney's Office, and the defense was protracted, complicated, time-consuming and difficult. Attendant publicity contributed to the task of defense counsel. Plaintiff's mental and physical health deteriorated, and as a result, his counsel deferred any discussion of fees. Plaintiff, however, insisted on a billing in 1976, because of his strong sense of personal and moral obligation to pay for services rendered and a desire to know where he stood vis-a-vis the fee obligation. In response to plaintiff's urgent request, Black wrote a letter in September of 1976, offering to consider \$18,500 the total fee, taking into account the \$8,500 actually paid prior to that date by Hulbert. Plaintiff, although unemployed and still ill, told Mr. Black that the fee suggested in the September letter was token in nature and unacceptable to him. The two subsequently agreed orally that plaintiff would pay the law firm a reasonable and fair fee "if and when" plaintiff became able to do so . . .

The testimony indicates that plaintiff intended his obligation to be one for reasonable fees at a then undetermined level. Mr. Black apparently intended that obligation to be contingent upon plaintiff's future ability to pay, if any. (R. 98-99)

These findings are supported by both the testimony of Mr. Wayne Black (R. 325) and Mr. Hulbert (R. 153). The appellant asserts, without acknowledging the conversation between Mr. Black and Mr. Hulbert subsequent to the letter of September 3 and the note in response, that no court would enforce against a client an agreement to pay more than he was informed would be required for his attorney's service. (See Brief of Appellant at page 37). This allegation, supported with

no authority but the statement that it is "so patently obvious as to defy reason" is directly contrary to this Court's holding in Oliver v. Mitchell, 14 Utah 2d 9, 376 P.2d 390 (1962).

In that case, Mr. Mitchell had been represented by D. H. Oliver on a charge of first degree murder. Oliver was appointed as counsel by the trial court to handle the defense, as Mitchell was an indigent. Mitchell, who was fully entitled to representation by Oliver without any obligation to pay him for his services promised to pay his attorney "when he could" and wrote to Mr. Oliver from prison after his conviction and renewed this pledge.

While in prison, Mitchell began receiving payments as the insurance beneficiary of his brother, who had been killed in military service. Mitchell informed Oliver of this fact and told him he couldn't pay until he was released from prison. Oliver brought an action to recover a fee for his services in Mitchell's defense and garnished the insurance fund being held by prison officials.

In upholding the trial court's award of fees to Oliver, the Court, in an unanimous decision, indicated that

It is incontestable that plaintiff performed a valuable service for which there is usually a charge, and of which defendant freely availed himself without dissent and, indeed, for which defendant promised to pay. Granting the fact the court appointed Mr. Oliver as an officer of the court to act as defendant's counsel as a public service, and that a criminal defendant's right to counsel is absolute regardless of his ability to pay; does

this relieve the defendant of his promise to pay when able? We know of no rule or reason why this should be held to convert into a mere moral obligation. Indigents are as legally competent to contract as other men and their procedural rights are the same not greater. A promise to pay his attorney is to the credit of an indigent defendant for as yet in Utah the court appointed defense attorney receives no compensation by the county or other public authority and he must rely exclusively on the possible future ability of his client to pay. In a majority of cases the client may never be able to properly compensate his attorney but this is no reason to prevent an attorney from recovering from one who can.

14 Utah 2d at 12.

There is no distinguishable difference between the above cited case and the present action. Mr. Hulbert, who could have accepted Mr. Black's offer of a nominal charge for the firm's services but promised to pay a reasonable value when able, stands in the identical position of the indigent who promises to pay when able though he otherwise would not be under obligation to compensate his counsel. In both cases the happening of a subsequent event triggered the fee obligation (obtaining a fund which made the client "able" to pay) and in both cases the fees are enforceable as promised by the client.

Modifications of the original conditions and terms of compensation due to attorneys from clients are not per se unenforceable. In Rudd v. Crown International, 26 Utah 2d 263, 488 P.2d 298 (1971), the Court was asked to review an award of attorney's fees wherein counsel had originally indicated his fee would be \$35 per hour, but as the representation

became more detailed and time-consuming, he changed his fee to first \$5,000 and then \$10,000. The Court upheld the \$10,000 award and indicated that the amount of the fee which is reasonable isn't controlled by any set formula and the judgment of the trial court in determining a reasonable fee is presumed correct because of the advantaged position of the judge to hear and determine the issues raised concerning reasonableness of fees. See also Wallace v. Build, Inc., 16 Utah 2d 401, 402 P.2d 699 (1965).

Mr. Hulbert, in seeking and receiving the assistance of Rawlings, Roberts and Black in his defense on the indictments filed subsequent to his original agreement with the firm, obviously incurred an obligation for payment to the firm even in the absence of an agreement so specifying. It is axiomatic that an individual who receives services at his own request is under a duty implied in law to compensate the party providing such services for their reasonable value in the absence of a specific agreement as to the amount of compensation. See Trafton v. Youngblood, 69 Cal.2d 17, 442 P.2d 648 (1968); Carter v. Wooley, 521 P.2d 793 (Okla. 1974). This obligation was incurred as the services were performed, and Mr. Hulbert's subsequent promise to pay a reasonable fee when able is a promise which is legally sufficient to bind him to an express contract. As stated in A. Corbin, Contracts §211 at 303-04 (1952)

A past debt, still existing and enforceable, is a sufficient basis for the enforcement of a new promise

by the debtor to pay it. This is true, whether the past debt is contractual or quasi-contractual in character.

One who is already bound to pay for services rendered at his request can be sued upon his subsequent express promise to pay for the debt.

Professor Corbin also notes that in the law of contracts a subsequent promise to pay a debt previously owing is enforceable even if there is a deficiency of some type in legal rights of the creditor to collect on the previous debt.

This authority is simply cited to demonstrate that Judge Durham's holding that Mr. Hulbert's promise to pay a reasonable fee for the services rendered on his behalf was an enforceable promise is on solid footing in the law of contracts.

The evidence is sufficient to support the finding that Mr. Hulbert "necessarily incurred" the reasonable fees associated with his defense by requesting and accepting the firm's representation, and that his subsequent promise to pay that reasonable amount constituted an agreement enforceable against him, which therefore is enforceable against the State by virtue of Utah Code Ann. §63-30a-2 (Supp. 1977).

The appellant has also challenged the validity of the contract on the basis that it was made contingent upon plaintiff's future ability to pay. As demonstrated by the Oliver decision, supra, this contingency doesn't affect the validity or enforceability of the agreement if the fact upon which future liability is premised (ability to pay) is realized. In the appellant's words "[t]he uncertainty and 'iffiness' of

any contract founded such a factual basis is so apparent to require no further elucidation." (Brief of Appellant at 41) Again, the appellant's statement of the law, which is so obvious as not to need supporting authority, is directly contrary to the prevailing authority. Prof. Corbin indicates that

[W]hen one is contracting on the basis of new consideration, he can limit his duties as he sees fit. The same is true where he is promising on the basis of a "past consideration". . .

The new promise may be made conditional on any new performance or event. Frequently, a debtor promises to pay the debt as soon as he is financially able to do so. This makes his "ability" to pay a condition precedent to a right of action; and it must be alleged and proved by the creditor. What constitutes ability to pay is indeed a variable quantity; and often, in the light of surrounding circumstances, a promise so worded has been interpreted as a promise to pay within a reasonable time.

A. Corbin, Contracts §215 at 308-09 (1952).

Clearly, one of the most distinguished scholars in the field would have some reservations about the Attorney General's view of the law applicable to contingent obligations, and is of the opinion that the promise to pay for past services when "able" is both enforceable and routine.

There can be no question that the Legislature fulfilled the condition which gave rise to Mr. Hulbert's duty to pay and at the same time created his right to recover that liability from the State.

The final objection of the appellant to the fee as found by the lower court is that it represents a modification of the attorney-client agreement after its initial formulation by the parties and is therefore, he argues, presumptively invalid. This argument is flawed in two respects.

First, Mr. Hulbert never had an express agreement with the firm for their representation on the indictments subsequent to May of 1975 and his liability for that service initially arose by operation of law; that is, his obligation to pay for services rendered on his behalf at their reasonable value is an agreement implied by law. Thus, his promise to do just that, pay a reasonable attorney's fee, wasn't a modification of his earlier contract, it was an expressed intention to fulfill the duty previously implied.

Second, as the cases cited by appellant demonstrate, the rule that agreements between clients and counsel altered during the course of representation should be closely scrutinized by the court is to protect against attorney's misusing the confidences and influence he has with respect to his client's affairs and to prevent over-reaching by counsel. However, as demonstrated by the Rudd v. Crown International decision, *supra*, modifications are not presumptively invalid and, in the absence of some objection by the client, the reasonableness of the fee found at trial will not be overturned on appeal.

The cases cited by appellant, and the rationale implicit to their holdings, are clearly inapplicable to a case such as

this, where the client insists that his counsel's attempt to modify the fee for the benefit of the client will not be accepted. The Oliver case, supra, is again enlightening on this issue, as the Court there lauded the client for his expressed promise to pay that which he otherwise wouldn't owe and did not find any irregularity with his voluntary acceptance of a greater obligation than required by the terms of his initial attorney-client arrangement, even though his counsel benefitted financially from that alteration.

An agreement to pay what one owes, despite personal financial impediments which preclude actually ever being judicially compelled to do so, is certainly not contrary to public policy and is to be wholeheartedly supported.

It is a fundamental proposition that the findings of the trial court will not be overturned on appeal if there is any substantial evidence to support them, Sullivan v. Turner 22 Utah 2d 85, 451 P.2d 907 (1968), and that where a case is tried to the court without a jury, evidence must be reviewed in the light most favorable to sustain the findings of the court and the judgment based upon such findings. Lake Creek Irr. Co. v. Clyde, 22 Utah 2d 222, 451 P.2d 375 (1968); DeVas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962). The appellant has not actually attacked the factual determination of the court below (that Mr. Hulbert agreed to pay reasonable attorney's fees, and that Mr. Black agreed to accept the same, when Hulbert became able to pay), but has argued that the Conclusions of Law entered by the

court don't flow from such findings. The respondent submits that the authority cited above shows conclusively that the findings of the court support the conclusion that Mr. Hulbert necessarily incurred \$62,384.99 in reasonable attorney's fees and court costs and that the arguments raised by appellant in opposition to such a conclusion are contrary to decided case law in this and other jurisdictions, the views of legal scholars and not supported by the logic and reasoning of the appellant's own authority.

POINT III. UTAH CODE ANN. §63-30a-3 (SUPP. 1977) IS A CONSTITUTIONALLY VALID RETROACTIVITY CLAUSE CREATING A FINANCIAL LIABILITY ON THE PART OF THE STATE FOR A PREVIOUSLY INCURRED MORAL OBLIGATION.

This Court has previously acknowledged that neither the United States Constitution nor the Utah Constitution contain any provision which by its express terms prohibits the legislature from enacting measures which have retroactive application. Mecham v. State Tax Comm'n, 17 Utah 2d 321, 410 P.2d 1008 (1966). The Court further noted that the legislature, in fact, could lawfully, enact measures which have a reasonable retrospective application upon subjects or actions occurring prior to the date of the convening of that body. See also Garrett Freightlines v. State Tax Comm'n, 103 Utah 390, 135 P.2d 523 (1943). Indeed, while Utah has a specific statute which provides that acts which do not expressly indicate that they are to have retroactive effect will not be construed to have such application, Utah Code Ann. §68-3-3 (1953), there is nothing in the organic law of the State which

calls into question the validity of retroactive legislation.

The appellant concedes that Utah has no direct constitutional prohibition regarding retroactive legislation, but asserts that Utah Code Ann. §63-30a-3 (Supp. 1977) is unconstitutional because it violates the Fourteenth Amendment to the United States Constitution and Art. I, §7 of the Utah Constitution. This argument is premised upon the contention that by creating a liability on the part of the State for past actions the legislature divested the State of a previously vested interest in violation of constitutional restrictions on legislative prerogative.

It can be quickly noted from a reading of the Fourteenth Amendment that it is a restriction on the State's ability to enact laws which have certain proscribed effects on individuals, but doesn't speak at all to the power of a state to alter the rights of the state itself. The Amendment provides, in relevant part, that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

Not surprisingly, given the absence of any directive to the contrary, courts have universally recognized that a state

legislature is free to modify, impair or eliminate the vested right of the State itself and the constitutional limitations on the legislature's actions only come into play when vested rights of individuals are retroactively impaired. The general rule, as stated in 16A C.J.S. Constitutional Law §417 at 106 (1954), is as follows:

As long as private rights are not infringed, the state may constitutionally pass retrospective laws waiving or impairing its own rights, or those of its instrumental subdivisions or of the public generally.

In Riesberg v. State, 243 N.Y.S.2d (Ct. of Claims 1963), a New York court addressed the question of whether the enabling act of certain legislation, which operated to give certain injured parties a cause of action against the State for injuries which were received prior to the date of the legislation and at a time when the State had not yet waived its immunity with regard to such claims, was unconstitutional as a retroactive impairment of the State's vested rights and "special" or "private" legislation for the benefit of specific people -- the exact claim asserted by the appellant in this case. The court held that the statute was constitutional and stated:

While it has been said that, generally, retrospective laws are unconstitutional if they destroy or disturb existing or vested rights, nevertheless the State may constitutionally pass retrospective laws waiving or impairing its own rights, and it may impose upon itself new liabilities with respect to transactions already past.

A statute should be upheld as constitutional if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law.

The Legislature can recognize and provide redress for the State's liability for past obligations equally with its right to waive its immunity for claims to arise in the future.

243 N.Y.S.2d at 890.

This holding is consistent with all authority discovered by the respondent. In State ex rel. Meyer v. Cobb, 467 S.W.2d 854 (Mo. 1971), the Missouri Supreme Court cited the applicable rule with regard to an enactment affecting rights of the State.

The state may constitutionally pass a retrospective law impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.

467 S.W.2d at 856.

This rule has such general acceptance that even states which do have constitutional provisions forbidding retroactive legislation interpret those restrictions not to apply to laws which only affect the rights of the state. In New Orleans v. Clark, 95 U.S. 644 (1877), the United States Supreme Court considered a case arising out of Louisiana where the plaintiff was suing on a bond obligation he claimed was owed by a municipality which had been annexed into New Orleans. At the time of such annexation, the Louisiana legislature had enacted a measure specifically requiring New Orleans to pay off the bonds. Both the old municipality and the City of New Orleans

contended that there was no lawful obligation to the plaintiff and that the act imposing the burden of payment on New Orleans was unconstitutional in light of the state's constitutional limitation on retroactive legislation. The Supreme Court responded that

The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, -- no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion. (emphasis added)

95 U.S. at 655.

This same holding was reached in Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo. 1933), where the court found that "the provision of the [Missouri] Constitution inhibiting laws retrospective in their operation is for the protection of the citizen and not the state." 59 S.W.2d at 51. See also, State Highway Dep't. v. Bass, 29 S.E.2d 161 (Ga. 1944); Kershner v. Sganzzini, 45 N.M. 195, 113 P.2d 576 (1941); Henry v. McKay, 3 P.2d 145 (Wash. 1931); 16 Am.Jur.2d, Constitutional Law §418 at 758 (1964) ("A state may constitutionally pass a retroactive law which impairs its own rights.")

Simply asserting the protection of the Fourteenth Amendment doesn't strengthen the appellant's argument, as the United States Supreme Court since the turn of the century has clearly noted that "the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." League v. Texas, 184 U.S. 156 (1901).

Appellant's cited authority does not address the State's waiver of its own "vested rights" and is therefore wholly inopposite to the issue presented by the facts of this case.

Equally unsuited to his argument are the appellant's own citations indicating that a state legislature may constitutionally give legal effect to previously existing moral obligations (see Brief of Appellant at 48), which actually supports the respondent's position. Though the Attorney General argues that Utah Code Ann. §63-30a-1, et seq. (Supp. 1977) wasn't intended as a legal remedy for a moral obligation, the respondent submits that it is manifest that such was the precise and only purpose of the Act. It was intended to extinguish the financial obligations incurred by a public official indicted for acts occurring in the performance of government duties, obligations incurred in successfully resisting the efforts of the State to punish him for acts committed while in the service of the State. It represents an acknowledgment that having to resist the vast resources of the State in defending a criminal prosecution is an onnerous task, the cost of

which should not, morally, fall upon the public servant who is ultimately exonerated of the charges.

The Act's limitation to public officials is certainly understandable and rational in view of the greater exposure they face due to their high visibility, the constant public pressure to eradicate government waste and abuse of power -- be it real or imagined -- and the distinct groups of criminal charges to which only public officials are subject. There can be no doubt the legislation was designed to remedy a moral wrong previously visited upon the respondent and others by the forces of the State and to insure protection for others similarly wronged in the future. As such, it is clearly constitutional legislation as demonstrated by appellant's own authority.

Additionally, the appellant asserts that because Mr. Hulbert was active in lobbying for passage of the bill and that it inured to his personal benefit, it is unconstitutional "private" legislation in violation of Article VI, §26 of the State Constitution. That section provides that "[n]o private or special law shall be enacted where a general law can be applicable." The force of this argument is severely undercut by the recognition that all liabilities acknowledged for past obligations relate to particular and defined individuals, sometimes to single individuals not a member of any class, but that the acknowledgment and payment of these liabilities, often on the express recommendation of the Board of Examiners,

is not constitutionally invalid because the legislature has the inherent power to pay claims of citizens, or provide a means for payment, by admitting its obligation either through direct compensation for a particular claim or by creation of a cause of action against the state for individuals who share a common species of claim.

In the instant case, Mr. Hulbert is a member of a defined class given a cause of action by legislative enactment; he was not, however, given an action not available to others similarly situated and his entitlement did not result in any prejudice to the rights of other individuals or class of individuals of the State. Under the test set forth in State v. Kallas, 97 U. 492, 94 P.2d 414 (1939), such legislation is general. The definitions set forth there are as follows:

Laws which apply to and operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question, are general and not special . . .

Special legislation is such as relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied, while a local law is one whose operation is confined within territorial limits, other than those of the whole state or any properly constituted class of locality therein.

94 P.2d at 420. See also, Nelson v. Miller, 25 Utah 2d 277,

480 P.2d 467 (1971); Untermeyer v. State Tax Comm'n, 102 Utah 214, 129 P.2d 881 (1947); Utah Farm Bureau Ins. Co. v. Utah Ins. Guarrantay Ass'n, 564 P.2d 751 (Utah 1977).

In the latter case, this Court began its discussion of the issue of what constitutes special legislation by acknowledging that the Supreme Court "makes every reasonable presumption in favor of constitutionality and will not nullify a legislative enactment unless it is clearly and expressly prohibited by the Constitution." 564 P.2d at 753. The Court then acknowledged the definitions set forth in Kallas, supra, and quoted with approval the definition of special legislation contained in People v. Western Fruit Growers, 22 Cal. 2d 494, 140 P.2d 13 (1943), indicating that a law

is special legislation if it confers particular privileges or imposes peculiar disabilities, or burdensome conditions in the exercise of a common right; upon a class of persons arbitrarily selected, from the general body of those who stand in precisely the same relation to the subject of the law. The constitutional prohibition of special legislation does not preclude legislative classification, but only requires the classification to be reasonable.

140 P.2d at 19-20.

In Utah Farm Bureau, supra, this Court found that the Utah Insurance Guaranty Association Act created a public corporation designed to fill a public need and to promote the public welfare by aiding citizens who might otherwise innocently fail to have required insurance due to the insolvency of their insurers. The Act, and the corporation it created, was intended

to effectuate the detection and prevention of insolvency on the part of insurers and to accomplish this purpose all insurers operating in the state, with certain defined exceptions, were required to become members of the Association and contribute an assessment to its operation. The Court held the creation of such a corporation to be founded upon a reasonable classification, equally applied to all insurers falling within the defined class, and that the subject matter of the Act making such a classification was a proper area for legislative action. The Court, therefore, upheld the Act as constitutional general legislation.

The reasoning cited in support of the Utah Farm Bureau holding is equally relevant and controlling in the case at bar. Utah Code Ann. §63-30a-1, et seq. (Supp. 1977) provides that a particular class of individuals (officers or employees of the state or its political subdivisions) with an entitlement to recover fees and costs incurred in the successful defense of grand jury indictments. This entitlement is arguably a "privilege" conferred upon the class defined, but it is expressly made available to all members of the class -- so the first test for a general law set forth in Kallas, supra, (uniform application to members of the class) is met. The remaining test (reasonableness of the class as a subject of legislative enactment) requires simply that there be a rational basis for conferring such a "privilege" on public employees without extending the benefits to all citizens of the State.

In testing the Act against this standard, the Court should take cognisance of the rule acknowledged by the courts of several other jurisdictions; namely, that the appropriate test to apply on review is substantially the same as employed in evaluating whether legislation is violative of the Equal Protection of the Fourteenth Amendment if a suspect classification isn't involved. See, e.g., State v. Lewis 559 P.2d 630 (Alaska 1977); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (1977); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971). That test, as articulated in State v. Mason, 3 Utah 2d 289, 283 P.2d 213 (1955) provides that

A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act. . . .

In order to see whether the excluded classes or transactions are on a different basis than those included, we must look at the purpose of the act. The objects and purposes of a law present the touchstone for determining proper and improper classifications. . . .

It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional.

283 P.2d at 215.

The Act in question doesn't contain an expression by the legislature of its purpose, but respondent submits that it cannot be doubted that the purpose of the legislation was to relieve public officials and government employees of financial obligations incurred in successfully defending themselves on grand jury indictments arising out of the performance of their duties on behalf of their employer.

The reasonable basis for limiting this attorney's fee provision to officers and employees of a public entity, and not awarding such an entitlement to all citizens who successfully defend grand jury indictments, can be determined with minimal effort if examination is made of the history of grand jury prosecutions in this state, coupled with a recognition of the greatly expanded criminal sanctions to which a public official is subject and the State's legitimate interest in providing assurance to public employees that working for the government will not expose them to exaggerated risks of financial insecurity without regard to the culpability of their conduct in the performance of their duties.

Utah Code Ann. §77-19-7 (1953) sets forth the statutory duties of the grand jury. It provides that

The grand jury must inquire into the case of every person imprisoned in the jails of the county on a criminal charge and not indicted or informed against; into the conditions and management of the public prisons within the county; and into the wilful and corrupt misconduct in the office of public officers of every description within the county.

Under modern rules of criminal procedure^s, as shaped by the vast constitutional protections afforded to arrestees, including rights to speedy trial, prompt arraignment and preliminary hearing, the grand jury's duty to incarcerated individuals, charged but not informed against, is now merely a vestige of earlier procedure not accompanied by actual responsibilities. Almost exclusively, therefore, the duty of a grand jury is to investigate public officials.

A brief examination of Title 76, Chapter 8 of the Utah Criminal Code reveals that Parts 1 (corrupt practices), 2 (abuse of office), and about half of 4 (offenses against public property) of the chapter define and describe offenses applicable almost exclusively to public officials. Given this maze of possible offenses and an investigatory body with no real duty to investigate anything else, public employees stand a markedly greater chance of being inducted than other citizens. Combined with the attendant publicity normally surrounding the prosecution of a public servant, the spectre of grand jury indictment looms as a greater "occupational hazard" for present and prospective public employees than most callings and entirely justifies the State in recognizing this fact legislatively and providing the class with a remedial "privilege".

The foregoing demonstrates that the Act in question makes a classification which has a rational relation to the purposes to be accomplished by the legislation and that it applies

equally to all members of the class. Under the established law of this state such an act is constitutional and not violative of Art. VI, §26 of the State's Constitution. As stated in 2 Sutherland, Statutory Construction §40.18 at 219 (4th Ed.)

Acts conferring franchises, privileges, and immunities are general and not special legislation unless there is an arbitrary standard imposed as to those who may avail themselves of the privileges.

No such arbitrary standard is imposed by this Act, which was largely patterned after a previously enacted measure designed to insulate public officials from the financial hazards associated with possible civil liability and legal expenses which might be incurred by public employees. See Utah Code Ann. §63-48-1 et seq. (2d Rep. Vol. 1978).

The appellant's assertion that the retroactivity provision of the Act alters the measure into "private" legislation is without support. It has been previously demonstrated that there is no constitutional objection to retroactive legislation in a case such as this, so the mere fact that valid class legislation is coupled with a valid retroactive provision doesn't work any transformation regarding the constitutionality of the statute. Both components are valid and their combination is as well. See Riesberg v. State, supra. Appellant has presented no authority to the contrary.

Finally, it must be noted that Art. VI, §26 of the Constitution doesn't prohibit all special legislation, but only in cases "where a general law can be applicable". Even

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if this Court were to determine that the Reimbursement of Legal Fees Act constituted special legislation, there would be no abridgment of any privileges or immunities of an individual by the Act, so no Fourteenth Amendment problem would arise, and if the Act is intended to benefit only Mr. Hulbert for his unique travails, then no general law would be applicable and there would still be no constitutional problem. By saying no special legislation is permissible where a general law is applicable, the Constitution impliedly acknowledges that there will be cases where special laws can be enacted because general laws aren't applicable. This is precisely why the legislature can make payments to individuals after the Board of Examiners reviews claims against the state and makes its recommendations. Such allocations are a species of equitable compensation made on particular facts applicable only to the claimant. Courts of other jurisdictions have frequently acknowledged that the legislature may consider moral obligations as sufficient justification for the appropriation of state monies to individuals (see Annot. 172 A.L.R. 1407), and Utah has considered such appropriations at every legislative session since the time of statehood. See Wood v. Budge, 13 Utah 2d 359, 374 P.2d 516 (1962). Whether or not attorney's fees have previously been the subject of such claims is totally irrelevant. The legislature has the constitutional power to recognize the obligation and pay the claim individually by appropriation if it is a singular claim, or enact a general law giving relief to the whole class to whom they feel the

State is so obligated. The ironic fact of this case is that while they have done both, the State's highest legal officer refuses to accept their right to do either. Such a refusal is without support in the law.

POINT IV. THIS APPEAL PRESENTS NO JUSTICIABLE CLAIM AND THE ISSUES RAISED ARE MOOT.

Throughout the course of Mr. Hulbert's attempt to recover on his claim, the Attorney General has insisted that any such claim would have to be submitted to the Board of Examiners. Mr. Hulbert, after proceeding through the court system in the manner indicated in the Act, did exactly that. He submitted the judgment to the Board, who voted 2-1 to recommend to the legislature that the claim not be paid, pending appeal by the State of the judgment. The legislature, despite this recommendation, appropriated \$50,000 for full payment of Mr. Hulbert's claim.

There is no dispute that Mr. Hulbert did submit the claim and that the Board issued a recommendation, but the Attorney General is now apparently contending that this action did not constitute having the claim "acted upon" within the meaning of Article VII, Section 13 of the Constitution. Plaintiff-Respondent believes that such an assertion is clearly refuted by the Board's own description of their conduct, but would further indicate to the Court that, by statute, the Board of Examiners cannot take "no action" on a claim, but must make

a recommendation to the Legislature. Utah Code Ann. §63-6-13 (1953) provides, in relevant part, that:

The board must at the time designated proceed to examine and adjust all such claims referred to in section (63-6-11) of this act, and may hear evidence in support of or against them, and shall report to the legislature such facts and recommendations concerning them as it may think proper. (emphasis added)

This is supplemented by the next section of the act, which provides:

The board must make up its report and recommendations at least thirty days before the meeting of the legislature; and a brief abstract of the report, showing the claims rejected, and those allowed and the amounts thereof, must be published in a newspaper published at the seat of government before the meeting of the legislature for such time as the board may prescribe. (emphasis added) Utah Code Ann. §63-6-14 (1953)

No option is provided for "not acting", and the recommendation deemed appropriate by the Board is the action which a claimant may appeal to the Legislature, if he is aggrieved by such action, as provided in Utah Code Ann. §63-6-17 (1953).

Mr. Hulbert took such an appeal to the Legislature and they disregarded the recommendation of the Board and appropriated \$50,000 for settlement of the claim. There is absolutely no question that the Legislature can make such an appropriation despite a different recommendation by the Board. In Wood v. Budge, 13 Utah 2d 359, 374 P.2d 516 (1962), this Court took note of the Legislature's authority to do so.

The provision of Sec. 13 of Art. VII, quoted above, that, " * * * no claim * * * shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners" plainly indicates that the action of the Board was not intended to be so final and basolute as to preclude other action by the Legislature. We can perceive no other meaning then that after the Board has performed its duty of examining and acting upon such claims, the Legislature may then "pass upon", i.e., exercise its judgment, on them and take such action as it deems appropriate. . . To decide otherwise would produce the illogical result of turning the subsequent presentation of claims to the Legislature into an empty gesture whose only purpose would be to rubber-stamp the action of the Board.

13 Utah 2d at 362.

The Budge case involved review of the issuance of a writ of mandamus to compel the Attorney General to make payments to claimants to whom the legislature had appropriated money despite the Board of Examiners' recommendation that such claims be denied. This Court held that the Order compelling payment was properly entered and offered the following admonition concerning the appropriate relationship between the executive officers who comprise the Board of Examiners and the Legislature.

It is also pertinent to observe that if one of the executive officers constituting the Board could circumvent legislative action by refusing to pay out funds appropriated to pay such a claim, problems would arise in determining how far actions of that character could extend; and may well result in perplexities relating to the balance of power between the executive, legislative and judicial branches of our state government.

These departments, though to a degree interrelated and cooperating in the overall functions of government, have separate powers which should be safeguarded in order to preserve this balance which has always been recognized to be one of the advantages of our system. In case of doubt or uncertainty on a problem such as here exists, we think it wise and desirable to adopt an interpretation of the law and to follow a policy which will fit harmoniously into and sustain that balance rather than to choose an alternative which would provide a foundation for disrupting it.

13 Utah 2d at 362-63.

This Court further noted that the power of the Legislature to settle claims was unquestionable and not restricted by the powers granted to the Board of Examiners.

Our Legislature is directly representative of the people of the sovereign state, and thus has inherently all of the powers of government except as otherwise specified by the State Constitution. By way of comparison, it is significantly different in that respect from the federal government, which is a government of limited powers that can properly do only those things within the scope of the powers expressly granted to it by the states through the Federal Constitution; whereas, the State Legislature, having the residuum of governmental power, does not look to the State Constitution for the grant of its powers, but that Constitution only sets forth the limitations on its authority. Therefore, it can do any act or perform any function of government not specifically prohibited by the State Constitution. In order to justify a conclusion that the power to approve and pay such claims has been taken away from the Legislature and placed exclusively within the control of the Board of Examiners, it would have to clearly so appear, which is not the case here.

13 Utah 2d at 363.

The Court indicated that the only restriction on the Legislature's power was some showing of the legitimacy of the claim. "In order to justify approval and payment there must be at least some semblance of a valid claim. . ." 13 Utah 2d at 363. This requirement is clearly satisfied in the instant case because Mr. Hulbert's claim, arising by statute, has been the subject of a full trial on the merits resulting in a judgment in his favor.

The Legislature having acted to pay the claim, and Mr. Hulbert having agreed to the terms of that payment, there is nothing left for this Court to resolve on appeal. The Attorney General's refusal to comply with the mandate of the Legislature is not justified under the clearly established law of this State.

The Attorney General's posture in this regard is most baffling. He resisted the court action by saying the Board of Examiners - Legislature route was, constitutionally, the only acceptable course for presenting the claim. After the respondent followed just that course, the Attorney General refused to distribute the appropriation, claiming the courts had to decide Mr. Hulbert's entitlement. Such internally inconsistent arguments underscore his real opposition to payment: he just doesn't like the idea. It should require little argument to support the proposition that the Attorney General's personal views on the relative merit of legislative enactment or appropriations should play no role in his duty to comply with the law. While the appellant's entire brief is couched in terms of what an "injustice" is being perpetrated on the

taxpayers, the appellant has lost sight of the fact that the legislature, the elected representatives of the taxpayers, is the body constitutionally mandated to make judgments on the wisdom of particular fiscal items, and by ignoring that fact the Attorney General is overstepping the bounds of his office in the exact fashion warned against in Wood v. Budge, supra.

The respondent respectfully submits that he has complied with every conceivable requirement imposed by law in asserting his claim against the State, and the legislature having lawfully allocated a sum for paying that claim, this appeal should be dismissed as the dispute between Mr. Hulbert and the State has been resolved, and only that dispute is properly at issue.

CONCLUSION

The arguments raised by appellant in opposition to the judgment entered below are all contrary to the established law of this State. The jurisdiction of the District Courts to entertain claims against the State and to render judgment thereon has been directly sustained by this Court and is an integral part of Utah's present statutory procedure for presenting such claims. The issue of how such judgments might lawfully be satisfied, while intriguing, has no bearing on the court's jurisdiction and is not relevant to this appeal.

The judgment for reasonable attorney's fees entered below is supported by the factual findings and the Conclusions of Law based on those findings. This Court has previously sustained an award for fees based on a promise to pay for

services where the recipient of those services otherwise would have had no obligation to do so, and that holding, which is controlling here, is consistent with the law and theory which has developed at common law on the enforceability of promises made for past services rendered. This binding agreement between the respondent and his counsel forms the basis of the "reasonable attorney's fees necessarily incurred" for which Mr. Hulbert is entitled to compensation, and the State's obligation is for the amount so found.

There is not now, nor has there ever been, any per se constitutional restriction on the legislature's power to pass retroactive measures, and the legislature is free to waive any vested state interest attached to past actions. The only requirement the Constitution imposes on enactments granting new rights to an individual or to a class is that there be a rational basis for the creation of such rights and for limiting them to the individual or class. In the instant matter, either the State's interest in insuring that its own employees not suffer unjustified financial ruin for performance of their duties or the State's interest in remedying past injustices inflicted on a citizen by agencies of the State government is sufficient rationale to support the legislation. The first will sustain a general enactment and the latter a special law. Whichever this Act is viewed as, it is still constitutionally permissible.

Finally, this appeal is presently moot because the legislature has resolved Mr. Hulbert's claim through appropriation.

For the reasons stated above, the respondent respectfully submits that this appeal should be dismissed or denied.

DATED this _____ day of June, 1979.

BRANT H. WALL

M. DAVID ECKERSLEY

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two copies of the foregoing were sent to Robert B. Hansen, Attorney General of the State of Utah, State Capitol Building, Salt Lake City, Utah 84114, this _____ day of June, 1979.
