2004

Armand L. Smith Individually and as Trustee for the Armand L. Smith, Jr And Shannon S. Windham Trusts, and Virginia L. Smith, Individually v. Price Development comapny, nka Fairfax Realty Inc., North Plains Land Company, LTD, The state Treasurer, Edward T. Alter of the State of Utah, for and in behalf of The State of Utah : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF the STATE OF UTAH

ARMAND L. SMITH, Individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH,

Plaintiffs & Appellees,

(PRICE DEVELOPMENT COMPANY, a Utah corporation f/k/a FAIRFAX REALTY, INC., a Utah corporation, et. al.,

Defendants (Non-Participating Parties)),

v.

The State Treasurer, Edward T. Alter of the State of Utah, for and in behalf of THE STATE OF UTAH,

Additional Rule 19 Defendant & Appellant.

Appeal No. 20040675-SC

[redacted] BRIEF

Supreme Court

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DOCKET NO. 20040675-SC

Third District Court
Case No. 940904312CV

(Honorable Frank G. Noel
District Court Judge)

BRIEF OF APPELLEES SMITHS

APPEAL BY STATE TREASURER FROM SUMMARY JUDGMENT ORDER OF JUNE 24, 2004 MADE FINAL UNDER RULE 54(b) BY AND OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE FRANK G. NOEL, DISTRICT JUDGE PRESIDING

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IN THE SUPREME COURT OF the STATE OF UTAH

ARMAND L. SMITH, Individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH, Plaintiffs & Appellees, (PRICE DEVELOPMENT COMPANY, a Utah corporation f/k/a FAIRFAX REALTY, INC., a Utah corporation, et. al., Defendants (Non-Participating Parties)), v. The State Treasurer, Edward T. Alter of the State of Utah, for and in behalf of THE STATE OF UTAH, Additional Rule 19 Defendant & Appellant.	Appeal No. 20040675-SC Third District Court Case No. 940904312CV (Honorable Frank G. Noel District Court Judge)

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Pursuant to Utah Appellate Rule 24(b), the Appellees, Armand L. Smith, individually and as Trustee and Virginia L. Smith, an individual ("Smiths"), herewith submit this Appellees' Brief answering the Opening Brief of Appellant, Utah State Treasurer, filed November 19, 2004.

ISSUES ON APPEAL RAISED BY STATE TREASURER

The issues in this appeal are those raised by the State Treasurer's Opening Brief, but the constitutional issues can be more accurately and precisely framed:

1. **Was the District Court Correct in Holding That the Punitive Damage Statute, Utah Code Ann. § 78-18-1(3) Is Unconstitutional Under the Utah and United States Constitutions As a "Taking" of the Smiths' Constitutionally Vested Property Rights in the June 29, 2001 Final Punitive Damage Judgment?**

    a. **Was the District Court Correct in Concluding that the Punitive Damage Statute § 78-18-1(3) (1989) Does Not Give the State Treasurer any Interest in the Punitive Damages Judgment, and that the State Treasurer's Claim to Fifty Percent of the Punitive Damage Award Did Not Mature and Was Not Triggered Until the Punitive Damage "Award" Was "Paid"?**

2. **Although It Was Not Necessary for the District Court to Reach the Additional Constitutional Issues, Does the Punitive Damage Statute, Utah Code Ann. § 78-18-1(3) (1989) Also Violate the Separation of Powers Articles V and VIII of the Utah Constitution or the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution or Art. I, Sec. 24 of the Utah Constitution?**

3. **Alternatively Only, if the State Treasurer is Found to be Entitled to a Net Fifty Percent of the Punitive Award, Is the State Treasurer Also Entitled to the $560,020 of Statutory Interest on the Judgment Against Price Development Co.?**

The Smiths are in agreement with the State Treasurer that it has preserved each of these issues on appeal at the trial court and that the standard of review by this Court is one of correctness.

CONSTITUTIONAL AND STATUTORY PROVISIONS DETERMINATIVE OF THIS APPEAL

1. Punitive Damage Statute, Utah Code Ann. § 78-18-1(3) (1989), as originally enacted, annexed as Attachment 1.
2. Utah Constitution, Art. I, Sec. 22, annexed as Attachment 2.
3. United States Constitution, Fifth Amendment annexed as Attachment 3.
4. New 2004 Punitive Damage Statute and Enrolled Bill, S.B. 201, annexed as Attachment 4.
5. Utah Constitution, Art. V, Sec. 1, annexed as Attachment 5.
6. Utah Constitution, Art. 1, Sec. 24, annexed as Attachment 6.
7. Utah Constitution, Art. VIII, Sec. 1 and Art. VIII, Sec. 7, annexed as Attachment 7.
8. Fourteenth Amendment to United States Constitution annexed as Attachment 8.

STATEMENT OF CASE AND UNDISPUTED FACTS

This appeal is before this Court from the District Court's Rule 54(b) Summary Judgment Order of June 24, 2004 declaring Utah Code Ann § 78-18-1(3) (1989) unconstitutional and unenforceable as a "taking," contrary to United States and Utah Constitutions, of the Smiths' constitutionally vested property rights in the compensatory and punitive damage judgment of the District Court dated June 29, 2001. In large part, the State Treasurer's Statement of the Case and

Facts are reasonably accurate as far as it goes, and the Smiths submit this Statement as a chronological supplement:

1. On June 29, 2001 based upon a unanimous jury verdict, District Judge Noel entered judgment in favor of the Smiths and against Price Development Company (n/k/a/ Fairfax Realty Co.) of $1,100,000 compensatory damages and $5,500,000 punitive damages:

   "IT IS ORDERED, ADJUDGED AND DECREED . . .

   4. That on the Special Verdict of the Jury Re: Punitive Damages for breach of fiduciary duty, judgment be, and the same is hereby entered, in favor of Armand L. Smith, individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and Virginia L. Smiths, and against Price Development Company n/k/a Fairfax Realty, Inc. in the sum and amount of $5,500,000 . . . ." R. 4504.

2. This Court, by unanimous decision of October 3, 2003, affirmed in all respects the June 29, 2001 judgment. R. 4559-4577.

3. Price Development filed a certiorari petition in the United States Supreme Court on or about January 26, 2004, opposed by the Smiths, that was denied on March 29, 2004. R. 5309. This Court issued its Remittitur back to the trial court on the following day, March 30, 2004. R. 4592.

4. Neither the State Treasurer nor the Attorney General attempted to intervene in the case at any time to assert any interest in the June 29, 2001 judgment. Upon Smiths' Motion for Joinder filed in early April 2004, the District Court on April 14, 2004 joined the Utah State Treasurer as a Rule

19 Additional Defendant for purposes of determining the constitutionality of the punitive damage statute, Utah Code Ann. § 78-18-1(3) (1989). That section provides with respect to a punitive damage award:

> "in any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund."

5. Although § 78-18-1(3) (1989) was amended in other particulars in 1991 and 2002, the Smiths and the State Treasurer agreed that the applicable statute at the date of judgment was the 1989 statute. State Br. @ 3, 5; R. 5237, 5345.

6. On April 14, 2004, the State Treasurer appeared orally before the District Court and asserted a net 50% interest, after attorneys' fees, in the punitive damage award, based upon § 78-18-1(3) (1989). The Smiths and the State Treasurer stipulated with Court approval that 50% of the punitive damage award (less $20,000) or $2,740,000, together with statutory interest on that portion of the punitive damage award, or $560,020, would be placed with a neutral depository pending a determination of the constitutionality of § 78-18-1(3) (1989). R. 4695-4699.

7. On April 30, 2004, the Smiths filed a motion for summary judgment against the State Treasurer to declare § 78-18-1(3) (1989) as unconstitutional and unenforceable; and alternatively, for the award of statutory interest on the judgment, upon the following legal bases:

(1) the entire June 29, 2001 punitive damage judgment vested on that date as a constitutional property right in the Smiths, with interest thereon, which they, alone, were entitled to enforce and recover against Price Development. Section 78-18-1(3) (1989) requiring that a net 50% of the punitive damage "award" be remitted to the State Treasurer when "paid" by Price Development, constituted a "taking" of Smiths' vested property rights in the judgment, contrary to the "Taking Clause" of the U. S. Constitution and Art. 1, Sec. 22 of the Utah Constitution;

(2) Section 78-18-1(3) (1989) is unconstitutional as in violation of the Separation of Powers Articles, Art. V Sec. 1, and Art. VIII Sec. 1 and 7 of the Utah Constitution which forbids the Legislature from diminishing, degrading or changing a final and vested judgment of the Judicial Branch;

(3) Section 78-18-1(3) (1989) is discriminatory in attempting to set over to the State Treasurer 50% of a punitive damage judgment in a business fraud/breach of fiduciary duty case while not affecting settlements on statutory punitive damage judgments such as the State antitrust laws under § 76-10-919(1)(b), and therefore it denies to the Smiths the Equal Protection of the Law under the Utah and U. S. Constitutions;

(4) alternatively, but in all events, even if § 76-18-1(3) (1989) were upheld, the Smiths were entitled to the interest on the judgment which was distinct from the "payment" of the punitive damage "award."

R. 5226-5229.

8. Smiths' principal argument that § 78-18-1(1) (1989) was unconstitutional under the "Taking Clause" was predicated on the basis that the State Treasurer had only a claim to the punitive damage "award" and then not until it was "**paid**." "Payment" came years after the punitive damage judgment constitutionally vested as a guaranteed property right in the Smiths. R. 5242-5251.

9. As evidence of the "taking" argument, the Smiths argued the likelihood that the Internal Revenue Service ("IRS") would take the position that the entire $5,500,000 punitive damage judgment had vested in the Smiths and was taxable to them as ordinary income under the Alternative Minimum Tax ("AMT"), even if § 78-18-1(3) (1989) were upheld as constitutional and a net 50% of the judgment, viz., $2,740,000 was paid to the State Treasurer. Case precedent and Congressional proceedings suggest this result, which would be financially ruinous to the Smiths and emasculate the Utah legal policy of punitive damages. R. 5254-5257.

10. In further support that § 78-18-1(3) (1989) was a "taking," the Smiths pointed to the 2004 amendment to § 78-18-1(3) (2004) by the Utah Legislature which, *inter alia*, made the State Treasurer, **for the first time**, **a vested judgment creditor** in any punitive damage **judgment** entered by a district court, with right to execute on the punitive judgment with "equal standing and footing" with the plaintiff judgment creditor. The

Smiths argued that the 2004 amendment was substantive and structural giving the State Treasurer for the first time a vested interest in the judgment. See Addendum 4; R. 5252-5254.

11. The State Treasurer argued that under § 78-18-1(3) (1989), the punitive damage judgment was "divided" between the State Treasurer and the Smiths "at the time of the entry of judgment," that Smiths only became "vested" in 50% of the punitive damage judgment when entered and therefore, there was no "taking" of Smiths' vested rights in the judgment. R. 5350-5352. The Treasurer did not dispute that the State had no rights to enforce or execute on the judgment, and only addressed in passing the IRS federal income tax consequences of the vesting of 100% of the judgment in the Smiths. R. 5365. The Treasurer argued that the 2004 amendment to § 78-18-1(3) (1989) by the Legislature was only a clarification and not a substantive change in the statute. R. 5364-5365.

12. As to the alternative issue of interest on the punitive damage judgment, the Smiths argued that even if the punitive damage statute were upheld, the State's alleged interest did not trigger until the punitive damage award was paid. Accordingly, the Smiths were entitled in all events, to the statutory interest on the entire punitive damage judgment from entry to the date of payment against Price Development in favor of the Smiths. R. 5274-5275. The State Treasurer opposed also this alternative motion. R. 5365-5366.

13. After oral argument, District Judge Noel issued the court order granting summary judgment in favor of the Smiths and declaring § 78-18-1(3) (1989) unconstitutional in violation of the Taking Clauses of the Federal and State Constitutions. The Court in the written order stated:

> 4. That the statute, § 78-18-1(3) (1989), as enacted in 1989, on its face clearly does not give the State Treasurer or the State of Utah any interest in the Judgment of this Court when first issued, nor does it give the State any interest in the underlying cause of action. The State's interest is triggered when and if the punitive damage Judgment is "paid" to the payee, Judgment creditor in this case, the Smiths. To do as the State suggests, and rule that the statute gives the State an interest in the Judgment when first issued, would require this Court to read something into the statute that simply is not there. This the Court is unwilling to do.
>
> 5. That the Smiths' property interests in the entire Judgment which are entitled to constitutional protection, vested in the Judgment as of the date of its entry on June 29, 2001.
>
> 6. That Utah Code Ann., § 78-18-1(3), as enacted in 1989, constitutes a "taking" by the State of Utah of the Smiths' vested property interests in the Judgment of this Court, which is prohibited by the Fifth Amendment of the United States Constitution made applicable to the State through the Fourteenth Amendment, as well as Art I, Sec. 22 of the Utah Constitution. After having reached this conclusion, however, this Court makes no determination as to the constitutionality of Utah Code Ann., § 78-18-1(3), as amended by the 2004 Legislature." R. 5429-5430.

14. The District Court did not find it necessary to reach the Separation of Powers, the Equal Protection, or judgment interest arguments of Smiths' motion for summary judgment. R. 5430-5431.

15. From the summary judgment order made final under Utah Rule of Civil Procedure 54(b), the State Treasurer takes this appeal.

SUMMARY OF THE ARGUMENT

The District Court order determining that Utah Code Ann. § 78-18-1(3) (1989) was unconstitutional should be affirmed for essential constitutional reasons. The statute constitutes a "taking" of Smiths' constitutionally vested property rights in the final punitive damage judgment of the Court in violation of Article I, Sec. 22 of the Constitution of Utah and the Fifth and Fourteenth Amendments of the United States Constitution. Additionally, the statute is constitutionally flawed in violation of the Separation of Powers, Article V and Article VIII of the Utah Constitution, and the Equal Protection Clause of the Federal and State Charters.

The June 29, 2001 punitive damage judgment of $5,500,000 entered against Price Development and in favor of the Smiths only, was final, absolute, unqualified and unconditional. The Smiths are the judgment creditors in 100% of the punitive damage judgment which they enforced and defended against Price Development on appeal in this Court and on certiorari in the U.S. Supreme Court.

Section 78-18-1(3) (1989) attempts to require Smiths, years after the final judgment has vested in and been defended and enforced by Smiths, to remit 50%

of the punitive damage "award" to the State Treasurer if and when "paid" by Price Development to the Smiths. The conclusion is inescapable that the statute is conditional upon the hypothesis of payment long after the judgment constitutionally vested in the Smiths. While the cornerstone of constitutional analysis is the "vesting" of the property rights in the final judgment, the State Treasurer does not argue in this appeal that the final judgment ever vested in the Treasurer. Rather, he contends that the Smiths "only became vested in 50% of the final judgment" which judgment was somehow "divided" with the Treasurer when entered. The argument is a fiction that flies squarely in the face of the constitutional "taking" prohibitions of the Utah and Federal Constitutions above-referenced. The final vested punitive damage judgment was and is a property right of the Smiths like any other property interest entitled to State and Federal constitutional guarantees.

Added demonstration of the vesting of the full and final punitive damage judgment in the Smiths is the distinct possibility that the Internal Revenue Service, following established precedent, will tax, under the Alternative Minimum Tax, the entire punitive damage judgment to the Smiths. If § 78-18-1(3) (1989) were held constitutional herein, and the I.R.S. taxed the Smiths on the full judgment as it has in other cases, the result would not only be financially ruinous to the Smiths, but it would also scuttle this Court's legal policy on punitive damages.

In its recently concluded 2004 Session, the Utah Legislature fundamentally changed § 78-18-1(3) (1989) to read the way the Treasurer would like to but

cannot now construe the 1989 statute. Section 78-18-1(3) (2004), for the first time, makes the State Treasurer a judgment creditor of a post-May 2004 punitive damage judgment on equal footing with the plaintiff to execute upon, enforce, and settle the judgment. The 2004 statute is an open acknowledgement of the constitutional defects in § 78-18-1(3) (1989) before this Court. In fact, the Treasurer's appeal in this case essentially asks this Court to rewrite § 78-18-1(3) (1989) so it reads as does § 78-18-1(3) (2004). The District Court expressly declined to judicially amend the statute.

Section 78-18-1(3) (1989) is also constitutionally flawed in violation of the Separation of Powers Articles V and VIII of the Utah Constitution. At stake is the strength, veracity and integrity of a final judgment of the Judicial Branch. The law is firmly settled that the final punitive damage judgment herein vested in the Smiths is the supreme act, the *sine qua non,* of the Judicial Department and it may not be diluted, degraded, abrogated, or changed by the legislature. Section 78-18-1(3) (1989) is unconstitutional for attempting to do just that.

Further, § 78-18-1(3) (1989) will not stand constitutional scrutiny under the Equal Protection Clause of the Utah and Federal Constitutions. The statute unconstitutionally discriminates against those who recover a non-statutory punitive damage judgment for deceit and breach of fiduciary duty and intentional partnership asset conversion, vis-à-vis, those who obtain a statutory punitive damage judgment in the form of treble damages for violation of Utah's antitrust laws or other statutory punitive damage statutes.

Lastly, and only in the alternative, were this Court to reverse and uphold the constitutionality of § 78-18-1(3) (1989), the Smiths would still be entitled to the statutory interest payable by Price Development on the entire punitive damage judgment, no part of which ever vested in the State Treasurer. At best, the Treasurer's entitlement is only to a net 50% of the punitive damage "award," if and when "paid." It is only the punitive damage judgment, and not the "award" which carries statutory interest.

ARGUMENT

I. UTAH CODE ANN. § 78-18-1(3) (1989) IS UNCONSTITUTIONAL AND UNENFORCEABLE AS A "TAKING" OF THE SMITHS' CONSTITUTIONALLY VESTED RIGHTS IN THE FINAL JUNE 29, 2001 PUNITIVE DAMAGE JUDGMENT, IN VIOLATION OF THE UTAH AND UNITED STATES CONSTITUTIONS.

1. The June 29, 2001 Judgment Vested a Constitutional Property Right in the Smiths to the Entire Punitive Damage Judgment, Including Interest.

The State Treasurer's statement is correct that the constitutional interpretation of a statute is ordinarily to be gauged by its plain meaning.[1] (App. Br. at 9). However, "[i]t is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional." City of Mobile v. Bolden, 446 U.S. 55, 76 (1980) (citations omitted).

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[1] While indirectly referencing legislative history, the Treasurer states emphatically that § 78-18-1(3) (1989) is not ambiguous and is to be interpreted by its plain meaning. State Br. @ 10. The Smiths agree. State v. Casey, 2002 UT 29 ¶ 20.

In the constitutional context, it is undeniable that the Smiths' property interests vested in the entire punitive damage judgment when it was entered on June 29, 2001. The judgment was indivisible, entered only in favor of and to be enforced by the Smiths, and was constitutionally protected property as much as any other real or personal property right. The punitive damage judgment "is as much an article of property as anything else that a party owns." State of Louisiana, ex rel. v. Mayor and Administrators of the City of New Orleans, 109 U.S. 285, 291 (1883). That property right in the entire judgment could have been executed upon only by the Smiths, and sold, assigned or mortgaged by them in the same way as other real or personal property. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); McCullough v. Virginia, 172 U.S. 102, 123-24 (1898); Gilroy v. Lowe, 626 P.2d 469, 472 (Utah 1981).

When the judgment was entered in favor of the Smiths and against Price Development on June 29, 2001, nothing else, in fact or law, was required as a condition to the Smiths' constitutional vesting in the judgment. The integrity of that final judgment, as affirmed by this Court, is collaterally attacked by the State Treasurer's argument in this appeal that only 50% of the punitive damage judgment vested in the Smiths in consequence of § 78-18-1(3) (1989). That claim came as a surprise to the District Court which found not only that the State Treasurer is not named or anywhere to be found, even impliedly, in the judgment, but also that both the punitive damage judgment and the statute would have to be rewritten to say what they plainly do not say.

The very integrity of final judgments in the State of Utah is in jeopardy in this appeal. This Court has stated that a final judgment is an act of the Judicial Department which is the absolute disposition of the rights of the interested parties:

> "A judgment or decree duly entered, establishes in the most authentic form, that which had theretofore been in dispute, or unsettled or uncertain. . . . Since the parties submitted to the court the resolution of their disputes and the determination of their rights and liabilities, that resolution when entered as a judgment conclusively binds them. Such questions may not again be litigated; they have been adjudicated for all time, and are fused into the judgment or decree."

Adams v. Davies, 156 P.2d 207, 209 (Utah 1945). "A judgment is the final determination of the rights of the parties." Lukich v. Utah Construction Co., 150 P.2d 298 (Utah 1915).

> "[T]he finality of a judgment must be respected in order to insure the rights of parties. . . . Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding."

Crofts v. Crofts, 445 P.2d 701, 702 (Utah 1968). "If the language of judgment is clear and unambiguous, it must be enforced as it speaks." Park City Utah Corporation v. Ensign Company, 586 P.2d 446, 450 (Utah 1978).

The constitutionally protected property rights of Smiths in the final June 29, 2001 Judgment cannot be taken or damaged by the State Treasurer without compensation. Both the Fifth Amendment of the United States Constitution, made applicable to the States under the Fourteenth Amendment, Penn Central

Transportation Co., 438 U.S. at 122, and Article I, Sec. 22 of the Utah Constitution contain a simple but eloquent prohibition:

> " . . . nor shall private property be taken for a public use, without just compensation."

Fifth Amendment, U.S. Constitution.

> "Private property shall not be taken or damaged for public use without just compensation."

Art. I, Sec. 22, Utah Constitution.

The finality of the judgment, vesting in Smiths the rights of the judgment creditor who has obtained the judgment, may not by prior or subsequent statute of the Legislature be taken away, diminished, degraded or eliminated. The United States Supreme Court in the early case of McCullough v. Virginia, 172 U.S. 102, 123-24 (1898), stated the now long-recognized rule:

> "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

Id. at 123-24. The rule in McCullough is embedded in the law governing the constitutional rights of the Smiths before this Court and it has echoed down through the years.[2] In Johnston v. CIGNA Corp., Inc., 14 F.3rd 486 (10th Cir.

[2] Not only do rights that have become vested by a judgment constitute property "protected from legislative interference," but an attachment or lien "entitling a creditor to resort to property for the satisfaction of a claim is a property right protected by the Fifth Amendment." United States v. Board of Educ. of City of Chicago, 588 F.Supp. 132, 235 (N.D. Ill. 1984).

1993), cert. denied 514 U.S. 1082 (1995), the Tenth Circuit Court of Appeals recognized the validity of the doctrine:

> "The nature of the vested rights doctrine is twofold. The doctrine has a due process component premised upon the acknowledgment that once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property. *Axel Johnson v. Arthur Andersen & Co., 6 F.3d 78 (2nd Cir. 1993); Tonya K. v. Board of Educ., 847 F.2d 1243, 1247-48 (7th Cir. 1988); see also, Taxpayers for Animus-La Plata Referendum v. Animus-La Plata Water Conservancy, 739 F.2d 1472, 1477 (10th cir. 1984)* ("the [Supreme] Court has indicated that it would not allow a legislature to interfere with an adjudicated right"). In cases involving Congress and the federal judiciary, the vested rights doctrine also has a separation of power component which prevents Congress from sitting as a 'court of errors' with the powers to suspend or revise final judgments of the federal courts." (Some citations omitted).

Id. at 490-491 (emphasis added).

The Tenth Circuit in Johnston went on to cite with approval McCullough in stating:

> "The case perhaps most often cited for the vested rights doctrine is *McCullough v. Virginia, 172 U.S. 102, 123-24, 43 L.Ed. 382, 19 S. Ct. 134 (1898)*, in which the Supreme Court held that the Legislature lacks the power to take away rights that have been vested by final judgment."

Id. at 491. The Tenth Circuit then stated the accepted principle:

> "In fact, the Court has reiterated the vested rights principle underlying *McCullough* on several occasions. *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)* ('judgments within the powers vested in [Article Three] courts. . . may not be unlawfully revised, overturned or refused faith and credit by another Department of Government'); *Hodges v. Snyder, 261 U. S. 600, 603, 67 L. Ed. 819, 43 S.Ct. 435 (1923)* ('the private rights of parties which have been vested by the judgment of a court cannot be taken

> away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation'); *Stephens v. Cherokee Nation, 174 U.S. 445, 478, 43 L.Ed. 1041, 19 S. Ct. 722 (1899)* ('it is undoubtedly true that legislatures cannot set aside the judgments of courts'); *United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647-48, 22 L.Ed. 772 (1875)* (invalidating attempt by Congress to revise a final judgment entered by the Court of Claims because 'where no appeal is taken to [Supreme Court], [such judgments] are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by [Claims] court')' *Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (1 How.) 421, 431, 15 L.Ed. 435 (1855)* ('[an] act of Congress cannot have the effect and operation to annul the judgment of the court already rendered or the rights determined thereby'); *Massingill v. Downs, 48 U.S. (7 How.) 760, 768, 12 L.Ed. 903 (1849)* ('no legislative act can change the rights and liabilities of parties which have been established by solemn judgment')."

Id. at 491.

The property rights of the individual, as vested in the final judgment here, have high constitutional priority before this Court and the United States Supreme Court. Bertagnoli v. Baker, 215 P.2d 626, 628 (1950); Moyle et al. v. Salt Lake City, 176 P.2d 882, 885 (1947).

> "[A]ll history shows that rights of persons are unsafe where property is insecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled. . . ."

Sinking Fund Cases, 99 U.S. 700, 767 (1879). It cannot be disputed, in law, that on June 29, 2001 the Smiths, and only the Smiths, became vested as the judgment creditor in the final judgment.

2. **Under Sec. 78-18-1(3) (1989), the State Treasurer's Entitlement to Any Punitive Damage Award Does Not Arise Until and is Only Triggered By an "Award" Being "Paid."**

The State Treasurer argues that the plain meaning under the statute is that the Treasurer obtains an interest in a net 50% of punitive damages "where awarded and paid" with the monies to be remitted to the State Treasurer for general fund use. State Br. @ 10-11. The problem with the Treasurer's argument is that the statute **plainly** does not say either what the Treasurer would like it to say or what it must say in order for the Treasurer's argument to succeed. The section clearly contemplates an entitlement to a punitive damage award, not judgment, but only if the punitive award is ever paid. The section states:

> "In any judgment where punitive damages are awarded and **paid**, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund." (Emphasis added and bolded).

§ 78-18-1(3) (1989).

Troubling questions plague the Treasurer's arguments, the answers of which unravel his position. To begin with, when does the Treasurer claim that its 50% interest "vested"? Also, vested in what? As to the first query, the Treasurer admits that the statute is silent and, in fact, contains no language as to when he acquires his claimed 50% interest in the judgment. State Br. @ 11. Nowhere in the Treasurer's Brief does he claim (much less explain when or how) the Treasurer's interest ever "vested."

As to the second query, there are no vested rights of the Treasurer in any judgment at any time, but only at some unknown future date and then only if a punitive damage award is paid. In order for a property right or interest to vest in a judgment of a court in Utah, there must be no other condition or hypothesis to be satisfied before the interest can vest. A future and speculative interest does not rise or equate to a present, vested right. State of Arizona v. Estes Corp., 558 P.2d 714, 716 (Ariz. App. Ct. 1976) ("rights are not vested if they are qualified by contingencies"); Vaughn v. Nadel & Gussman Partnership, 618 P.2d 778, 783 (Kan. 1980) ("a vested right is a right so fixed that it is not dependent on any future act, contingency or decision to make it more secure.").

Still other questions undercut the State Treasurer's position. If, as the Treasurer argues, the Smiths' property rights constitutionally vested in only 50% of the final punitive damage judgment, how could the Smiths enforce against Price Development by threatened execution, and then defend on appeal, 100% of the punitive damage judgment? Could the State Treasurer, under § 78-18-1(3) (1989), enforce by execution or defend on appeal the claimed net 50% of the punitive judgment against Price Development? If Price Development had attempted to discharge the punitive damage judgment in bankruptcy, would the State Treasurer have been entitled to enforce the judgment as a creditor of Price Development? Was the Treasurer ever a judgment creditor of Price Development? Hypothetically, if the Smiths agreed to settle the case with Price Development for the amount of the compensatory damages and waived the punitive damage

judgment, would the State Treasurer have had the right to block the settlement and enforce its claimed interest against the judgment debtor, Price Development? If not in the Smiths, where is this second 50% interest in the punitive damage judgment vested? Surely not in the Treasurer for the reasons already advanced. Was the 50% interest placed in a black void or in perpetual animated suspension? These questions will not go away.

In point of law, § 78-18-1(3) (1989) and the vested rights doctrine established more than a century ago compel the conclusion that the State Treasurer never became vested in the punitive damage judgment of the District Court. Rather, the Treasurer only becomes entitled under the statute to a net 50% punitive damage "award" when and if "paid." That attempted entitlement is conditional and a hypothesis that has nothing to do with the Smiths' constitutionally vested rights in the entire June 29, 2001 punitive damage judgment. The Legislature did not provide in § 78-18-1(3) (1989), as it could have, that the Treasurer would be named as a judgment creditor in the punitive damage judgment as was done in the 2004 legislation.

In order for the State Treasurer to prevail he must ask this Court to rewrite 78-18-1(3) (1989) to say what the Legislature clearly did not say. This Court should decline that request just as the experienced District Judge declined herein. See Order of Noel, J. ¶ 4; R. 5427-5432.

3. Case Precedent Supports the Unconstitutionality of §78-18-1(3) (1989) As a "Taking" of Smiths' Vested Rights in the Punitive Damage Judgment.

The constitutional difficulties facing § 78-18-1(3) (1989) are strikingly comparable to the Colorado punitive damage statute struck down by the Colorado Supreme Court in Kirk v. Denver Publishing Co., 818 P.2d 262, 273 (Colo. 1991). In Kirk, a 1987 punitive damage statute in Colorado provided that one-third of all punitive damages awarded be payable to the state general fund when those damages were "collected." Just as with § 78-18-1(3) (1989), the Colorado statute, C.R.S. § 13-21-102 (4) (1987), did not vest the State of Colorado with any interest in the punitive damage judgment, but rather set forth that the state was entitled to one-third of a final judgment (by definition already vested in the private plaintiff), and then only if and when the "punitive damages," were "collected."[3] The Colorado statute read:

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

C.R.S. § 13-21-102(4) (1987) (emphasis added).

The Colorado Supreme Court, in concluding that the Colorado statute worked a "taking" of the plaintiff's constitutionally vested property rights in the

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[3] It is noteworthy that the Utah statute, § 78-18-1(3) (1989) was enacted only two years after the Colorado statute in Kirk.

punitive damage judgment, began its analysis by stating that a vested interest in a judgment of a court is a property right protected as any other property interest:

> ". . . The term 'property' also includes the judgment itself, which creates an independent legal right to full satisfaction from the 'goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained.' . . . [S]ee generally, *Evans v. City of Chicago, 689 F.2d 1286, 1296 (7th Cir. 1982)* (final judgment no longer subject to modification is vested property right); *Truax-Traer Coal Co. v. Compensation Comm'r., 17 S.E.2d 330, 334 (W.Va. 1941)* (judgment is 'property' and as such is proper subject of constitutional protection").

818 P.2d at 267 (emphasis added).

The Kirk Court went on to hold that the punitive damage judgment was not only indivisible and part of the compensatory damage judgment to which the State of Colorado had no interest, but also the Colorado statute was a forced contribution imposed not on the wrongdoer defendant, but rather upon the plaintiff who suffered the wrongdoing:

> "As we previously observed, while a judgment for exemplary damages is designed to punish the wrongdoer and deter similar conduct by others, it is only available when a civil wrong has been committed under extremely aggravating circumstances and when the injured party has a successful claim for actual damages against the wrongdoer. *Harding Glass Co., Inc., 640 P.2d at 1123 at 1126-27.* In that sense, an exemplary damages award is not totally devoid of any and all reparative elements. More importantly, the forced contribution of one-third of the exemplary damages judgment is imposed not on the defendant wrongdoer who caused the injuries but upon the plaintiff who suffered the wrong. It goes without saying that placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct."

Id. at 270 (emphasis added) (citations omitted). Utah agrees. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 806 (Utah 1991) (compensatory and punitive damages have nexus with respect to the egregiousness of the misconduct, the impact upon the plaintiff, the ratio of compensatory to punitive damages, and the relationship between the parties (fiduciary in this case)).

Turning to the issue of constitutionally vested rights, the Colorado Supreme Court cited the landmark case of McCullough, *supra*, as well as a string of other cases in holding:

> "Where a private property interest emanates from a final judgment, the long-standing rule, announced by the Supreme Court in *McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)*, and consistently followed by other courts, is that such a property interest cannot be diminished by legislative fiat . . . [quoting *McCullough* and other cases]. "

Id. at 268 (emphasis added). Concluding that the taking of a money judgment from a vested judgment creditor is "substantially equivalent to the taking of money itself" (id. at 269), the Colorado Court struck down the Colorado statute as a "taking" violative of the Colorado and Federal Constitutions:

> "We thus conclude that section 13-21-102(4) constitutes a taking of a judgment creditor's private property interest in an exemplary damages award without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, section 15, of the Colorado Constitution."

Id. at 273.

The statute in Kirk is clearly comparable to § 78-18-1(3) (1989) because the punitive "damages" in Kirk are synonymous with "award" in Utah, and the

entitlement thereto is conditional upon being "collected" in Kirk and "paid" in Utah. The State Treasurer attempts to distinguish the holding in Kirk on the basis that the Colorado Court cited the phrase in the Colorado statute: "[n]othing in subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due." A fair reading of the Kirk decision, however, demonstrates that the Treasurer's claim is meritless. The Colorado Supreme Court reached its conclusions in Kirk squarely on a comprehensive and well-reasoned analysis of the "Taking Clauses" of the State and Federal Constitutions, quite independently of the disclaimer in the last sentence of C.R.S. § 13-21-102(4) (1987). The focus of the Kirk Court was the vesting and the time of the vesting of the plaintiff, Kirk, in the punitive damage judgment, vis-à-vis the Colorado statute which entitled the State to a third of all damages when and if collected. In the 7-page Kirk opinion, the Colorado Supreme Court mentions the disclaimer sentence only in passing as an "add-on" type statement for its already-reached conclusion that the plaintiff had a constitutionally vested property interest in the punitive damage judgment. Id. at 267, 272. For convenience, a copy of the Kirk Opinion is annexed as Attachment 9.

The 1989 Utah Punitive Damage Statute, § 78-18-1(3) (1989) substantively matches the 1987 Colorado statute, C.R.S. § 13-21-102(4) (1987) and makes the Kirk decision highly persuasive as to the "taking" issue before this Court. Just as the District Court below concluded, the Colorado Court in Kirk determined that it

did not have to reach the constitutional Separation of Powers and Equal Protection arguments because of its conclusion that the "Taking Clauses" rendered the comparable Colorado statute unconstitutional.

II. IN THE 2004 LEGISLATIVE SESSION, THE UTAH LEGISLATURE RADICALLY CHANGED § 78-18-1(3) (1989), WHICH MAY HAVE REMOVED THE CONSTITUTIONAL DEFECT UNDER THE "TAKINGS" CLAUSE WHICH IS NOW BEFORE THE COURT.

In the 2004 session of the Utah Legislature, Section 78-18-1(3) (1989) was amended to introduce new substantive provisions that demonstrably changed the structure and vesting of the interest of the plaintiff obtaining a punitive damage judgment, as well as providing for a new interest of the State Treasurer in said judgment. The new statute, § 78-18-1(3) (2004), as well as a copy of the Enrolled Bill, S.B. 201, are annexed to this Brief as Attachment 4. While the 2004 statute is not retroactive or applicable to this case, it could not have been scripted better to highlight the Legislature's recognition of the constitutional infirmities in § 78-18-1(3) (1989) before this Court. A side-by side comparison of the 1989 and 2004 statutes is illustrative:

§ 78-18-1(3) (1989)	§ 78-18-1(3) (2004)
"In any judgment where punitive damages are awarded and paid, 50% of the [net punitive damages] shall . . . be remitted to the state treasurer for deposit into the General Fund." (Emphasis added.)	Amended. The word "paid" is repealed.

No similar provision. No similar provision.	"(a) In any case where punitive damages are awarded, the judgment shall provide that 50% of the [net punitive damages] shall . . . be remitted by the judgment debtor to the state treasurer for deposit into the General Fund." (Emphasis added.)
No similar provision.	"(c) The state shall have all rights due a judgment creditor until the judgment is satisfied, and stand on equal footing with the judgment creditor of the original case in securing a recovery."
No similar provision.	"Unless all affected parties, including the state, expressly agree otherwise or the application is contrary to the terms of the judgment, any payment on the judgment by or on behalf of any judgment debtor, whether voluntary or by execution or otherwise, shall be applied in the following order: (i) compensatory damages, and any applicable attorneys fees and costs; (ii) the initial $20,000 punitive damages; and finally (iii) the balance of the punitive damages."

As the Court can readily determine, there are fundamental, substantive changes in the 2004 statute:

- Under § 78-18-1(3)(a) (2004), every punitive damage judgment thereafter entered in Utah "shall provide" that 50% of the net punitive damages, after $20,000 and actual and reasonable attorney's fees and costs are deducted, is to be remitted to the State Treasurer. Thus under the 2004 statute, the

Treasurer's interest is recognized in the judgment when it is entered, vis-à-vis the 1989 statute in which the Treasurer's entitlement arises only and if a punitive damage "award" is actually "paid."

- It is the punitive damage judgment debtor under the 2004 statute who must pay the net 50% of the punitive damage judgment to the State Treasurer, vis-à-vis the 1989 statute before the Court in which the burden and onus rests upon the plaintiff judgment creditor after payment is received from the judgment debtor;
- The words "paid" and punitive damages "awarded" in the 1989 statute have been repealed under § 78-18-1(3)(a) (2004), further attaching the vesting time of the Treasurer's interest to the entry of the punitive damage "judgment" vis-à-vis the payment of the award;
- Under § 78-18-1(3)(c) (2004), the State Treasurer, totally unlike the 1989 statute, has full rights of a judgment creditor who can immediately execute upon and enforce the punitive damage judgment until satisfied, and in so doing "stands on equal footing with the judgment creditor" who secured the punitive damage judgment. Thus, under the 2004 version, the State Treasurer has standing to pursue the judgment upon execution, and in bankruptcy, if necessary, defend an appeal, and for settlement purposes stands on equal footing with the punitive damage plaintiff. In the 1989 statute before the Court, the State Treasurer has no such standing;

- Under the new § 78-18-1(3)(d) (2004), the State is listed as an "affected party" whose agreement must be obtained if the payment of a judgment, including punitive damages, is made in any way other than a priority of compensable damages first, actual attorney's fees and costs, second, the initial $20,000 of punitive damages third, and punitive damages fourth. The Treasurer has no such rights under § 78-18-1(3) (1989), under which the punitive damage judgment plaintiff and defendant may compromise or even waive the punitive damage judgment.

The Treasurer argues that § 78-18-1(3) (2004) was a mere "clarification" of the language in the 1989 statute and did not constitute a substantive change (State Br. @ 13) while making the candid admission that "[a]mendments to statutes are generally presumed to indicate a legislative intent to change existing legal rights." State Br. @ 14. Contrary to the Treasurer's argument, the 2004 changes to § 78-18-1(3) (1989) are not simply a stylistic or clarifying facelift. They constitute a heart transplant, fundamentally changing the rights of the punitive damage plaintiff in the final judgment, as well as providing for the first time rights of the State Treasurer in that judgment. Section 78-18-1(3) (2004) draws a "bright-line" under the constitutional flaws in § 78-18-1(3) (1989) in effect at the entry of the June 29, 2001 punitive damage judgment.

III. THE ACT OF VESTING OF THE ENTIRE JUNE 29, 2001 PUNITIVE DAMAGE JUDGMENT IN THE SMITHS MAY WELL SUBJECT THEM TO FEDERAL INCOME TAX LIABILITY, UNDER THE ALTERNATIVE MINIMUM TAX, REGARDLESS OF THE TREASURER'S CLAIM.

Because the full June 29, 2001 punitive damage judgment of $5,500,000 in this case constitutionally vested in the Smiths as of that date, there is a major concern that the U. S. Commissioner of Internal Revenue ("I.R.S.") will take the position that the entire punitive damage judgment is taxable to the Smiths under the alternative minimum tax (sometimes "AMT") even if § 78-18-1(3) (1989) is determined constitutional and a net $2,740,000 less actual attorneys' fees and costs, were to be remitted to the State Treasurer. While this certainly is not a result to which the Smiths would admit, it is an issue that reflects upon and is a real consequence of the vesting of the entire punitive damage judgment in the Smiths. Moreover, it absolutely cuts against the State Treasurer's argument that the final punitive damage judgment was divided upon entry on June 29, 2001 and that the Smiths' property rights only vested in 50% of that judgment.

There can be no doubt that the I.R.S., supported by tax court decisions, has assessed income tax liability based on the AMT upon taxpayers who have recovered punitive damages on the portion paid to the state under state statute. In Banatis v. Commissioner of Internal Revenue, 340 F.3d 1074 (9th Cir. 2003), cert. granted on attorney's fees, 124 S.Ct. 1712 (2004) U.S. LEXIS 2384, the Ninth Circuit Court of Appeals affirmed the ruling of the U. S. Tax Court holding that economic and punitive damage awards are includable in gross income of the

taxpayer, under the AMT, including part of the punitive damages paid to the State of Oregon to settle Oregon's claim under the state punitive damage statute.

The Tax Court had earlier held in Banatis v. Commissioner of Internal Revenue, 2002 Tax Ct. Memo. LEXIS 4, ¶ 9, that under the AMT, attorney's fees paid under a 40% contingency fee agreement applicable to both compensatory and punitive damages, as well as all of the punitive damages, including that part paid to the State of Oregon, were includable within the taxpayer's gross income without deduction. Id. at 20. The Ninth Circuit Court of Appeals reversed as to the contingent attorney's fees paid to the plaintiff's lawyers, but affirmed the tax court as to the total punitive damages including that portion paid to the State of Oregon. Banatis at 1093. After reviewing the policy of the Alternative Minimum Tax Statute, the Ninth Circuit held:

> "We affirm the judgment of the Tax Court that the economic and punitive damage awards are includable in gross income and that the alternative minimum tax was constitutionally applied in this case. We reverse the judgment of the Tax Court as to the inclusion of attorneys fees in the taxpayer's gross income."

Id. (emphasis added). The Banatis decision is before the U. S. Supreme Court on certiorari regarding the Ninth Circuit's reversal as to attorney's fees against the I.R.S.

In a noted tax news commentary published by Tax Analysts TM on July 18, 2003, Robert W. Wood, author of *Taxation of Damage Awards and Settlement Payments*, 2nd Ed. 1998 (2001 Supplement) wrote regarding the proposed 2003 Senate Bill, Jobs and Growth Tax Relief Reconciliation Act 2003:

> "A last-minute amendment to the Senate Bill, introduced by Senator Orrin Hatch, R-Utah, dealt with punitive damage awards and is worth noting. The Hatch-Amendment indicated that even though punitive damages are now always taxable to the recipient (and that was made clear back in 1996), a plaintiff will not be taxable on any punitive damages that must be paid to a State under a so-called 'split-award statute.' Many states require that in a civil action where punitive damages are paid to a private party, the state automatically gets a 50% cut. In such a state, this clarification makes clear that even though the punitives received by the plaintiff will be taxable to the plaintiff, those going to the state will not."

The Hatch proposed amendment never made it out of the Senate Committee, much less was considered by the full Senate or the House of Representatives. 2003, Tax Analysts, Tax Notes Today, July 22, 2003.

The Treasurer's Brief attempts to twist and distort this issue contending that the Smiths argued to the District Court the "fairness" of the AMT treatment of a punitive damage judgment, whereas "fairness" is irrelevant in considering the constitutionality of § 78-18-1(3) (1989). State Br. @19. The Treasurer misses the whole point: that the I.R.S. position, the Tax Court decisions, the Banatis precedent, and the unsuccessful Hatch amendment all underscore the principle that, as in this case, the plaintiffs' constitutional property rights vest in a punitive damage judgment and the consequences of that vesting subject the plaintiff/taxpayer to tax liability on the full punitive damage judgment, even if a net 50% of the punitive award is years later remitted to the State Treasurer. Constitutionally, it is not a matter of fairness, but rather the pragmatic recognition of the brutal reality of the Treasurer's erroneous argument in this case.

The issue is also relevant because if § 78-18-1(3) (1989) were upheld as constitutional and the Smiths were required to pay ordinary income tax on the net 50% remitted to the Treasurer, the result would wipe out virtually all recovery by the Smiths of any part of the punitive damage judgment, bestowing an absolute windfall upon the Treasurer. Most importantly, such a result would emasculate much of the legal policy underlying punitive damages in this State, including the incentive of Smiths and other victims to seek redress for egregious wrongdoing. Crookston, 817 P.2d at 806-08 (Utah 1991). The constitutional policy of this Court affirms and protects vested property rights; it does not destroy them. Bertagnoli v. Baker, 215 P.2d 626, 628 (Utah 1950); Purdy v. Attorney General, 732 A.2d 442, 447 (R.I. 1999).

While legislative history is entirely silent on the subject, the State Treasurer will acknowledge that the new 2004 change in the punitive damage statute, § 78-18-1(3) (2004), was enacted as an attempt to avoid in the future subjecting the punitive damage plaintiff to ordinary income tax liability on 100% of the judgment by vesting the State in future punitive damage judgments in Utah. While the 2004 enactment has no application to 1989 statute, it is a further recognition that under § 78-18-1(3) (1989), the Smiths became constitutionally vested in 100% of the punitive damage judgment herein.

IV. THE STATE TREASURER ERRONEOUSLY RELIES UPON STATUTES OR CASES IN OTHER STATES WHICH ARE EITHER INAPPOSITE OR DISTINGUISHED ON THEIR FACE.

In an attempt to shore up his flawed position, the State Treasurer provides a string cite of cases, without analysis, from other states wherein so-called split-punitive damage recovery statutes were reviewed. State Br. @ pp. 17-18. As concluded by the District Court, the weight given to those cases and statutes substantially depends on the similarity to the Utah statute § 78-18-1(3) (1989). Apart from the Kirk decision, the cases cited are distinguishable, inapposite because of statutory dissimilarity, and of no assistance to this Court in deciding the constitutional issues in this appeal other than to highlight the divergence.

The Treasurer first cites Anderson v. State of Alaska, 78 P.3d 710 (Alaska 2003). In fact, there are two Alaska opinions one, of which the State Treasurer cited to the lower court but not on appeal, being Evans v. State of Alaska, 56 P.3d 1046 (Alaska 2002). R. 5359. In both cases, the four sitting Justices of the Alaska Supreme Court were evenly divided, with two Justices opining that the Alaska statute was an unconstitutional "taking" and a violation of substantive due process. As a result, the district court finding of constitutionality stood. However, two Justices writing in Evans focused on the vesting of a property interest in the jury verdict stating:

> ". . . [I]f the verdict includes no express finding that the state deserved part of the money, there is no factual predicate that allows the court to . . . divert half the plaintiff's award to the state. Regardless of whether we conceptualize a verdict as vesting a property interest in the plaintiff or leaving it in the defendant, then,

> an order awarding half the verdict to the state necessarily results in an impermissible taking."

Evans, 56 P.3d at 1078. In both Evans and Anderson, the two Justices who opined that the Alaska statute was constitutional failed to even discuss the constitutionally vested property rights that arise in a final judgment or a verdict.

The Treasurer also cites to DeMendoza v. Huffman, 51 P.3d 1232 (Ore. 2002). DeMendoza is inapposite for the reason that the Oregon statute, like the new 2004 Utah statute, § 78-18-1-(3) (2004), provides that the State of Oregon "shall become a judgment creditor as to the punitive damages" and that the judgment shall identify the State as a judgment creditor. Id. at 1235; see, O.R.S. § 18.540. Consequently, unlike § 78-18-1(3) (1989), a final judgment for punitive damages in the State of Oregon did not 100% vest in the plaintiff. The Oregon Supreme Court, in DeMendoza, emphasized the importance of a final judgment:

> "We note that cases in other jurisdictions agree that a party has no vested property right in a claim for punitive damages until judgment is entered."

Id. at 1246 n. 14 (emphasis added).

In Fust v. Attorney General for the State of Missouri, 947 S.W.2d 423 (Mo. 1997), also cited, the plaintiff did not raise and the Missouri Court did not address a constitutional "takings" challenge under the state or federal Constitutions. The plaintiff apparently did raise a Separation of Powers argument, but the Court's analysis is superficial and contains no discussion regarding the vested rights in

final judgments, completely ignoring the substantial case law developed in the path of McCullough v. Virginia, *supra* at 430-31.

Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003) is equally unavailing to the Treasurer. In Cheatham, the Indiana Court ruled, expressly, that the Indiana statute was materially different from the Colorado (and thus the Utah) statute in Kirk and distinguished Kirk on that basis. Id. at 474-75. The Indiana court failed to even raise the question of the constitutionally vested property right in a final judgment. Neither did Cheatham discuss the constitutional Separation of Powers question.

The Treasurer further relies upon State of Georgia v. Moseley, et al., 436 S.E.2d 632 (Ga. 1993). Moseley is only important to demonstrate, like other cases, how distinguished it is from this case. In a one-page opinion, the Georgia Supreme Court reviewed the Georgia punitive damage statute only in the context of a claim by Moseley that the statute denied the punitive damage plaintiff the right of trial by jury and "access to the courts." The Georgia court said it did neither.

Moseley is hardly enlightening in this case. The Smiths have not argued and do not argue that the common law of Utah regarding punitive damages may not be changed without violating the constitutional guarantees of trial by jury and open access to the courts. What the Smiths do contend is that if the Legislature is to change the law, it must do it in a way and manner that does not result in the "taking" of Smiths' vested rights in a final judgment, does not diminish, degrade,

or abrogate a final judgment of the Judicial Branch, and does not deny the Smiths the equal protection of the law. As it was, the Georgia statute, O.C.G.A. § 51-12-5.1(e)(2) provided that upon issuance of a punitive damage judgment, the State of Georgia would have "all rights due a judgment creditor until such judgment is satisfied and such judgment shall stand on equal footing with the plaintiff of the original case in securing a recovery. . . ." This language appears to have been lifted and imported into the language of the new 2004 Utah statute, § 78-18-1(3)(c).

Two other cases relied upon by the Treasurer, Gordon v. State of Florida, 608 So.2d 800, 801-02 (Fla. 1992) and Shepard Components, Inc. v. Brice Petrides-Donohue and Assoc., 473 N.W.2d 612, 619 (Iowa 1991), hold, unremarkably, that the plaintiff has no vested right to a punitive damage award prior to the entry of a judgment. Neither Gordon nor Shepard Components involved statutes similar to Utah or Colorado and neither addressed the constitutional "taking" and Separation of Powers issues that adhere to a vested right in a final judgment that is before this Court. Moreover, the Florida statute in Gordon was repealed by the Florida legislature in 1997. Fla. Stat. § 768-73(2)(b). New York also repealed its punitive damage statute, the Kansas statute expired, and the Colorado statute, C.R.S. § 13-21-102 (4), repealed in 1995, had already been declared unconstitutional under the Kirk decision in 1991.

Thus, the cases and statutes cited by the State Treasurer in his Brief are not helpful to his position. Because of the similarity of § 78-18-1(3) (1989) to the

Colorado statute struck down in Kirk and that decision's substantial analysis of the "takings" issue, the Kirk decision is singularly the most persuasive authority before this Court on the constitutional "taking" question.

V. SECTION 78-18-1(3) (1989), VIOLATES THE SEPARATION OF POWERS SET FORTH IN ARTICLES V AND VIII OF THE UTAH CONSTITUTION, WHICH PROHIBIT THE LEGISLATURE FROM INTERFERING WITH OR IMPAIRING THE INTEGRITY OF A FINAL JUDGMENT OF THE JUDICIAL BRANCH.

The District Court, in holding that § 78-18-1(3) (1989) constituted a prohibited "taking" in violation of the Utah and United States Constitutions, did not reach Smiths' further claim that the statute also violates the constitutional Separation of Powers Article under the Judicial Article. The conclusion is inescapable that § 78-18-1(3) does violate the separation of powers doctrine, perhaps the most fundamental principle of the Utah Constitution.

1. The Separation of Powers Doctrine.

The Utah Constitution provides for a separation of the three branches of government in Article V, Section 1:

> "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

(Emphasis added). Article V also "prohibits the legislative branch or the executive branch from taking over judicial functions." In re Criminal Investigation, 754 P.2d 633, 642 (Utah 1988). The judicial powers of the courts, as set forth in Article VIII, is vested:

> "in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

Art. VIII, sec. 1. The judicial power of the district courts is set forth in Article VIII, section 7:

> "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law. . . The District Courts or any judge thereof, shall have power . . . necessary to carry into effect their orders, judgments and decrees . . ."

The 'judicial power of courts,' "is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation." Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562, 569 (Utah 1984), quoting Citizens Club v. Welling, 27 P.2d, 23 (1933).

Utah courts have long recognized the danger of legislative intrusion into judicial functions. In the early case In re Handley's Estate, 49 P. 829 (Utah 1897), this Court addressed the separation of powers in reviewing a statute affecting final judgments. The Court explained the purpose behind the separation of powers doctrine:

> "The purpose of separating and classifying the powers of government, and of intrusting the lawmaking power to the officers of one department and the right to execute laws to another, and the power to interpret and construe and apply laws to the conduct and contentions of mankind to another, was to prevent the evils that would arise if all were concentrated and held by the same hand. Such a concentration of power would give to the class of officers possessing it absolute power and that would amount to a despotism."

Id. at 830. The law at issue in Handley's Estate allowed heirs to reopen final

probate judgments. The Court held that the law constituted a legislative usurpation of judicial authority and thus violated the separation of powers:

> "If we were to affirm the validity of the law in question, we would, in effect, say that the legislature may exercise judicial powers, authorize and require the courts to set aside final judgments and decrees, divest titles, and destroy and annihilate vested rights. The people of the state have not intrusted such powers to the legislature."

Id. at 831 (emphasis added).

This Court has more recently rejected, under the Separation of Powers doctrine, attempts by the legislature to wield judicial power. See e.g. Salt Lake City v. Ohms, 881 P.2d 844, 852 (Utah 1994) (holding unconstitutional a statute by which the legislature attempted to vest judicial power in persons not duly appointed as Article VIII judges). "Core judicial functions necessarily include all powers that are 'necessary to protect the fundamental integrity of the judicial branch' and, as such, may not be delegated to persons other than judicial officers." Id. at 849 (citations omitted). Such knowledgeable core judicial functions include "the authority to enforce any valid judgment, decree or order." Id.

2. The Controlling Precedent of the Constitutional Separation of Powers Doctrine Precludes the State Treasurer's Appeal.

The Separation of Powers doctrine in the Utah Constitution is modeled upon Articles I, II, and III of the Constitution of the United States. "[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is

essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380 (1989).[4]

The Supreme Court of the United States first addressed the relationship between the judiciary and the legislature in Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). At issue was a federal statute providing that the courts would determine whether a war veteran was entitled to a pension and the amount thereof, and that the Secretary of War was to review the court decision and transmit his opinion to Congress for its approval. Although the case was dismissed as moot, the Justices' views regarding the constitutionality of the statute were noted. The Justices and judges of three circuit courts refused to entertain the applications under the statutory scheme, the New York panel stating:

> "[The Act] subjects the decisions of these courts . . . first to the consideration and suspension of the secretary of war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

Id. at 412. The justices from Pennsylvania jointly mailed a letter to President Washington declaring that "[n]o decision of any court of the United States can,

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[4] Where provisions of the Utah State Constitution and the United States Constitution are similar, this Court looks to federal case law for guidance in interpreting the state constitutional provision. E.g. West Gallery Corporation v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utah 1978) (federal case law concerning free speech guarantees relied on in interpreting state constitutional provision); Terra Utilities, Inc. v. Public Serv. Comm'n, 575 P.2d 1029, 1033 (Utah 1978) (due process decisions of the U.S. Constitution "are highly persuasive as to the application of that [due process] clause of our state Constitution").

under any circumstances . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested." Id.

The fundamental and founding principle that decisions of the judiciary cannot be revised or altered by the legislature has been restated and affirmed on numerous occasions. See McCullough, 172 U.S. at 123-24; Johnston, 14 F.3d at 490-91. The United States Supreme Court recently reiterated this crucial rule in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995):

> "The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'"

Id. at 218-19 (emphasis added), citing Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990).

Under the Separation of Powers doctrine, the legislature is prohibited from interfering in or revising the final judgment of a court of this State:

> "In cases involving the Congress and the federal judiciary, the vested rights doctrine . . . has a separation of powers component which prevents Congress from sitting as a 'court of errors' with the power to suspend or revise final judgments of the federal courts."

Johnston, 14 F.3d at 491 (emphasis added). "It is not within the power of the legislature to take away rights which have been once vested by a judgment." McCullough, 172 U.S. at 123-24; see also Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855).

In addition to Hayburn's Case, the United States Supreme Court in United States v. O'Grady, 89 U.S. 641 (1874) soundly rejected the United States' attempt to revise the terms a final judgment by way of legislation in existence at the time of the judgment. Therein, the United States, in paying on a final judgment owed to plaintiff, attempted to deduct from the judgment a tax allegedly owed by the plaintiff to the United States. The Supreme Court found that the United States failed to raise a counterclaim for the tax and had no legal basis to alter the final judgment:

> "Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the [United States] Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of government."

Id. at 647-48.

3. The State Treasurer Misapprehends the Nature and Magnitude of the Separation of Powers Doctrine.

The Treasurer claims that § 78-18-1(3) does not violate the constitutional separation of powers because "[o]nce the punitive damages were defined by statute, that is the sum that the Smiths or others similarly situated could expect to recover under any judgment where punitive damages are awarded." State Br. @ 17. There are fatal defects in the Treasurer's argument. First, the District Court's June 29, 2001 judgment plainly and articulately states that the Smiths, and only the Smiths, have a vested interest in the compensatory and punitive damage judgment. Second is the equally obvious problem that the Treasurer is not named

anywhere in the Judgment even as an interested party, much less a judgment creditor. Third, the Smiths were aware of the statute as well as the likelihood of its unconstitutionality. The Treasurer never intervened to claim a vested interest. As a result, the final judgment constitutionally vested in the Smiths on June 29, 2001, which judgment was thereafter reviewed and affirmed by this Court. The final judgment is now unequivocally beyond rewrite or revision that would alter its plain terms or attempt to divest, dilute, or deprive the Smiths of their constitutional rights and property interests.

The fact that the statute existed at the time of the judgment is irrelevant because, as earlier stated, it does not vest in the Treasurer any interest in the final judgment but only conditionally or hypothetically upon payment of the punitive award by the judgment debtor to the judgment plaintiff.

If the State Treasurer is successful in his argument herein, then no final judgment of this Court will be secure from legislative invasion and revision. The law set forth in Hayburn's Case, O'Grady, and two-hundred and fifty years of Separation of Powers jurisprudence plainly forecloses that possibility.

VI. THE STATUTE, § 78-18-1(3) (1989), VIOLATES THE SMITHS' RIGHTS TO EQUAL PROTECTION OF LAW ESTABLISHED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 24 OF THE UTAH STATE CONSTITUTION.

The Equal Protection Clause of the Fourteenth Amendment guarantees that all persons "similarly situated" will be treated similarly. City of Cleburne, Tex. v.

Cleburne Living Center, 473 U.S. 432, 439 (1985). The Utah Constitution provides at Article 1, Sec. 24:

"All laws of a general nature shall have uniform operation."

Although the language of the Utah Clause is different from the Fourteenth Amendment, "these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984).

In point of law, Utah courts may construe the Equal Protection Clause in the Utah Constitution even more broadly than its Federal counterpart:

> "Although Article I, § 24 of the Utah Constitution incorporates the same general fundamental principles as are incorporated in the Equal Protection Clause, our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause. Case law developed under the Fourteenth Amendment may be persuasive in applying Article I, § 24, but that law is not binding so long as we do not reach a result that violates the Equal Protection Clause."

Id. at 670 (case citations omitted).

Under Article I, Section 24 of the Constitution: "a two-part test is necessary to ensure the uniform operation of the laws: 'first, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." Condemarin v. University Hospital, 775 P.2d 348, 352 (Utah 1989), quoting Malan v. Lewis.

Section 78-18-1(3) (1989) violates the Equal Protection guarantees of both the Federal and State Constitutions. First, the statute discriminates between similarly situated persons by taking 50% of punitive damage awards but leaving untouched statutory punitive damage awards. Second, the statute discriminates against similarly situated persons by taking 50% of punitive damage awards but not taking punitive damages obtained by settlement.

1. Section 78-18-1(3) (1989) Does Not Touch Statutory Punitive Damages That are Punitive in Nature.

The statute fails to pass muster under the Equal Protection Clauses as it does not apply to plaintiffs who recover statutory punitive damage awards of double or treble damages, even though such punitive awards are equally intended as punishment for improper behavior. See, e.g., Arnott v. American Oil Co., 609 F.2d 873, 888 (8th Cir. 1979), cert. denied, 446 U.S. 918 (1980). For instance:

- The Utah Antitrust Act provides for an award of "three times the amount of damages sustained." Utah Code Ann. § 76-10-919(1)(b).
- The Utah Pattern of Unlawful Activity Act (formerly the RICE statute), provides for an award of "twice the damages" sustained. Utah Code Ann. § 76-10-1605(1).
- The issuer of a bad check may be liable for triple the check amount. Utah Code Ann. § 7-15-1(7)(b)(vi)(A)(II).
- Treble damages are awarded in successful forcible entry and detainer cases. Utah Code Ann. § 78-36-10(3).
- In an action for waste, "there may be a judgment for treble damages." Utah Code Ann. § 78-38-2.

Numerous such examples exist under Federal statutes as well. For instance, The Clayton Antitrust Act, 15 U.S.C. § 15(a), the Copyright Act, 17 U.S.C. § 1203(c)(4), the Lanham Act, 15 U.S.C. § 1117(a), and RICO, 15 U.S.C. § 15(a), each provide for treble damages.

A simple example demonstrates that Section 78-18-1(3) violates the Smiths' guarantees to Equal Protection. Plaintiff brings a lawsuit against defendant for price fixing under the Utah antitrust laws, for breach of fiduciary duty and for common law fraud. The jury finds liability on all three counts and awards $1 million compensatory damages, and also awards punitive damages of $3 million for the breach of fiduciary duty and common law fraud counts. By statute, plaintiff would also receive $3 million treble exemplary damages under the Antitrust Statute. Under the Treasurer's theory of this case, would he claim entitlement to 50% of the $3 million treble damages award for the antitrust violation under § 78-18-1(3) (1989) as he would claim 50% of the punitive damages award on the breach of fiduciary duty and fraud counts, when paid? The Treasurer has stated that § 78-18-1(3) (1989) was not intended to reach statutory punitive damages. R. 5362. That being the case, the Equal Protection violation is clear. There is no rational basis for the Utah Legislature's attempt to take 50% of punitive damages under § 78-18-1(3) (1989) but not 50% of other punitive damages awarded under punitive statutes.

2. The Statute § 78-18-1(3) (1989) Does Not Reach Punitive Damages Obtained by Settlement.

The statute applies by its terms to punitive damages which are "awarded and paid." Utah Code Ann. § 78-18-1(3)(1) (1989) (emphasis added). Its operation thus applies to litigants who obtain punitive damages by trial but not to litigants who receive payment of punitive damages claim by settlement. The distinction is without rationale.

If litigants who succeed in recovering punitive damage payments are to be penalized by the State taking one-half, there is no rational basis for distinguishing between the methods by which such damages are obtained and paid. The effect punishes litigants who properly invoke their rights to the open courts of Utah and prevail against a defendant who has acted willfully, maliciously, or with wanton disregard of the rights of plaintiff.

VII. IN THE ALTERNATIVE ONLY, IF THIS COURT UPHOLDS THE CONSTITUTIONALITY OF § 78-18-1(3) (1989), THE SMITHS ARE NONETHELESS ENTITLED TO ALL INTEREST ON THE PUNITIVE DAMGE JUDGMENT WHICH VESTED ON JUNE 29, 2001.

If this Court affirms the District Court, it will be unnecessary to address this question. However, were this Court to reverse and uphold § 78-18-1(3) (1989), interest on the punitive judgment which accrued from the date of judgment through the date of payment is vested in and owed to the Smiths.

Price Development was required to pay statutory interest on the entire punitive damage judgment from the date of its entry on June 29, 2001 to the date

of payment. Even if § 78-18-1(3) (1989) were assumed to be constitutional, the best argument which the State Treasurer could make in that event would be an entitlement to a net 50% of the punitive damage award, but not until and only if the "award" is paid. In other words, the Treasurer's entitlement starts to run only when there is a payment of the award by Price Development to the Smiths, not when the judgment was entered. It is only the Smiths who are vested in the punitive damage judgment and it is only that judgment, not the punitive damage award, which carries statutory interest. Assuming, arguendo, § 78-18-1(3) (1989) is constitutional, the Legislature did not specify that the Treasurer would be entitled to statutory interest on the punitive damage award. It could have and has done so when that was the legislative intent. E.g. Utah Eminent Domain Code, § 78-34-9(5)(c) (the judgment "shall include, as part of the just compensation awarded, interest at the rate of 8% per annum . . .").

Interest payable on the judgment under Utah Code Ann. § 15-1-4(2) is vested in and payable only to the Smiths, regardless of the Treasurer's claim of entitlement to a net 50% of the punitive damage award when it was triggered by payment three years later. The failure of the Treasurer to be vested in the judgment deprives him, as a matter of law, of the $560,020 interest accrued on the judgment while the Smiths were enforcing and defending the same against Price Development.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the District Court that § 78-18-1(3) (1989) violates the "takings" prohibitions in the Utah and United States Constitutions. The statute further violates the Separation of Powers established in the Utah Constitution, and Equal Protection guarantees of the State and Federal Charters. In the alternative only, if the statute is upheld to be constitutional, the Smiths are entitled to the full amount of interest on the June 29, 2001 judgment.

Respectfully submitted,

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December 14, 2004.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Van Cott Bagley Cornwall & McCarthy, Suite 1600 Key Bank Tower, 50 South Main Street, Salt Lake City, Utah, 84144-0450, and that in said capacity and pursuant to Rule 21, Utah Rules of Appellate Procedure, a true and correct copy of the foregoing **BRIEF OF APPELLEES SMITHS** was served on the following this 14 day of December, 2004 by:

[ ] Hand Delivery
[ ] Facsimile No.
[X] Depositing the same in the U.S. Mail, postage prepaid
[ ] Federal Express
[ ] Certified Mail, Receipt No. _____, return receipt requested

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Tab 1

CHAPTER 18
PUNITIVE DAMAGES AWARDS

Section 78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

Section 78-18-2. Drug exception.

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

History: C. 1953, 78-18-1, enacted by L. 1989, ch. 237, § 1; 1991, ch. 6, § 4.

Applicability. — Laws 1989, ch. 237, § 4 provides that the act applies to all claims for punitive damages that arise on or after May 1, 1989.

NOTES TO DECISIONS

ANALYSIS

Evidence admissible.
Failure to assert foreign state's law.
Cited.

Evidence admissible.

Evidence of defendant's wealth properly admitted. See Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993).

Failure to assert foreign state's law.

Failure to assert Minnesota law and to object to Utah law on the issue of punitive damages precluded brokers from asserting the arbitrator's purported failure to apply Minnesota law as a grounds for vacating the award. Jeppsen v. Piper, Jaffray & Hopwood, Inc., 879 F. Supp. 1130 (D. Utah 1995).

Cited in Crookston v. Fire Ins. Exch, 860 P.2d 937 (Utah 1993).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Tort Law, 1990 Utah L. Rev. 269.

Due Process and Punitive Damages, 1991 Utah L. Rev. 407.

Note, *Crookston v. Fire Insurance Exchange* and the Utah Punitive Damage Act: Toward a Sounder Law of Punitive Damages?, 1993 Utah L. Rev. 513.

A.L.R. — Punitive damages: relationship to defendant's wealth as factor in determining propriety of award, 87 A.L.R.4th 141.

ages when cause of action renders both available, 2 A.L.R.5th 449.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 A.L.R.5th 195.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 A.L.R.5th 242.

Validity, construction, and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-

Tab 2

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 22. [Private property for public use.]
Private property shall not be taken or damaged for public use without just compensation. 1896

Tab 3

THE UNITED STATES CONSTITUTION

Amendment V - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tab 4

CHAPTER 18

PUNITIVE DAMAGES AWARDS

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) (a) In any case where punitive damages are awarded, the judgment shall provide that 50% of the amount of the punitive damages in excess of $20,000 shall, after an allowable deduction for the payment of attorneys' fees and costs, be remitted by the judgment debtor to the state treasurer for deposit into the General Fund.

(b) For the purposes of this Subsection (3), an "allowable deduction for the payment of attorneys' fees and costs" shall equal the amount of actual and reasonable attorneys' fees and costs incurred by the judgment creditor minus the amount of any separate judgment awarding attorneys' fees and costs to the judgment creditor.

(c) The state shall have all rights due a judgment creditor until the judgment is satisfied, and stand on equal footing with the judgment creditor of the original case in securing a recovery.

(d) Unless all affected parties, including the state, expressly agree otherwise or the application is contrary to the terms of the judgment, any payment on the judgment by or on behalf of any judgment debtor, whether voluntary or by execution or otherwise, shall be applied in the following order:

(i) compensatory damages, and any applicable attorneys fees and costs;

(ii) the initial $20,000 punitive damages; and finally

(iii) the balance of the punitive damages

S.B. 201
Punitive Damages Amendments -- Hillyard, L.

House Floor Sponsor: Webb, R. C.

Drafting Attorney: Esther Chelsea-McCarty

Effective Date: 03 May 2004 Session Law Chapter: 164

Bill List | Bills by Representative, Senator, or Subject
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Bill Status
Last Action: 18 March 2004, Governor Signed
Last Location: Lt. Governor's office for filing
Bill Status Last Updated: 23 March 2004, 8:07 AM

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S.B. 201 Punitive Damages Amendments (Hillyard, L.)

Date	Action	Location	Vote
1/30/2004	Numbered by Short Title	LRGC	
1/31/2004	Bill Distributed	LRGC	
2/12/2004	Numbered	LRGC	
2/12/2004	Bill Distributed	LRGC	
2/12/2004	Senate/ received from Legislative Research	SINTRO	
2/13/2004	Senate/ read 1st (Introduced)	SSTRUL	
2/16/2004	Senate/ to standing committee	SSTEDU	
2/18/2004	Senate Comm - Not Considered	SSTEDU	
2/20/2004	Senate Comm - Amendment Recommendation	SSTEDU	
2/20/2004	Senate Comm - Favorable Recommendation	SSTEDU	4 0 4
2/20/2004	Senate/ received fiscal note from Fiscal Analyst	SSTEDU	
2/20/2004	Senate/ comm report/ amended	SSTEDU	
2/20/2004	Senate/ placed on 2nd	S2ND	
2/26/2004	Senate/ read 2nd	S2ND	
2/26/2004	Senate/ pass 2nd	S3RD	22 0 7
2/27/2004	Senate/ read 3rd	S3RD	
2/27/2004	Senate/ pass 3rd	HCLERK	23 0 6
2/27/2004	Senate/ to House with amendments	HCLERK	
3/1/2004	House/ received from Senate	HCLERK	
3/1/2004	House/ read 1st time (Introduced)	HSTRUL	
3/2/2004	House/ read 2nd time (Under Suspension)	H3RDSB	
3/3/2004	House/ read 3rd time	H3RDSB	
3/3/2004	House/ passed 3rd reading	HSPKR	62 0 13
3/3/2004	House/ signed by Speaker sent to Senate	SPRES	
3/3/2004	Senate/ signed by President/ enrolled	LRGCEN	
3/3/2004	Received from Senate for Enrolling	LRGCEN	
3/10/2004	Enroll Draft	LRGCEN	
3/11/2004	Pass Review Forward for Enrolling	SSEC	
3/12/2004	Senate/ enrolled bill to Printing	SSEC	
3/15/2004	Senate/ to Governor	EGOV	
3/18/2004	Governor Signed	LTGOV	

PUNITIVE DAMAGES AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill makes changes concerning the division of punitive damage awards with the state.

Highlighted Provisions:

This bill:

- requires that the state's portion of a punitive damage award be paid directly to the state by the judgment debtor;
- puts the state on the same footing as another judgment creditor when collecting punitive damages; and
- prescribes a priority and order for the payment of punitive damages.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78-18-1, as last amended by Chapters 200 and 314, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-18-1** is amended to read:

78-18-1. Basis for punitive damages awards -- Section inapplicable to DUI cases -- Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only

if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) (a) In any [~~judgment~~] case where punitive damages are awarded [~~and paid~~], the judgment shall provide that 50% of the amount of the punitive damages in excess of $20,000 shall, after an allowable deduction for the payment of attorneys' fees and costs, be remitted by the judgment debtor to the state treasurer for deposit into the General Fund.

(b) For the purposes of this Subsection (3), an "allowable deduction for the payment of attorneys' fees and costs" shall equal the amount of actual and reasonable attorneys' fees and costs incurred by the judgment creditor[~~,~~] minus the amount of any separate judgment awarding attorneys' fees and costs to the judgment creditor.

(c) The state shall have all rights due a judgment creditor until the judgment is satisfied, and stand on equal footing with the judgment creditor of the original case in securing a recovery.

(d) Unless all affected parties, including the state, expressly agree otherwise or the application is contrary to the terms of the judgment, any payment on the judgment by or on behalf of any judgment debtor, whether voluntary or by execution or otherwise, shall be applied in the following order:

(i) compensatory damages, and any applicable attorneys fees and costs;

(ii) the initial $20,000 punitive damages; and finally

(iii) the balance of the punitive damages.

Tab 5

CONSTITUTION OF UTAH

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]
The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. 1896

Tab 6

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 24. [Uniform operation of laws.]
All laws of a general nature shall have uniform operation.

Tab 7

CONSTITUTION OF UTAH

ARTICLE VIII

JUDICIAL DEPARTMENT

Section 1. [Judicial powers — Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

1984 (2nd S.S.)

CONSTITUTION OF UTAH

ARTICLE VIII

JUDICIAL DEPARTMENT

Sec. 7. [Qualifications of justices and judges.]

Supreme Court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected.

1984 (2nd S.S.)

Tab 8

THE UNITED STATES CONSTITUTION

Amendment XIV - Citizenship rights. Ratified 7/9/1868.

1. 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.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Tab 9

was that the additional wells issue was common to several actions, including the yet uncompleted actions.[13] This common issue makes consolidated appellate review especially suitable. Interim appellate review creates the possibility of duplicative appellate review of this issue. Moreover, we see no urgent reason for immediate, separate appellate review. The presumption of nonappealability has not been overcome. Under these facts, we are persuaded that the judgments appealed from cannot be considered final in absence of a Rule 54(b) certification. We therefore dismiss the appeals for lack of appellate jurisdiction.

Appeals dismissed.

Dewayne C. KIRK, Plaintiff-Appellant,

v.

The DENVER PUBLISHING COMPANY, a Colorado corporation, Defendant-Appellee.

No. 88SA405.

Supreme Court of Colorado, En Banc.

Sept. 23, 1991.

Newspaper publisher sued its distributor for balance allegedly owed. Distributor counterclaimed for outrageous conduct and willful and wanton breach of contract. The District Court, City and County of Denver, Robert T. Kingsley, J., granted distributor's motion for directed verdict on publisher's claim for monies due on open account, directed verdict against distributor on his counterclaim for outrageous conduct and entered judgment for distributor on his claim for willful and wanton breach of contract. On appeal, the Court of Appeals, 729 P.2d 1004, remanded for new trial on damages, but otherwise affirmed. On remand, the District Court, John W Coughlin, J., awarded exemplary damages, but denied distributor's motion challenging constitutionality of statutory requirement that he pay one third of all such damages into state general fund. Distributor appealed. The Supreme Court, Quinn, J., held that statute requiring party receiving exemplary damages award to pay one third of such award into state general fund effected an unconstitutional taking of private property without just compensation.

Reversed and remanded.

Rovira, C.J., filed dissenting opinion in which Lohr, J., joined.

1. Constitutional Law ⇐277(1)

Judgment for exemplary damages qualifies as property interest subject to constitutional protection. West's C.R.S.A. §§ 13-21-102(4), 13-52-102(1); U.S.C.A. Const.Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

2. Constitutional Law ⇐278(1)

Private property interest emanating directly from final judgment cannot be diminished by legislative fiat. U.S.C.A. Const. Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

3. Eminent Domain ⇐2(1.1)

To withstand constitutional challenge to governmental appropriation of significant part of money judgment under taking clause of United States Constitution, governmental appropriation must bear reasonable relationship to governmental services provided to civil litigants in making use of judicial process for purpose of resolving civil claim resulting in the judgment. U.S.C.A. Const.Amend. 5.

4. Eminent Domain ⇐2(1.1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund effected an unconstitutional taking of private property without just compensation. West's C.R.S.A. § 13-21-102(4); U.S.C.A.

13. *See supra* note 6.

Const.Amends. 5, 14; West's C.R.S.A. Const. Art. 2, § 15.

5. Damages ⇐87(1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund did not qualify as valid penalty or forfeiture; placing burden of payment on judgment creditor who suffered wrong bore no reasonable relationship to any arguable goal of punishing wrongdoer or deterring others from engaging in similar conduct. West's C.R.S.A. § 13-21-102(4).

6. Taxation ⇐73

Statute requiring party receiving exemplary damages award to pay one third into state general fund did not satisfy criteria for ad valorem property tax; statute was designed to raise revenues for state general fund, but was limited only to personal property in form of judgment for exemplary damages and had no applicability at all to any other form of private property, real or personal. West's C.R.S.A. § 13-21-102(4).

7. Taxation ⇐40(1)

Where obvious purpose of statute is to produce revenue for state general fund, statute must conform to state constitutional requirement that all taxes upon each of the various classes of real and personal property be "uniform" and be levied under general laws prescribing such regulations as shall secure just and equal valuations of all property, whether real or personal. West's C.R.S.A. Const. Art. 10, § 3; West's C.R.S.A. § 13-21-102(4).

8. Constitutional Law ⇐229(1)
Damages ⇐87(1)
Taxation ⇐40(6)

Statute requiring party receiving exemplary damages award to pay one third into state general fund did not qualify as valid excise tax; excise tax imposed on limited class of persons exercising their rights to use courts, while other persons exercising same right were not subject to tax, would be so underinclusive as not to withstand even rational-basis standard of review under equal protection analysis. West's C.R.S.A. § 13-21-102(4); U.S.C.A. Const.Amend. 14.

9. Licenses ⇐29

Valid user fee need not be designed with mathematical precision to defray cost of service for which fee is imposed, but must bear reasonable relationship to overall cost of that service.

10. Damages ⇐87(1)

Statute requiring party receiving exemplary damages award to pay one third of such award into state general fund failed to qualify as valid user fee; statute exacted a forced contribution in order to provide general governmental revenues and did so in a manner and to a degree not reasonably related to costs of using the courts. West's C.R.S.A. § 13-21-102(4).

11. Constitutional Law ⇐55

Legislature may well abate or diminish pending civil action, but when that claim ripens into judgment, power of legislature to disturb the rights created thereby ceases.

Pryor, Carney and Johnson, P.C., W. Randolph Barnhart, Arlene V. Dykstra, Thomas L. Roberts, Richard V. Hess, Englewood, for plaintiff-appellant.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Dianne Eret, First Asst. Atty. Gen., Denver, for amicus curiae State of Colo.

Justice QUINN delivered the Opinion of the Court.

This case involves a challenge to the constitutionality of section 13-21-102(4), 6A C.R.S. (1987), which was enacted in 1986 as part of tort-reform legislation and requires a party receiving an exemplary damages award to pay one-third of all such "damages collected ... into the state general fund." [1] DeWayne C. Kirk filed a tort claim against Denver Publishing Company,

1. Appellate jurisdiction over this appeal lies in this court because the constitutionality of a statute is challenged. § 13-4-102(1)(b), 6A C.R.S. (1987).

doing business as The Rocky Mountain News, and was awarded a judgment for exemplary damages in the amount of $118,980. In a post-trial motion Kirk unsuccessfully challenged the constitutionality of the one-third payment requirement and thereafter filed this appeal. We conclude that section 13–21–102(4) effectuates a forced taking of the judgment creditor's property interest in the judgment and does so in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just compensation. U.S. Const. amends. V & XIV; Colo. Const. art. II, § 15. We accordingly reverse that part of the judgment upholding the constitutionality of section 13–21–102(4), and we remand the case to the district court with directions to conform its judgment to the views herein expressed.

I.

Although this case has a lengthy procedural history, the basic facts can be briefly stated. Kirk, who owned and operated an independent newspaper distributorship, purchased newspapers from The Rocky Mountain News and resold them to newspaper carriers, stores, and to the public through newspaper racks. In November 1979, Kirk terminated his relationship with Denver Publishing Company, but withheld payment for part of his September and all of his October billings in order to achieve leverage in his final accounting with Denver Publishing Company.

Because Kirk and the company were unable to settle a final accounting, Denver Publishing Company sued Kirk for the balance allegedly owed by him. Kirk counterclaimed for outrageous conduct and willful and wanton breach of contract. In the first trial, the court granted Kirk's motion for a directed verdict on Denver Publishing Company's claim for monies due on open account, directed a verdict against Kirk on his counterclaim for outrageous conduct, and entered a judgment of $910.26 for Kirk on the jury's verdict returned in his favor on his claim for willful and wanton breach of contract. The court of appeals affirmed the trial court's directed verdicts on Denver Publishing Company's open account claim and Kirk's counterclaim for outrageous conduct, and also affirmed the judgment of liability on Kirk's counterclaim against Denver Publishing Company for willful and wanton breach of contract, but remanded the case for a new trial "on the issues of actual damages, damages for emotional distress, and exemplary damages" on Kirk's contractual claim. *Denver Publishing Co. v. Kirk*, 729 P.2d 1004, 1009 (Colo.App. 1986).

Upon remand of the case for a new trial, Kirk was realigned as the plaintiff and was permitted to add a claim for malicious prosecution. The case was retried in 1988, and the jury awarded Kirk compensatory damages in the aggregate amount of $288,000 and exemplary damages in the amount of $160,500 on Kirk's claim for malicious prosecution. The exemplary damages award, at the request of Kirk, was subsequently reduced to $118,980 so as not to exceed the amount of actual damages on Kirk's claim for malicious prosecution.[2] After the jury verdict, Kirk filed a post-trial motion in which he requested the district court to invalidate, as violative of several provisions of both the United States and Colorado Constitutions, the statutory requirement of section 13–21–102(4) that he pay one-third of any collected exemplary damages award to the state general fund. The district court denied the motion.

Kirk thereafter filed this appeal and invokes several federal and state constitutional provisions in challenging the one-third payment requirement of section 13–21–102(4). Denver Publishing Company

2. The statutory scheme for exemplary damages provides that an exemplary damages award must not exceed the amount of actual damages unless exceptional circumstances not present here justify an increase. §§ 13–21–102(1)(a) & 13–21–102(3), 6A C.R.S. (1987). Kirk and Denver Publishing Company stipulated that the malicious prosecution claim, on which the exemplary damages award was based, arose subsequent to the effective date of the 1986 statutory scheme.

takes no position on the constitutionality of the statute. The Attorney General, however, has intervened as amicus and has filed a brief in support of the district court's declaration of constitutionality. We find it unnecessary to address all of Kirk's claims, as we conclude that the mandatory one-third payment requirement of section 13–21–102(4) violates the Taking Clause of the United States and Colorado Constitutions.[3] Our conclusion derives from the nature of an exemplary damages award as a private property right, the confiscatory character of the "taking" mandated by the statute, and the manifest absence of a reasonable nexus between the statutory taking of one-third of the exemplary damages award and the cost of any governmental services that arguably might support a significantly smaller forced contribution.

II.

We begin our analysis by examining the nature of an award for exemplary damages.

A.

Tort law generally provides for two types of monetary remedies for a civil wrong. Compensatory damages are intended to "make [the plaintiff] whole," *Bullerdick v. Pritchard*, 90 Colo. 272, 275, 8 P.2d 705, 706 (1932), while exemplary damages are intended to punish the wrongdoer and deter similar conduct in the future, *Seaward Construction Co., Inc. v. Bradley*, 817 P.2d 971, 974 (Colo.1991), *Leidholt v. District Court*, 619 P.2d 768, 770 (Colo.1980); *Mince v. Butters*, 200 Colo. 501, 503, 616 P.2d 127, 129 (1980). This is not to say that these two remedies are totally unrelated to and independent of each other. We implicitly recognized the interrelationship between compensatory and exemplary damages in *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 213–14 (Colo.1984), where we observed that a claim for exemplary damages is not "a separate and distinct cause of action," but rather "is auxiliary to an underlying claim for actual damages" and thus can be entered only in conjunction with an underlying and successful claim for actual damages assessed against a wrongdoer for a legal wrong to the injured party. So also, a claim for exemplary damages contemplates "tortious conduct," *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900, 902 (Colo.1987), and in that respect, requires, as does a claim for compensatory damages, some measure of legal fault. *See Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1126–27 (Colo.1982). Thus, while a compensatory damages award serves the reparative function of making the injured party whole, it also performs the secondary function of discouraging "a repetition of [the defendant's] wrongful conduct" by serving as a "warning to others who are inclined to commit similar wrongs." C. Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1174 (1931).[4] In a somewhat similar

3. Kirk raises the following constitutional claims which we find it unnecessary to address: that section 13–21–102(4) violates procedural and substantive due process of law and equal protection of the laws guaranteed by the United States and Colorado Constitutions, U.S. Const. amend. XIV; Colo. Const. art. II, § 25; that the statute was enacted in contravention of the General Assembly's revenue-raising authority conferred by article X of the Colorado Constitution; that the statute impairs the obligation of Kirk's contingency-fee contract with his attorney in violation of the constitutional proscription against the impairment of contracts under the United States and Colorado Constitutions, U.S. Const. art. I, § 10; Colo. Const. art. II, § 11; and that the statutory taking authorized by section 13–21–102(4) contravenes the separation-of-powers doctrine set forth in article III of the Colorado Constitution.

4. This interrelationship between the reparative and admonitory functions served by compensatory damages has been explained as follows:

> The large portion of our tort law in which liability is dependent on fault can only be used to compensate plaintiffs when there are defendants deserving of punishment. As long as the liability with fault rules are retained, the law of torts will have an admonitory function even though the doctrine of punitive damages is abandoned. So punishment in tort actions is not anomalous (if anomalous only means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function. The function itself is inherent in the liability with fault rules, and is not dependent on the allowance of punitive damages. Punitive damages are ordinarily merely a means of increasing the severity of

fashion, a claim for exemplary damages, while clearly designed to punish and deter, contemplates that the trier of fact will fix the award only after giving due consideration to the severity of the injury perpetrated on the injured party by the wrongdoer.

B.

In 1986, as part of tort-reform legislation, the General Assembly modified the preexisting statutory scheme for exemplary damages. Chap. 106, sec. 1, § 13–21–102, 1986 Colo.Sess.Laws 675–76. Section 13–21–102(1)(a), which substantially follows the initial Colorado exemplary damages statute enacted in 1889,[5] *see* 1889 Colo. Sess.Laws 64–65, states as follows:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

The term "willful and wanton conduct" is defined as conduct "purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." § 13–21–102(1)(b), 6A C.R.S. (1987). The 1986 statute states that the amount of reasonable exemplary damages "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." § 13–21–102(1)(a), 6A C.R.S. (1987). In keeping with the somewhat interrelated functions served by both compensatory and exemplary damages, however, the statutory scheme permits a court to increase an award of exemplary damages to a sum not to exceed three times the amount of actual damages if it is shown that the defendant during the pendency of the action has continued the injurious behavior against the plaintiff or others in a willful and wanton manner or has willfully and wantonly further aggravated the damages to the plaintiff when the defendant knew or should have known that such action would produce aggravation. § 13–21–102(3)(a) & (b), 6A C.R.S. (1987).[6]

The focal point of this case is section 13–21–102(4), 6A C.R.S. (1987), which states:

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

By its plain terms, section 13–21–102(4) contemplates the entry, and the actual collection, of a final judgment on behalf of the injured party, for it is only after the injured party has invested the time, effort, and expense of obtaining and actually collecting the judgment that the statutory grant of

the admonition of "compensatory" damages, and can only be criticized on that basis. C. Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1177 (1931) (footnotes omitted).

5. Although exemplary damages were recognized at the common law as early as 1763, see *Huckle v. Money*, 2 Wils. 206 (K.B.1763), and the practice of awarding exemplary damages was well recognized when the United States Constitution was adopted, *see Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274, 109 S.Ct. 2909, 2919, 106 L.Ed.2d 219 (1989), this court rejected the common law rule in *Murphy v. Hobbs*, 7 Colo. 541, 5 P. 119 (1884). In response to *Hobbs*, the General Assembly in 1889 enacted a statute permitting an award of reasonable exemplary damages "for a wrong done to the person, or to personal or real property," when the jury, in addition to awarding actual damages, finds that "the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings." 1889 Colo.Sess.Laws 64–65.

6. Section 13–21–102(2), 6A C.R.S. (1987), authorizes a court to reduce or disallow exemplary damages to the extent that:

> (a) The deterrent effect of the damages has been accomplished; or
>
> (b) The conduct which resulted in the award has ceased; or
>
> (c) The purpose of such damages has otherwise been served.

one-third interest to the state comes into play.

C.

[1] Property interests emanate from state law, and there is no question that under Colorado law a judgment for exemplary damages qualifies as a property interest.

> The term "property" includes a multiplicity of interests and is commonly used to denote everything that is the subject of ownership, whether tangible or intangible, as well as those rights and interests which have value to the owner. *See Black's Law Dictionary* 1095 (5th ed. 1979). The concept of property, therefore, encompasses those enforceable contractual rights that traditionally have been recognized as choses in action.

Baker v. Young, 798 P.2d 889, 893 (Colo. 1990).

Because the term "property" includes a "legal right to damage for an injury," *Rosane v. Senger*, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944), it necessarily follows that the term "property" also includes the judgment itself, which creates an independent legal right to full satisfaction from the "goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained." § 13-52-102(1), 6A C.R.S. (1987). The filing of a certified transcript of the judgment with the county clerk and recorder creates a "lien upon all the real property of such judgment debtor, not exempt from execution in such county, owned by him or which he may afterwards acquire until said lien expires." *Id.; see generally Evans v. City of Chicago*, 689 F.2d 1286, 1296 (7th Cir. 1982) (final judgment no longer subject to modification is vested property right); *Truax-Traer Coal Co. v. Compensation Comm'r*, 123 W.Va. 621, 17 S.E.2d 330, 334 (1941) (judgment is "property" and as such is proper subject of constitutional protection). Indeed, the statutory disavowal in section 13-21-102(4) of any state interest in a claim for exemplary damages "at any time prior to payment becoming due" is an implicit legislative acknowledgement of the property interest created in the judgment creditor by virtue of the judgment itself.

III.

We next consider the concept of "taking" as it relates to the federal and state constitutional proscriptions against the governmental taking of private property without just compensation. The Fifth Amendment to the United States Constitution states in general terms that private property shall not "be taken for public use, without just compensation." This provision is made applicable to the states under the Fourteenth Amendment to the United States Constitution. *E.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). Article II, section 15 of the Colorado Constitution more specifically states that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation" and that "the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

A.

The Taking Clause of both the federal and state constitutions is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.*, 438 U.S. at 123, 98 S.Ct. at 2659; *see also Board of County Comm'rs of Saguache County v. Flickinger*, 687 P.2d 975, 983 (Colo.1984). Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Flickinger*, 687 P.2d at 983 (quoting *Penn Central Transp. Co.*, 438 U.S. at 124, 98 S.Ct. at 2659); *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) (when

governmental regulation "goes too far it will be recognized as a taking").

[2] The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). In resolving a "taking" issue, the United States Supreme Court has considered the totality of circumstances underlying the taking, including such factors as the character of the governmental action, its economic impact, and its interference with reasonable economic expectations of the property owner. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980); *Kaiser Aetna*, 444 U.S. at 175, 100 S.Ct. at 390. An additional factor, and one entitled to considerable weight, is whether the property right has ripened into a judgment. Where a private property interest emanates directly from a final judgment, the longstanding rule, announced by the Supreme Court in *McCullough v. Virginia*, 172 U.S. 102, 123–24, 19 S.Ct. 134, 141–42, 43 L.Ed. 382 (1898), and consistently followed by other courts, is that such a property interest cannot be diminished by legislative fiat:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.[7]

7. The facts in *McCullough* prompted the United States Supreme Court to preface its opinion with the statement that "[p]erhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia." 172 U.S. at 106, 19 S.Ct. at 135. The basic facts in *McCullough* were as follows. In 1871 the Virginia Assembly passed an act for the refunding of the public debt. The act authorized the issuance of new coupon bonds for two-thirds of the old bonds, thereby leaving the other one-third as the basis of an equitable claim upon the state. The statute provided that "[t]he coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face." *Id.* at 103, 19 S.Ct. at 134. Under the 1871 act, therefore, a large amount of the state's outstanding debt was refunded. The refunding scheme, however, proved to be unpopular, and after 1871 there was repeated legislation tending to mitigate the effects of the 1871 statute. In 1872 the Virginia Assembly passed a statute stating that it shall not be "lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." *Id.* In a series of cases, the United States Supreme Court upheld state statutes authorizing the payment of taxes in coupon bonds. *E.g., Hartman v. Greenhow*, 102 U.S. 672, 26 L.Ed. 271 (1880); *Antoni v. Greenhow*, 107 U.S. 769, 27 L.Ed. 468 (1882); *Virginia Coupon Cases*, 114 U.S. 269, 5 S.Ct. 962, 29 L.Ed. 207 (1885); *Royall v. Virginia*, 121 U.S. 102, 7 S.Ct. 826, 30 L.Ed. 883 (1887); *McGahey v. Virginia*, 135 U.S. 662, 10 S.Ct. 972 (1890).

In 1882, the Virginia Assembly again passed a statute which, in effect, provided that a taxpayer seeking to use coupons in payment of his taxes should pay the taxes in money at the time of tendering the coupons and thereafter bring a suit to establish the genuineness of the coupons and that, if the suit be decided in the taxpayer's favor, the taxpayer would obtain from the treasurer a return of the money paid. The Virginia Assembly also passed in that year an act declaring that tax collectors should receive in payment of taxes and other dues "gold, silver, United States Treasury notes, national bank currency and nothing else." *Id.* at 104. This statute also contained a provision permitting a lawsuit by one claiming that such exaction was illegal and also provided that there shall be no other remedy and no writ of mandamus or prohibition or any other writ or process shall issue to hinder or delay the collection of revenue.

In 1892 McCullough filed an action in the Circuit Court of the City of Norfolk to establish the genuineness of certain coupons that he had tendered in payment of taxes. The action was commenced pursuant to the terms of the 1882 statute, which authorized the filing of such an action as the exclusive remedy for one challenging the requirement that taxes be paid in gold, silver, or United States currency. McCullough sought to establish the genuineness of certain coupon bonds for the payment of his taxes. The Circuit Court of the City of Norfolk rendered judgment in McCullough's favor, but in 1894, after the judgment was rendered, the Virginia Assembly repealed the 1882 statute authorizing the litigation commenced by McCullough.

See generally Hodges v. Snyder, 261 U.S. 600, 603, 43 S.Ct. 435, 436, 67 L.Ed. 819 (1923); *Daylo v. Administrator of Veterans' Affairs,* 501 F.2d 811, 816 (D.C.Cir. 1974); *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist.,* 307 Ky. 689, 211 S.W.2d 867, 873 (1948); *Stone v. McKay Plumbing Co.,* 200 Miss. 792, 30 So.2d 91, 92–93 (1947); *Karrer v. Karrer,* 190 Neb. 610, 211 N.W.2d 116, 119 (1973); *Inman v. Railroad Comm'n,* 478 S.W.2d 124, 128 (Tex.Civ.App.1972); *City of Norfolk v. Stephenson,* 185 Va. 305, 38 S.E.2d 570, 575 (1946).

B.

Because a judgment for exemplary damages entitles the judgment creditor to a satisfaction out of the real and personal property of the judgment debtor, the taking of a money judgment from the judgment creditor is substantially equivalent to the taking of money itself. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), the Supreme Court considered the constitutionality of a state statute authorizing a county to take the interest accruing on an interpleader fund deposited into the registry of the county court under circumstances where another statute imposed a fee for the clerk's services in receiving the fund into the registry. The Court rejected the notion that the statute created a valid fee for services and held that the county's retention of the interest fund violated the Taking Clause of the Fifth Amendment. Acknowledging that a state may deny a property owner the beneficial use of property or may restrict the owner's full exploitation of property so long as such action is justified as promoting the general welfare, the Court reasoned that the state had not merely adjusted the benefits and burdens of economic life to promote the common good, but had exacted "a forced contribution to general governmental revenues ... not reasonably related to the costs of using the courts," 449 U.S. at 163, 101 S.Ct. at 452, and then concluded:

> To put it another way: a State, by *ipse dixit,* may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's Fabulous Pharmacies, 449 U.S. at 164, 101 S.Ct. at 452.

In contrast to *Webb's Fabulous Pharmacies,* the Court in *United States v. Sperry Corp.,* 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), found no unconstitutional taking of money under a federal statute that required the Federal Reserve Bank of New York to deduct 1½% from the first $5 million dollars of an arbitration award entered by the Iran–United States Claims Tribunal. The purpose of the statutory deduction was to reimburse the United States government for the expenses incurred in the administration of the arbitration program. Acknowledging that the amount of a user fee need not "be precisely calibrated to the use that a party makes of government services," the Court concluded that the statutory deductions were not "so clearly excessive as to belie their purported character as user fees," stating:

The Supreme Court of Appeals of Virginia reversed the judgment in McCullough's favor, dismissed his petition, and awarded costs to the state. It was under this sequence of events that the United States Supreme Court held that the judgment rendered in the Circuit Court of the City of Norfolk pursuant to the 1882 act was rightfully entered and that the rights acquired by that judgment under the 1882 act could not be disturbed by the subsequent repeal of the statute in 1894.

The rule adopted in *McCullough* applies to private property rights acquired under a judgment and does not apply to an action to enforce a public right. An action to enforce a public right, "even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away." *Hodges v. Snyder,* 261 U.S. 600, 603–04, 43 S.Ct. 435, 436–37, 67 L.Ed. 819 (1923); *see Atlantic City Casino Assoc. v. City of Atlantic City,* 217 N.J.Super. 277, 525 A.2d 1109, 1113 (1985); *City of Norfolk v. Stephenson,* 185 Va. 305, 38 S.E.2d 570, 575 (1946).

> This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee.... We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1½% does not qualify as a "taking" by any standard of excessiveness.

110 S.Ct. at 394–95 (citations and footnote omitted).

[3] The rule to be gleaned from *Webb's Fabulous Pharmacies* and *Sperry* is that, in order to withstand a constitutional challenge to a governmental appropriation of a significant part of a money judgment under the Taking Clause of the United States Constitution, the governmental appropriation must bear a reasonable relationship to the governmental services provided to civil litigants in making use of the judicial process for the purpose of resolving the civil claim resulting in the judgment. We adopt that rule as the controlling norm for resolving the taking issue in this case.

IV.

[4] We turn to Kirk's claim that the requirement of section 13–21–102(4) that he pay to the state general fund one-third of all exemplary damages collected on his judgment constitutes a taking of private property without just compensation in violation of the Taking Clause of the United States and Colorado Constitutions. Although several types of revenue-raising and regulatory measures are available to a legislative body, we believe it will be helpful to briefly explain why the forced contribution of section 13–21–102(4) fails to satisfy the legal criteria for any of these measures.

[5] Section 13–21–102(4) does not qualify as a valid penalty or forfeiture. The Colorado exemplary damages statute, we have held, is not a penal statute in the sense of creating a new and distinct cause of action for a civil penalty, but instead "merely authorizes increased damages ancillary to an independent claim for actual damages." *Palmer*, 684 P.2d at 214. As we previously observed, while a judgment for exemplary damages is designed to punish the wrongdoer and deter similar conduct by others, it is only available when a civil wrong has been committed under extremely aggravating circumstances and when the injured party has a successful claim for actual damages against the wrongdoer. *Harding Glass Co., Inc.*, 640 P.2d at 112. In that sense, an exemplary damages award is not totally devoid of any and all reparative elements. More importantly, the forced contribution of one-third of the exemplary damages judgment is imposed not on the defendant wrongdoer who caused the injuries but upon the plaintiff who suffered the wrong. It goes without saying that placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct. *Cf. Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (statutory imposition of 15% penalty *on party who unsuccessfully appeals money judgment* upheld on basis that means chosen were sufficiently related to state's interest in discouraging frivolous appeals to satisfy Equal Protection Clause).

[6, 7] Section 13–21–102(4) does not satisfy the criteria for an *ad valorem* property tax. Where, as here, a statute's obvious purpose is to produce revenue for the state general fund, the statute must conform to the state constitutional requirement that all taxes upon each of the various classes of real and personal property be "uniform" and be levied under general laws prescribing such regulations as shall secure just and equal valuations of all property, whether real or personal. Colo. Const. art. X, § 3. In *Walker v. Bedford*, 93 Colo. 400, 26 P.2d 1051 (1933), this court invalidated a statute which imposed an additional registration fee upon motor vehicles based on their value. In so holding, we emphasized that the purpose of the statute was to raise general revenues but was applicable only to motor vehicles and to no other kinds of personal property. *Walker*, 93 Colo. at 405–06, 26 P.2d at 1053. In similar fash-

ion, section 13–21–102(4) is designed to raise revenues for the state general fund, but is limited only to personal property in the form of a judgment for exemplary damages and has no applicability at all to any other form of private property, real or personal.

[8] Section 13–21–102(4) does not qualify as a valid excise tax. In contrast to a direct tax on property, an excise tax is not based on the assessed value of the property subject to the tax, but rather is imposed on a particular act, event, or occurrence. *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo.1989); *Walker*, 93 Colo. at 403–07, 26 P.2d at 1052–53. "The object of an excise tax, like that of an *ad valorem* property tax, is to provide revenue for the general expenses of government, but, unlike the *ad valorem* property tax, the payment of the excise tax is made a condition precedent to the act, event, or occurrence on which the tax is based." *Bloom*, 784 P.2d at 307–08; *see Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779, 782 (Colo.1983). Even if we assume that an excise tax on a money judgment could survive a constitutional challenge under article II, section 6, of the Colorado Constitution, which mandates that justice "be administered without sale," section 13–21–102(4) imposes the burden of payment not on all persons using the civil justice system, nor for that matter on all successful plaintiffs, but only on those plaintiffs who obtain a judgment for exemplary damages and then only when the award is collected. An excise tax imposed only on such a limited class of persons exercising their right to use the courts, while other persons exercising the same right are not subject to the tax, would be so underinclusive as not to withstand even the rational-basis standard of review under equal protection analysis. *See generally Tassian v. People*, 731 P.2d 672 (Colo.1987) (chief judge's directive prohibiting pro se litigants from paying filing fees by personal check violative of equal protection of laws under Colorado Constitution).

[9] The only conceivable justification for section 13–21–102(4) is that it constitutes a user fee imposed on plaintiffs who successfully utilize the civil justice system in obtaining an exemplary damages award. A user fee is in the nature of a special fee designed to defray the cost of a governmental service and is imposed on the users of that service. *See generally Bloom*, 784 P.2d at 308; *Loup-Miller Constr. Co. v. City and County of Denver*, 676 P.2d 1170, 1174–75 (Colo.1984). A valid user fee need not be designed with mathematical precision to defray the cost of the service for which the fee is imposed, but must bear some reasonable relationship to the overall cost of that service. *Bloom*, 784 P.2d at 308; *Loup-Miller Constr. Co.*, 676 P.2d at 1175–76.

[10] Section 13–21–102(4) fails to qualify as a valid user fee. The payment required of the judgment creditor under section 13–21–102(4) is not allocated to the cost of funding the civil justice system, nor are the funds earmarked for a specific purpose remotely connected with the judicial process. In a manner similar to the statutory taking of interest on an interpleader fund invalidated in *Webb's Fabulous Pharmacies*, 449 U.S. 155, 101 S.Ct. 446, section 13–21–102(4) exacts a forced contribution in order to provide general governmental revenues and does so in a manner and to a degree not reasonably related to the cost of using the courts. The consideration received by judgment creditors subject to the forced contribution created by section 13–21–102(4) is the use of the courts in resolving their civil disputes. The General Assembly, however, has imposed filing fees and other fees on persons using the civil justice system in order to defray a significant part of the costs in funding that aspect of the judicial process. *See* §§ 13–32–101 to –104, 6A C.R.S. (1987 & 1990 Supp.); § 13–71–144, 6A C.R.S. (1990 Supp.). Section 13–21–102(4) thus has the effect of forcing a select group of citizens—persons who obtain a judgment for exemplary damages and are successful in collecting on the judgment—to bear a disproportionate burden of funding the operations of state government, which, "in all fairness and justice, should be borne by the public as a

whole." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163, 101 S.Ct. at 452.

The fact that a legislative body might choose to eliminate exemplary damages in civil cases without offending due process of law is not to say that any restriction whatever on an exemplary damages award will pass constitutional muster. *See Pacific Mutual Life Insurance Co. v. Haslip*, — U.S. —, —, 111 S.Ct. 1032, 1054, 113 L.Ed.2d 1 (1991) (Scalia, J., concurring). In our view, forcing a judgment creditor to pay to the state general fund one-third of a judgment for exemplary damages in order to fund services which have already been funded by other revenue-raising measures, and without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution, amounts to an unconstitutional taking of the judgment creditor's property in violation of the Taking Clause of the United States and the Colorado Constitutions. *Cf. Ochs v. Town of Hot Sulphur Springs*, 158 Colo. 456, 461–62, 407 P.2d 677, 680 (1965) (enforcement of municipal "frontage tax" on real property without any corresponding benefit to property results in "taking private property without compensation, and without due process of law").[8]

V.

In urging us to uphold the constitutionality of section 13–21–102(4), the Attorney General argues that no taking occurs at all because a judgment creditor does not have a property interest in one-third of the judgment for exemplary damages. We find this argument devoid of merit.

[11] The legislature may well abate or diminish a pending civil action, but when that claim ripens into judgment "the power of the legislature to disturb the rights created thereby ceases." *McCullough*, 172 U.S. at 123–24, 19 S.Ct. at 141–142. Section 13–21–102(4) passes the line of constitutional propriety by taking one-third of a collected civil judgment for exemplary damages notwithstanding the fact that the state has affirmatively disavowed, pursuant to the statute itself, "any interest in the claim for exemplary damages or in the litigation itself at any time prior to the payment becoming due." Such statutory taking of one-third of the collected judgment is direct and absolute, and its economic impact cannot be described as anything less than substantial.

To be sure, section 13–21–102(4) purports to create a state interest in one-third of the monies collected on the judgment and in that respect arguably might be read to defeat any reasonable economic expectation on the part of the judgment creditor to the total judgment. The statutory repudiation of any state interest in the tort litigation or in the judgment itself, however, affirmatively belies any notion that the judgment creditor's property interest in the judgment is less than total. Given the legislative disaffirmance of any stake in the exemplary damages award prior to collection, it would border on the fanciful were we to characterize the judgment creditor's expectation to a full satisfaction of the judgment as unreasonable, especially since upon entry of the judgment there is no preexisting claim on the part of the state to any part of the judgment. The state's asserted interest is not in the judgment itself but in the monies collected on the judgment, and that interest arises only at a point in time after the judgment creditor's property interest in the judgment has vested by operation of law. Moreover, the judgment itself results exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance whatever from the state.

We need not turn this case, however, on a judgment creditor's reasonable economic expectation of a property interest in the

8. The only case we have found dealing with a statutory provision similar to section 13–21–102(4) is *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D.Ga.1990). In that case, the court held that section 51–12–5.1(e)(2) of the Georgia Tort Reform Act of 1987, which authorized the state's taking of seventy-five percent of all punitive damages in products liability cases, was not rationally related to a legitimate state interest because the state provided no *quid pro quo* for the taking. 737 F Supp. at 1575–77.

total judgment. We are satisfied that, even if the expectation issue is viewed as a close one, the cumulative effect of all factors bearing on the "taking" issue weighs heavily on the side of a constitutionally protected private property interest on the part of the judgment creditor in the exemplary damages award. These factors, as previously noted, include the following: the legislative renunciation of any interest in the judgment prior to collection; the absence of any demonstrable nexus between, on the one hand, any alleged governmental interest in punishing and deterring fraudulent, malicious, or willful and wanton tortious conduct and, on the other, the statutory imposition of the forced contribution on the person injured by the wrongful conduct; and the gross disproportion between the statutory forced contribution and any governmental service made available to the judgment creditor but not otherwise funded by fees and other statutory assessments imposed on civil litigants using the judicial process to resolve their disputes. We thus conclude that section 13–21–102(4) constitutes a taking of a judgment creditor's private property interest in an exemplary damages award without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, section 15, of the Colorado Constitution.

We accordingly reverse that part of the district court's judgment upholding the constitutionality of section 13–21–102(4), and we remand the case to that court with directions to conform its judgment to the views herein stated.

ROVIRA, C.J., dissents.

LOHR, J., joins in the dissent.

Chief Justice ROVIRA dissenting:

The majority holds that section 13–21–102(4), 6A C.R.S. (1987), results in a forced taking of a judgment creditor's property in violation of both the United States and Colorado Constitutions. Because I believe that a claim for exemplary damages is purely a statutory right and such a claim may be limited or conditioned by the legislature, no taking of a property right results when an award of exemplary damages has been obtained pursuant to the statute. Accordingly, I respectfully dissent.

I

Based on plaintiff's claim for malicious prosecution against the Denver Publishing Company, a jury awarded him exemplary damages in the amount of $160,500. At the time plaintiff brought his claim, section 13–21–102(4) was in effect and provided that one-third of any exemplary damages award collected must be paid to the state general fund. In addition, section 13–21–102(1)(a) provided that exemplary damages should not exceed the amount of actual damages unless exceptional circumstances justify an increase. §§ 13–21–102(1)(a) and 13–21–102(3), 6A C.R.S. (1987). In order to comply with the statute, plaintiff requested that his exemplary damages award be reduced so as not to exceed the amount of actual damages awarded. Pursuant to his request, the trial court reduced the exemplary damages award to $118,980. Plaintiff also requested the trial court to find section 13–21–102(4) unconstitutional. The trial court refused.

On appeal plaintiff contends that the legislative requirement that a portion of an exemplary damages judgment actually collected be paid into the state's general fund is an unconstitutional taking of property. Although plaintiff has raised other constitutional issues, the majority relies only on the "taking" issue in arriving at the conclusion that the statute is unconstitutional.

II

The majority reasons that the entire judgment for exemplary damages is a property interest of the plaintiff and that if the state takes a portion such taking is unconstitutional.

To arrive at this conclusion, the majority examines the nature of an award for exemplary damages, and finds that compensatory damages and exemplary damages are related and dependent on one another, both having similar reparative functions. Compensatory damages serve a primary repara-

tive function of making the injured party whole, while exemplary damages, although designed to punish and deter, contemplate the severity of the injury perpetrated on the injured party by the wrongdoer as well, thus also serving a reparative function.

Because the term property includes a "legal right to damage for an injury," it follows that the term property includes the judgment itself. Maj. op. at 267 (quoting *Rosane v. Senger*, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944)). According to the majority, because section 13–21–102(4) contemplates the entry and actual collection of a final judgment before the statutory grant of one-third interest to the state comes into play, the state is taking a property interest, violating the Fifth Amendment of the United States Constitution and article II, section 15 of the Colorado Constitution.

I do not dispute that a judgment is a property right. I also agree that a "taking" of a judgment without compensation would be unconstitutional. I disagree however, based upon facts and law applicable to this case, that the plaintiff has a right to the entire exemplary damages judgment. My disagreement is premised on the ground that a claim for exemplary damages is a statutory right which may be conditioned by the legislature and thus the entire judgment never vested in the plaintiff.

Exemplary damages were authorized by statute to punish and deter conduct attended by circumstances of fraud, malice or willful and wanton conduct. 1889 Colo. Sess.Laws 64–65 Although exemplary damages may have a negligible reparative function, it is well-established in Colorado that punishment and deterrence is the essential purpose of exemplary damages. *Seaward Constr. Co., Inc. v. Bradley*, 817 P.2d 971, 974 (Colo.1991); *Mince v. Butters*, 200 Colo. 501, 616 P.2d 127 (1980); *French v. Deane*, 19 Colo. 504, 511, 36 P. 609 (1894). The effort by the majority to establish a link between actual and exemplary damages due to their reparative functions is tenuous at best.

The uniqueness of exemplary damages is also demonstrated in the statute authorizing such damages. First, the wrong giving rise to exemplary damages must be attended by circumstances of fraud, malice, or willful and wanton conduct. Second, the amount of an exemplary damages award may not exceed the actual damages awarded without circumstances justifying an increase. Third, the court may reduce an exemplary damages award if the deterrent effect has been accomplished or if the purpose has been served. §§ 13–21–102(1)(a), (2)(a), & (c), 6A C.R.S. (1987). Finally, a claim for exemplary damages must be proven beyond a reasonable doubt, while compensatory damages may be proven by a preponderance of the evidence. One has a right to compensatory damages when one has suffered an injury, but exemplary damages are allowed only in very limited circumstances.

The two remedies may be interrelated, as the majority opinion suggests, but a claim for exemplary damages is unique and should not be viewed as a legal right which is any greater than that provided by statute.

Since a claim for exemplary damages arises from statute, such a claim may also be limited by statute. *Kaitz v. District Court*, 650 P.2d 553, 556 (Colo.1982). If the legislature may completely eliminate exemplary damages in civil cases, as the majority concedes, the legislature may also place conditions on a statutory grant of authority to recover such damages. The plaintiff recognized that the right to exemplary damages is a statutory right, and that right is subject to legislative conditions. Plaintiff accepted the condition pursuant to section 13–21–102(1)(a) which provides that exemplary damages must not exceed the amount of actual damages, when he requested that the exemplary damages award be reduced from $160,500 to $118,980. Thus, plaintiff concedes that exemplary damages may be limited by the legislature.

The legislature cannot modify a judgment which is a property right, but the legislature is free to condition a claim for exemplary damages which is allowed only

pursuant to a statutory grant.[1] "It is true that the legislature can not pass an act depriving a citizen of any vested right, but to be a vested right, '[i]t must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property....'" *Smith v. Hill*, 12 Ill.2d 588, 592, 147 N.E.2d 321, 325 (1958) (quoting *People ex rel. Foote v. Clark*, 283 Ill. 221, 222, 119 N.E. 329, 330 (1918)). The Illinois court went on to hold that a plaintiff is entitled to a cause of action for damages actually sustained, but a vested right to exemplary damages arises only when such damages have been allowed by a judgment. "There being no vested right in any plaintiff to exemplary, punitive, vindictive or aggravated damages the legislature may therefore restrict or deny the allowance of such damages at its will." *Smith*, 147 N.E.2d at 325.

Any property right plaintiff may have in the award is limited as provided by the statute. When the statute became effective, plaintiff had a "mere expectancy" in a possible future exemplary damage award. This expectancy was conditioned by one-third going to the state, and plaintiff was aware of this at the time he filed his complaint.[2]

Section 13–21–102(4) repudiates any state interest in the tort litigation and prevents collection by the state until the plaintiff has collected the exemplary damages judgment. The majority reasons that this statutory provision supports its conclusion that the judgment creditor has a full property interest in the entire exemplary damages award. I disagree. The legislature, by that provision, has sought to protect the plaintiff's interests by conditioning the state's right to receive payment until the judgment has been collected. Since the state is only entitled to receive its portion of the exemplary damages award after collection has been successful, the plaintiff is not harmed.

The majority is concerned that the "forced contribution of one-third of the exemplary damages judgment is imposed not on the defendant wrongdoer ... but upon the plaintiff who suffered the wrong." Maj. op. at 270. I disagree. There is minimal burden placed on the plaintiff where, as here, the plaintiff had a mere expectancy in exemplary damages, and where only a portion of that received is contributed to the state. Furthermore, the state's receipt of one-third of an exemplary damages judgment does not negate the punishment of the wrongdoer. The wrongdoer must pay the entire exemplary damages judgment regardless of who receives it.

It is not unreasonable for the legislature to condition an exemplary damage award where the purpose behind exemplary damages is to punish the wrongdoer and deter dangerous or malicious conduct. The legislature has recognized that exemplary damages are allowed for the benefit of the public. In exercising its legislative powers, the legislature appropriately decided that the goal of benefitting society through exemplary damages awards required a portion of exemplary damages awards be paid to the state.

As I do not believe that the statute violates the taking clause of either the Colorado or the United States Constitutions, I am confronted with the other constitutional claims not addressed in the majority opinion.[3] Because the majority reverses on the

1. Non-economic damages have also been limited by statute in order to prevent undue burden on economic, commercial, and personal welfare. § 13–21–102.5, 6A C.R.S. (1987).

2. Expressed alternatively, a plaintiff's property right in a judgment for punitive damages is intrinsically subject to partial defeasance upon collection by reason of the statutory scheme in place at the time of entry of judgment. A plaintiff receives the full benefit of the property right so described; there is no taking.

3. *See* maj. op. at 265 n. 3.

taking clause issue it would serve no worthwhile purpose to consider the other constitutional issues raised by the plaintiff. I respectfully dissent.

I am authorized to state that JUSTICE LOHR joins in this dissent.