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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AEGIS MEDICAL SYSTEMS, INC.,

Plaintiff and Appellant,

v.

RENEE ZITO et al.,

Defendants and Respondents.

A134907

**(Alameda County
Super. Ct. No. RG10524741)**

Appellant Aegis Medical Systems, Inc. (Aegis) operates a network of narcotic treatment clinics and directly contracted with the state’s Department of Alcohol and Drug Programs (the Department) to provide methadone maintenance services in Kern, Stanislaus and other counties as a part of the Medi-Cal drug treatment program. In 2010, the Department and its director, Renee Zito, issued Bulletin 10-06 (Bulletin) stating that it would terminate direct contracts with drug treatment providers except in counties that were not otherwise providing or contracting for treatment services as required by federal and state law. After being notified that its state contracts in Kern and Stanislaus Counties would be terminated under this policy, Aegis brought a suit challenging the Bulletin as an unlawful “underground regulation” issued in violation of the Administrative Procedure Act (APA). (See *Davenport v. Superior Court* (2012) 202 Cal.App.4th 665, 669.)

The superior court denied relief, but Aegis prevailed on appeal and this court concluded in an unpublished opinion that the Bulletin was an invalid underground regulation. (*Aegis Medical Systems, Inc. v. Renee Zito et al.*, A129504 (June 30, 2011 unpub. opn.)) On remand to the trial court, Aegis filed an unsuccessful motion to

recover its attorney fees under the private attorney general doctrine as codified in Code of Civil Procedure section 1021.5 (hereafter section 1021.5). We conclude that section 1021.5 does not apply because, as the trial court correctly determined, the financial burden of this litigation was not out of proportion to Aegis's pecuniary stake in the proceedings. We therefore affirm the order denying attorney fees.

FACTS AND PROCEDURAL HISTORY

At the time relevant to this case, the Department (acting under an interagency agreement with the California Department of Health Services) was responsible for insuring that drug treatment services, including methadone maintenance, were provided at the county level as required by federal and state law under the Medicaid/Medi-Cal program. If a county refused to provide the required drug treatment services, the Department would "contract directly with the certified providers in that county." (Health & Saf. Code, former §§ 11758.40, 11758.43.)¹ Aegis is one such certified drug treatment provider and has contracted directly with the Department to provide methadone maintenance services.

On June 21, 2010, the Department issued the Bulletin, which stated that the Department would only enter into contracts with drug treatment providers for services that were not being provided by the counties, and would terminate any contracts that did not satisfy this criterion. This represented a shift in policy because the Department had formerly exercised its discretion to enter into direct contracts with drug treatment providers in situations where a county was providing the same services. Also on June 21, 2010, the Department sent written notice to Aegis that it would be terminating contracts in Kern and Stanislaus Counties pursuant to the Bulletin.

¹ Health and Safety Code former sections 11758.40 and 11758.43 were repealed by Stats. 2012, ch. 36, § 15, effective June 27, 2012, operative July 1, 2012, as part of the 2011 realignment legislation, which, among other things, transfers functions formerly performed by the Department to the California Health and Human Services Agency. (Gov. Reorg. Plan of 2011, § 190, eff. Sept. 9, 2011, oper. July 1, 2012, Stats 2012, ch. 36 (Sen. Bill No. 1014), § 2, eff. June 27, 2012, oper. July 1, 2012.)

Aegis responded to the notice by filing a “Complaint for Declaratory and Injunctive Relief; Petition for Writ of Mandate” (the Petition). The Petition alleged that the Bulletin was an invalid regulation that had not been adopted in accordance with the rulemaking provisions of the APA. It sought a declaration that the Bulletin was void and could not be used or relied upon in any manner, a writ of mandate directing the Department to cease its reliance on the Bulletin, and injunctive relief prohibiting the Department from terminating its contracts in Kern and Stanislaus Counties. The superior court denied relief and Aegis appealed. On June 30, 2011, this court reversed the superior court’s order, concluding that the Department had not complied with the APA when issuing the Bulletin. It directed the superior court to “enter a judgment granting declaratory relief, to issue a peremptory writ of mandate, and to issue such injunctive relief as may be appropriate and consistent with this opinion.” (*Aegis Medical Systems, Inc. v. Renee Zito et al., supra* (unpub. opn.).)

On remand, the superior court entered a judgment that (1) declared the Bulletin to be invalid because it was not promulgated in accordance with the APA; and (2) directed the issuance of a writ of mandate commanding the Department to publish notice that the Bulletin had been invalidated and to refrain from enforcing the Bulletin. The Department filed a return indicating that it has complied with the writ.

Aegis filed a motion for attorney fees and expenses under section 1021.5, which provides in relevant part, “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interests of justice be paid out of the recovery, if any.”

The motion sought \$243,165.94 in attorney fees incurred during the litigation (233.5 hours at \$675 an hour, 11.2 hours at \$350 an hour, with a multiplier of 1.5 based on the complexity of the litigation); \$867.19 in costs; and \$42,462.50 in fees and costs for

bringing the motion. Aegis argued that its lawsuit had secured an important right affecting the public interest because it enforced compliance with the APA rulemaking requirements. It further argued that vindicating the legislative intent behind the APA “benefitted all Californians,” and particularly the methadone patients and health care providers who had not been given a voice in the implementation of the new policy. Aegis claimed that its interest in the litigation was not financial, because it would be reimbursed by the same amount whether it contracted with the state or with the counties. It submitted a declaration by its executive vice-president stating that the Department had extended its contracts with Aegis until Aegis was able to directly contract with each county, so that there was no lapse of services to Aegis’s patients.

In its opposition to the motion for attorney fees under section 1021.5, the Department responded that the public did not benefit from the lawsuit, which Aegis had brought to protect its own pecuniary interests in its contracts with the state. The Department argued that the invalidation of the Bulletin did not preclude the state from terminating its contracts with Aegis and other providers because the contracts themselves gave the Department the right to terminate for any reason, and, moreover, the final judgment in the case did not require the Department to maintain its contracts with any drug treatment providers. According to the Department, Aegis’s litigation costs were not disproportionate to its own expected financial gain, as it was seeking to maintain contracts with the state in Kern and Stanislaus Counties that were worth over \$4 million. Susan King, the Manager of the Department’s Fiscal Management and Accountability Branch, signed a declaration stating that Aegis’s contracts with the Department totaled \$4,034,662 in fiscal year 2008-2009, and \$7,399,811 in fiscal year 2009-2010, including contracts worth \$4,255,984 in Kern and Stanislaus Counties in fiscal year 2009-2010.

The superior court denied Aegis’s motion for attorney fees and issued the following written order:

“It appears to the court that while the public garnered the benefit that an ‘underground’ regulation was declared invalid, that benefit was only coincidental to the

action, and that the gravamen of the action was the attack on the underground regulation in order to compel the reinstatement of Aegis' contracts with the state agency.

“Despite Aegis’ argument that it filed the case for the benefit of the statewide community of narcotic treatment providers, this court finds that the lawsuit was instituted to protect [] Aegis’ pecuniary interests.

“Aegis[] argued that ‘. . . Plaintiff did not stand to reap any financial benefit from pursuing this lawsuit’ [citation] and ‘Plaintiff’s suit benefitted all drug-Medi[-C]al providers.’ [Citation.]

“Aegis’ posture is belied by the fact that concurrently with its filing of the lawsuit plaintiff sought provisional relief by way of an alternative writ seeking the court’s immediate order that the state agency be ordered to ‘refrain from terminating Plaintiff’s Drug Medi[-]Cal contracts for services in Kern and Stanislaus Counties. . .’

“Aegis[] also sought an order invalidating [the Bulletin] which had led, in part, to the termination of Aegis’ contracts, but significantly, Aegis did not seek an order that the state refrain from terminating [] any provider’s contracts in the statewide community of drug Medi[-]Cal providers other than their own.

“Moreover, but for the fact that Aegis was able to mitigate the loss of the state contracts by entering into new contracts directly with Kern and Stanislaus Counties, the cost of this litigation would have been dwarfed by the financial value of the litigation to the plaintiff.

“As stated in *Beach Colony II v. California Coastal Com[.]* (1985) 166 Cal[.]App[.]3d 106 at p. 114, [Code of Civil Procedure section 1021.5] ‘was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protected a public interest.’ ”

Aegis appeals from this order.

DISCUSSION

I.

Section 1021.5

Section 1021.5 codifies the private attorney general doctrine enunciated in *Serrano v. Priest* (1977) 20 Cal.3d 25, which “ ‘ “ ‘rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.’ ” ’ ” (*Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, 992.) Case law has construed an award under section 1021.5 to require a showing that (1) the litigation enforced an important right affecting the public interest; (2) it conferred a significant benefit on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement were such as to make the award appropriate. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 (*Whitley*).

The third, “financial burden” element, the one dispositive of this appeal, requires the court to examine the necessity of private enforcement and the cost of the litigation relative to the financial benefit it yielded or could reasonably have been expected to yield to the litigant. (*Whitley, supra*, 50 Cal.4th at pp. 1214-1215.) “ ‘ “An award on the ‘private attorney general’ theory is appropriate when the cost of the claimant’s legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff ‘out of proportion to his individual stake in the matter.’ [Citation.]” ’ ” (*Id.* at p. 1215.) A party seeking fees under section 1021.5 has the burden of establishing that its litigation costs transcend its personal interests. (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 246-247; *Beach Colony II v. California Coastal Com., supra*, 166 Cal.App.3d at p. 113.)

To determine whether the “financial burden” element has been satisfied, a court compares the actual cost of bringing the case with estimated value of the case to the successful litigant at the time that litigant decided to pursue litigation; i.e., the monetary

value of the benefits to be obtained, discounted by an estimate of the probability of success. (*Whitley, supra*, 50 Cal.4th at pp. 1215.) “The trial court must first fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves. . . . Once the court is able to put some kind of number on the gains actually attained it must discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome. . . . [¶] After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation—the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition. . . . [¶] The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. . . . [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.” (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9-10 (*LAPPL*).

II.

Standard of Review

In denying fees under section 1021.5, the trial court in this case determined that “but for the fact that Aegis was able to mitigate the loss of the state contracts by entering into new contracts directly with Kern and Stanislaus Counties, the cost of this litigation would have been dwarfed by the financial value of the litigation to the plaintiff.” This was, effectively, a determination that Aegis had failed to satisfy the financial burden element of section 1021.5 because the cost of the litigation was not out of proportion to the value of the case *to Aegis*. Before we decide whether this finding should be upheld on appeal, we take a brief detour to consider the appropriate standard of appellate review.

A superior court’s ruling on a request for attorney fees under section 1021.5 is generally reviewed for abuse of discretion. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 251.) De novo review is appropriate when the superior court’s

determination of whether the statutory criteria were met presents an issue of statutory construction or a question of law. (*Whitley, supra*, 50 Cal.4th at p. 1213; *Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025-1026.) Appellate courts have also reviewed an attorney fee order de novo when a published appellate opinion supplied the basis for the fees because, in such cases, the appellate court is “in at least as good a position as the trial court to determine whether section 1021.5 fees should be awarded.” (*Wilson v. San Luis Obispo County Democratic Central Com.* (2011) 192 Cal.App.4th 918, 924.)

The financial burden element of section 1021.5 requires a determination of the cost of the litigation relative to its value to Aegis. This is not a question of law, nor does it rest on our prior (unpublished) appellate opinion, which drew no conclusions about the value of the litigation. The trial court, being more familiar with the dynamics of the litigation, is in a better position to assess the financial burden of the lawsuit in relation to its value to Aegis. We review the trial court’s order for abuse of discretion. (See *LAPPL, supra*, 188 Cal.App.3d at p. 11 [trial court’s assessment of financial burden element merits deference from appellate court, though appellate court “need not shrink” from correcting errors in methodology or calculation].)

III.

Analysis

Aegis calculated its adjusted lodestar of attorney fees (excluding those expended on the motion for fees) to be \$161,532, and its counsel asked the court to apply a 1.5 multiplier for total fees of \$243,165. The trial court concluded that Aegis brought this litigation to preserve its direct contracts with the state in Kern and Stanislaus Counties, as evidenced by its having sought injunctive relief that would have prohibited the termination of those contracts. It denied Aegis’s request for fees under section 1021.5 because the value of those contracts far exceeded the fees incurred.

The court did not abuse its discretion in so concluding. The Department, in its opposition to Aegis’s motion for attorney fees under section 1021.5, submitted evidence that the contracts in Kern and Stanislaus Counties were worth \$4,255,984 in fiscal year

2009-2010. Granting that this figure does not reflect the profit earned by Aegis, it can, nonetheless, be reasonably inferred that the value of the contracts to Aegis was several times greater than the actual cost of bringing this case.

Citing *Whitley*, *supra*, 50 Cal.4th 1206, Aegis argues that it did not have a quantifiable pecuniary interest that can be compared to the cost of the litigation because it did not seek, and was not awarded, monetary relief. We are not persuaded. The plaintiff in *Whitley* was the conservator of her severely disabled brother and brought litigation resulting in a published appellate opinion that extended certain procedural protections to disabled persons challenging a community placement. (*Id.* pp. 1211-1212.) She sought fees under section 1021.5, which were denied on the ground that the financial burden imposed by the case was not out of proportion to her personal interest in her brother's well-being. (*Whitley*, at p. 1213.) The Supreme Court held that "a litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees" under section 1021.5 (*Whitley*, at p. 1211), noting that such interests "are incapable of reasonably accurate valuation." (*Id.* at p. 1225.)

Though Aegis was seeking equitable relief rather than money damages, the goal of this equitable relief was to maintain contracts with the state that would otherwise have been terminated under the Bulletin. The benefit to be obtained from this litigation was pecuniary, even if that pecuniary benefit did not come in the form of money damages. The intangible interests of the plaintiff in *Whitley* are far different than Aegis's much more concrete financial interest in maintaining its state contracts.

Aegis suggests that it did not stand to gain any financial benefit from this litigation because the Department continued to abide by the contracts in Kern and Stanislaus Counties until Aegis entered into contracts with those counties directly. Again we disagree. In assessing the financial burdens and benefits of the litigation, the proper focus is not on the amount ultimately recovered, but "on the monetary value of the benefits that the successful litigant reasonably expected to obtain." (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 155, fn. 10; see also *Satrap v. Pacific Gas & Electric* (1996) 42 Cal.App.4th 72, 79 [value of litigation is based on "realistic expected

recovery” rather than “actual recovery”]; and *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1414, overruled on other grounds in *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151; *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 955 [“the court must look at the estimated value of the case when the critical litigation decisions were being made, not the actual recovery after trial”].) That Aegis was ultimately able to contract with the counties does not affect the expected value of the case when litigation decisions were made.

Aegis argues that the superior court improperly focused on its “initial subjective motivation” behind the lawsuit, again citing *Whitley, supra*, 50 Cal.4th at p. 1219. We disagree. In *Whitley*, the court held that a litigant’s personal, nonpecuniary motives did not preclude an award of fees on the theory that having such a stake in the litigation offset the costs under the “financial burden” prong of section 1021.5. (*Whitley, supra*, 50 Cal.4th 1211.) In this context, the court rejected an argument that the litigant’s reasons for bringing suit were controlling: “[T]he Legislature that enacted section 1021.5 was not so much concerned with what brought a litigant with a potential public interest case into an attorney’s office, but rather with allowing that litigation to move forward from there by offering at least the prospect that the financial burden of the litigation could be shifted to the opposing party if the litigant prevailed.” (*Whitley, supra*, 50 Cal.4th at p. 1220.)

We do not construe the superior court’s order to show an improper focus on Aegis’s reasons for bringing the lawsuit. The trial court observed in its order that Aegis filed this suit to protect its own pecuniary interests, as evidenced by its having sought injunctive relief for itself alone. This was not tantamount to a finding that Aegis’s subjective motivation for bringing suit itself warranted a denial of fees—rather, the court was rejecting Aegis’s claim that it lacked a pecuniary interest in the litigation.

The superior court’s observation that but for the direct contracts with Kern and Stanislaus Counties, the cost of the litigation would have been “dwarfed” by its financial value shows that it was properly focused on the third element of section 1021.5—whether the financial burden of litigation was objectively disproportionate to Aegis’s individual stake in the case. “[A] court may speak of the litigant’s motivation ‘as a shorthand

reference to a court’s conclusion that the objective financial incentives for prosecuting the lawsuit were not disproportionate to the financial burden.’ Motivation language is particularly useful because in assessing the financial burdens and benefits in the context of section 1021.5, we are evaluating incentives rather than outcomes.” (*Whitley, supra*, 50 Cal.4th at p. 1220.)

Because we conclude the trial court did not abuse its discretion in determining that Aegis failed to meet the “financial burden” element of section 1021.5, we need not consider whether it satisfied the remaining criteria, i.e., that the action resulted in the enforcement of an important right affecting the public interest and that it conferred a significant benefit on the general public or a large class of people.

DISPOSITION

The order denying an award of attorney fees under section 1021.5 is affirmed. Respondents shall recover ordinary costs on appeal.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.