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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

CLOVIS UNIFIED SCHOOL DISTRICT ET AL.,

Plaintiffs and Respondents,

v.

JOHN CHIANG, AS STATE CONTROLLER, ETC.,
ET AL.,

Defendants and Appellants.

C068907

(Super. Ct. No. 06CS00748)

In *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794 (*Clovis I*), we upheld an argument from the plaintiff school districts and community college districts here (collectively, plaintiffs) that the State Controller's (the Controller) so-called contemporaneous source document rule (the CSDR) was an invalid underground regulation under the state Administrative Procedure Act, in the context of the state-mandated reimbursement process. The Controller had used the CSDR to reduce certain state-mandated reimbursement claims from the school district plaintiffs.

Now, plaintiffs seek attorney fees for their efforts, relying on the private attorney general doctrine codified in Code of Civil Procedure section 1021.5 (hereafter, section 1021.5). We conclude, however, that the trial court erred in finding that plaintiffs met the “financial burden” requirement of section 1021.5; plaintiffs had ample financial incentive to pursue this litigation. Consequently, we reverse the trial court orders awarding section 1021.5 attorney fees to plaintiffs.¹

FACTUAL AND PROCEDURAL BACKGROUND

Under California’s Constitution, if the state imposes any “new program or higher level of service” on any local government (including a school district), the state must reimburse the locality for the corresponding costs. (Cal. Const., art. XIII B, § 6.)

Pursuant to statutes governing the state mandate process, once the Commission on State Mandates (the Commission) determines that a state program constitutes a reimbursable state mandate, it adopts regulatory “parameters and guidelines” (P&G’s) to govern the reimbursement process. (Gov. Code, §§ 17551, subd. (c), 17553, 17557.) The Controller, in turn, then issues nonregulatory “claiming instructions” for each Commission-determined mandate, based on the P&G’s. (Gov. Code, § 17558.)

In their complaints for declaratory relief and petitions for writ of mandate, the school district plaintiffs (comprising Clovis, Fremont, Newport-Mesa, Norwalk-La Mirada, Riverside, Sweetwater, and San Juan) alleged that the CSDR constituted an invalid underground regulation under the state Administrative Procedure Act. (Gov. Code, § 11340 et seq.) The Controller used the CSDR in auditing employee salary and benefit costs in reimbursement claims for the following four state-mandated school district programs during the relevant fiscal years 1998 to 2003: (1) the School District of

¹ The trial court’s award of section 1021.5 attorney fees actually comprised two orders: an original order on June 2, 2011, and a supplemental one on June 22, 2011.

Choice Program; (2) the Emergency Procedures, Earthquake Procedures and Disasters Program; (3) the Intradistrict Attendance Program; and (4) the Collective Bargaining Program. (*Clovis I, supra*, 188 Cal.App.4th at p. 799.)

In *Clovis I*, we agreed with the school district plaintiffs that the Controller’s CSDR was an invalid underground regulation. We concluded that the CSDR improperly imposed more onerous reimbursement claim requirements in terms of contemporaneous documentation than did the CSDR’s corresponding regulatory P&G from the Commission. We also concluded that the Controller could reaudit the relevant reimbursement claims without using the CSDR. (*Clovis I, supra*, 188 Cal.App.4th at pp. 801-807, 812-813.) The Controller did so; more on that later.

As for the community college district plaintiffs (comprising San Mateo, Santa Monica, State Center, and El Camino), their complaint for declaratory relief and petition for writ of mandate (appended to the complaints and petitions of the school district plaintiffs) alleged that another state mandate auditing rule used by the Controller—the “Health Fee Rule”—constituted an invalid underground regulation for the Health Fee Elimination Program; or, alternatively, that the Controller’s auditing actions in this respect were beyond its lawful authority. (*Clovis I, supra*, 188 Cal.App.4th at p. 800.)

In *Clovis I*, we upheld the validity of the Health Fee Rule. (*Clovis I, supra*, 188 Cal.App.4th at pp. 810-812.)

After the Controller reaudited the CSDR-related programs noted above—without using the invalidated CSDR—and approved certain state-mandated reimbursement claims from the school district plaintiffs, plaintiffs moved for their attorney fees under section 1021.5.

Plaintiffs had incurred about \$300,000 in attorney fees, but requested about \$235,000 in recognition of work on unsuccessful contentions. The trial court deemed this reduction appropriate and awarded plaintiffs the \$235,000.

The Controller appeals from this attorney fee award.

DISCUSSION

“[S]ection 1021.5 acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring.” (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 511 (*Families*), disapproved on another point in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1226, fn. 4 (*Whitley*).)

For a plaintiff to obtain its attorney fees under section 1021.5, the plaintiff must show that its litigation: (1) enforced an important right affecting the public interest; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on the plaintiff that was out of proportion to its individual stake in the matter. (§ 1021.5; *Families, supra*, 79 Cal.App.4th at p. 511.) It is this third requirement, the financial burden requirement, that is the principal issue in this appeal.

A trial court is to assess the litigation realistically and determine from a practical perspective whether these three requirements of section 1021.5 have been met. We review the trial court’s determination under the abuse of discretion standard. (*Families, supra*, 79 Cal.App.4th at pp. 511-512.)

These three requirements also apply to local public entities (including school districts and community college districts) seeking attorney fees under section 1021.5. (See *People ex rel. Brown v. Tehama County Bd. of Supervisors* (2007) 149 Cal.App.4th 422, 456; see also § 1021.5, subd. (b) [as pertinent, the section states, the “financial

burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate”].)

To determine whether the section 1021.5 financial burden requirement has been met, a trial court must compare (1) the “ ‘actual cost’ ” of bringing the case (i.e., the legal fees and litigation costs) with (2) the “ ‘estimated value of the case’ ” to the successful litigants at the time they decided to pursue the litigation (i.e., the monetary value of the benefits obtained by the successful litigants discounted by an estimate of the probability of success at the time the litigants decided to proceed). (*Whitley, supra*, 50 Cal.4th at pp. 1215-1216.) If the case’s estimated value exceeds by a substantial margin its actual cost, the financial burden requirement has not been met. (*Id.* at p. 1216.)

That is what happened here—the estimated value of the case exceeded by a substantial margin the actual cost. Consequently, the trial court abused its discretion in awarding plaintiffs their attorney fees under section 1021.5.

In this litigation, plaintiffs incurred about \$300,000 in attorney fees; however, they had sought nearly \$18 million of state mandate reimbursement, and ended up with a reimbursement award of just over \$4.1 million. This litigation involved questions of law almost entirely, so the \$300,000 in attorney fees would have comprised the vast majority of the actual litigation costs. Comparing the approximately \$300,000 in actual costs with the \$18 million plaintiffs sought (60 times greater) or the \$4.1 million plaintiffs were awarded (14 times greater), presents an unfavorable comparison for meeting the financial burden requirement of section 1021.5, no matter how one slices it. Furthermore, there were 11 plaintiffs among whom to share the financial risks of litigation. In light of these ratios and risks, it simply cannot be said that the financial burden of this litigation was out of proportion to the plaintiffs’ stake in the matter.

Plaintiffs beg to differ. Taking their cue from the trial court’s rationale for the attorney fee award, plaintiffs raise three points.

First, plaintiffs downplay their financial interest in this litigation by contending that this case focused on the nonpecuniary motive of correcting legally improper auditing practices, rather than on the pecuniary motive of recovering costs. As *Whitley* clarified, the financial burden requirement of section 1021.5 focuses “not on the nonfinancial motives a litigant may have in bringing the suit,” but on the “*financial* incentives and burdens” in litigating. (*Whitley, supra*, 50 Cal.4th at pp. 1211, 1215-1217, 1224.) The distinction plaintiffs draw, however, is one without a difference here. We can be sure that plaintiffs would hardly have welcomed the Pyrrhic victory of having the challenged auditing practices legally invalidated without a cent of mandate reimbursement to show for it. Practically speaking, this litigation was driven by money, involving specific reimbursement requests comprising multiple millions down to the last dollar. Along these lines, the trial court had remarked that plaintiffs “brought this lawsuit, not to protect their personal financial interest, but to obtain reimbursement of costs they are mandated to incur by the state and to preserve funding for the provision of the public educational services they were established to provide to students.” Again, we fail to see the distinction drawn by this remark. Through this litigation, plaintiffs sought to protect their overall budgets from unfunded state mandates; therefore, plaintiffs *were* acting to protect their financial interests.

Second, plaintiffs maintain the financial benefit of this litigation is not real because it is contingent upon an appropriation by the Legislature. As the Controller knowingly observes, however, payment of any judgment or claim by the state requires a legislative appropriation. (Cal. Const., art. XVI, § 7; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 196; Gov. Code, § 965.8; see also Gov. Code §§ 17561, subd. (a) [“The state shall reimburse each local agency and school district for all ‘costs mandated by the state’ ”] and 17612, subd. (a) [“Upon receipt of the [state mandate] report submitted by the [state mandate] commission . . . , funding shall be provided in the

subsequent Budget Act for costs incurred in prior years”].) Through this litigation, plaintiffs obtained a judgment that declared the CSDR invalid and that granted a writ of mandate to invalidate certain audits based on the CSDR; and, the Controller complied with the granted writ by authorizing \$4.1 million to plaintiffs for state-mandated reimbursement.

Third, and finally, plaintiffs note the litigation was uncertain in that their auditing challenges could have been rejected in whole or part. That is the nature of litigation, though—it is uncertain. As discussed above, this uncertainty is accounted for through the *Whitley* process of estimating the value of a case. (*Whitley, supra*, 50 Cal.4th at pp. 1215-1216.) Furthermore, as the Controller recognizes, plaintiffs’ auditing challenges were very specific and detailed, and sought nearly \$18 million in state mandate reimbursement. We add that, even with partial success, plaintiffs stood to gain significantly in financial terms. In short, plaintiffs’ case “bulked large enough to warrant the cost of winning it”; the case was not “ ‘out of proportion’ ” to their “ ‘stake in the matter.’ ” (*County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 90; see also *Whitley, supra*, 50 Cal.4th at pp. 1215-1216.)

We conclude the trial court abused its discretion in awarding section 1021.5 attorney fees to plaintiffs.

DISPOSITION

The trial court’s June 2, 2011 “Order re Attorney Fees and Costs” is reversed to the extent it awards section 1021.5 attorney fees to plaintiffs; in all other respects, that order is affirmed. The trial court’s June 22, 2011 “Supplemental Order Re Attorney Fees” is reversed. Accordingly, we also deny plaintiffs’ request for attorney fees in this

appeal. The Controller is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(1), (3).)

BUTZ, J.

We concur:

ROBIE, Acting P. J.

MURRAY, J.