Supreme Court Copy

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No. S175855

Supreme Court
OF THE
State Of California

IN RE CONSERVATORSHIP OF ROY WHITLEY.

North Bay Regional Center,

Respondent,

vs.

Virginia Maldonado, as Conservator for Roy Whitley,

Petitioner.

Reply In Support Of Petition for Review

From A Non-Published Decision of the Court of Appeal (1st Dist., Div. 3; A122896)
Affirming an Order of the Sonoma County Superior Court
Denying Private Attorney General Fees (No. SPR-061684)
Honorable Elaine Rushing, Judge

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As shown below, none of the three points raised by the North Bay Regional Center's answer to the petition for review should dissuade the Court from granting review.

I

THE *WILLIAMS-PUNSLY* LINE OF AUTHORITY MISINTERPRETS SECTION 1021.5; IT PROVIDES NO REASON TO DENY REVIEW

Quoting liberally from *Hammond v. Agran* (2002) 99 Cal.App.4th 115, the NBRC argues that the *Williams-Punsly* line of Court of Appeal cases unanimously and correctly interprets Civil Code section 1021.5. (Ans., 5-7.)

Even if this argument were correct, it would state no reason to deny review. The entire *Williams-Punsly* line of cases existed before this Court granted review in *Adoption of Joshua S.* of the same issue that this petition raises. If the Court thought the *Williams-Punsly* cases were the only authority on this point, that they were correctly decided, or that either of those propositions was a reason for denying review, it would not have taken *Joshua S.*

Furthermore, the *Williams-Punsly* cases are not the sole authority on point. As the petition explains,[1] *Press* and a number of Court of Appeal opinions disagree with the *Williams-Punsly* cases and correctly limit the "financial burden" determination to monetary rewards and burdens of the public interest litigation, excluding non-pecuniary interests from the calculus.

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[1] See Pet., 13-14 & nn. 11-12, citing *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 & n. 11; *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1122-1123; *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 585, and other cases.

Nor do the *Williams-Punsly* line of cases correctly interpret section 1021.5. From a purely linguistic point of view, the *Williams-Punsly* cases give insufficient attention to the statutory words "***financial*** burden of the litigation." By limiting consideration to "financial" as opposed to other types of litigation burdens, the statute implies that consideration of offsetting benefits of the litigation should likewise be confined to "financial" interests. Neither the NBRC nor any of the *Williams-Punsly* cases has presented any convincing reason for supposing that the Legislature intended an asymmetrical balance of only financial burdens against any and all benefits, financial and otherwise.[2]

Hammond[3] correctly states that "necessity" "adds another factor beyond just 'financial burden,' " but errs in suggesting that "necessity" permits consideration of non-pecuniary interests. (See Ans., 6.) Section 1021.5 refers to the "necessity ... of private enforcement," not "necessity ... of a fee award." The statutory phrase requires consideration of whether private litigation was needed to enforce the public interest, not whether strong personal, non-pecuniary interests sufficiently motivated the plaintiff to bring the necessary private enforcement action.[4]

More importantly, section 1021.5's statutory language must be construed in light of its legislative purpose, which is " 'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees ... to those who successfully bring such suits and thereby bring about bene-

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[2] Had the Legislature intended a wide-ranging consideration of all factors inducing and inhibiting a particular public interest lawsuit, it would simply have dropped the adjective "financial."

[3] *Hammond v. Agran, supra,* 99 Cal.App.4th at p. 125; see Ans., 6.

[4] See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 577; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 85 ("[U]nder the 'necessity' prong of section 1021.5, the court looks only to the whether there is a need for a private attorney general for enforcement purposes, because no public attorney general is available.").

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on September 21, 2009.

____

Marilyn C. Li

fits to a broad class of citizens.' "[5] The Legislature recognized "that privately initiated lawsuits are often essential to the effectuation of the 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."[6]

Considering personal, non-pecuniary interests as offsetting the financial burden of private enforcement thwarts this statutory purpose. Few individuals are wealthy enough to pursue non-remunerative litigation to vindicate personal, non-pecuniary interests.[7] Certainly, petitioner Maldonado could not have afforded this litigation however strongly she felt about her brother's welfare.[8] (App. 252:4-14.)

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[5] *Serrano v. Priest* (1977) 20 Cal.3d 25, 43, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 27.

[6] *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.

[7] The NBRC ignores this everyday reality. It argues that plaintiffs often initiate litigation for "heart-felt, and deeply-rooted non-pecuniary motives" and are "willing to undertake the expense and risk of litigation" even without the chance of obtaining a fee award. (Ans., 7.) That may well be true—but only for the few who can afford to hire a lawyer to prosecute the case. For the many ordinary citizens like Maldonado, all the heart-felt motives and willingness to undertake litigation in the world cannot make up for the undeniable fact that they cannot afford to pay legal fees and so must depend on charity or fee awards to vindicate their non-pecuniary interests.

[8] The NBRC also emphasizes that Maldonado initiated the *Richard S.* hearing to block her brother's move, not vindicate any public interest, and that she did not raise in her first appellate filings the jurisdictional issue on which she ultimately prevailed on appeal. (Ans., 8.) Both points have already been addressed in Maldonado's petition for review. She commenced the *Richard S.* hearing for purely personal reasons; she pursued the appeal for additional reasons. (App. 252:4-14.) She sought a fee award only for the work done on the appeal. (See Pet., 5-6 & n. 3.) Her initial appellate filings were hurried responses to the NBRC's effort to preempt and moot the appeal. (See Pet., 5, 10 n. 9.)

Maldonado and those like her cannot pay for the legal help they need to vindicate the public interest. Fee awards entice to attorneys to take on their often difficult and otherwise unremunerative public interest cases. By denying Maldonado and others like her private attorney general fee awards because of their strong personal interests, the *Williams-Punsly* line of cases discourage attorneys from representing the personally motivated but not wealthy plaintiffs who bring most public interest litigation. In doing so, these cases prevent section 1021.5 from achieving its legislatively intended effect.

II

THE ISSUE IS IMPORTANT DESPITE FEW RECENT PUBLISHED DECISIONS ON POINT

The NBRC also argues that review should be denied because there have been no published decisions on the disqualifying effect of personal, non-pecuniary interests. (Ans., 4-5, 8.) The absence of a flood of cases, the NBRC claims, shows there is no significant problem requiring this Court's review and remedy.

Published appellate opinions do not provide a fair measure of the issue's continuing importance. Few appellate decisions are published, particularly when they adhere to established, albeit erroneous, authority. The unpublished opinion in this case illustrates the point. The NBRC has offered no tally of the number of unpublished opinions that have relied on the *Williams-Punsly* line of authority to deny fees.

Moreover, the true impact of the *Williams-Punsly* error occurs much earlier in litigation than the appeal of an order granting or denying fees and cannot be measured by counting appellate opinions, whether or not published. Uncertainty about the availability of fees if the plaintiff prevails affects lawyers' choices of clients and cases, discouraging them from accepting personally motivated champions and public interest litigation. The amicus letters urging the Court to grant review in this case attest to the real,

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.504(d)(1)]

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the foregoing brief contains 2,275 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: September 21, 2009.

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Jan T. Chilton

PROOF OF SERVICE

(Supreme Court No. S175855)
(Court of Appeal Case No A133896)
(Sonoma County Superior Court Case No.: SPR-061684)

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

Reply In Support Of Petition For Review

on all interested parties in said case addressed as follows:

CALIFORNIA COURT OF APPEAL 350 McAllister Street San Francisco, CA 94102	Case No. A133896
SONOMA COUNTY SUPERIOR COURT 600 Administration Drive, Rm. 107-J Santa Rosa, CA 95403	Case No. SPR-061684
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☒ **(BY MAIL)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes with postage fully prepaid.

Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6201 et seq.) was not an obstacle to compelling arbitration under a valid mandatory arbitration agreement between a lawyer and his or her client. Resolution of that issue removed only one of several defenses the client raised to avoid arbitration. This Court remanded the case to the Court of Appeal, directing it to resolve those remaining issues:

> Schatz also argues that his agreement for contractual arbitration applied only to his engagement of Allen Matkins in the 1999 partnership dispute and not the 2000 easement dispute from which the present fee dispute arises. Moreover, he contends that for various reasons Allen Matkins is estopped from compelling contractual arbitration. These issues were raised in the Court of Appeal but the court did not address them because of its conclusion that contractual arbitration was categorically unavailable. The Court of Appeal is to address these issues on remand.

(*Id.*, at p. 575 n. 4.)

This case is an appropriate vehicle for decision of the important question that it squarely raises even if the resolution of that one issue may not seal Maldonado's ultimate victory or defeat on her motion for a fee award. The Court can direct the Court of Appeal to resolve, on remand, whether its earlier published decision in this case benefited a sufficiently large group of the public to warrant a private attorney general fee award under section 1021.5.

Even if the size-of-group-benefited issue were deemed to make this case a less than ideal vehicle for deciding the separate non-pecuniary-interest issue, the Court should still grant the petition to review the latter issue. The non-pecuniary-interest issue has been pending for a substantial period. The Court granted review in *Adoption of Joshua S.* four years ago. If it does not accept review of this case, the Court may have to wait for at least

that long again for the same issue to be presented by another case, let alone one in which the defendant made no other argument against awarding fees.

The longer this issue remains unresolved by this Court, the more damage is done by the *Williams-Punsly* line of authority. The Court should grant review of this case rather than wait for an indefinite period for a more perfect occasion to resolve this important issue.

IV

CONCLUSION

For the reasons stated above, the Court should grant review and reverse.

Dated: September 21, 2009.

SEVERSON & WERSON
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By______________________________
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Attorneys for Petitioner
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important, and continuing impact this issue has on public interest litigation in California.

As the amicus letters also point out, even when lawyers do accept public interest litigation and prevail, their opponents routinely raise the *Williams-Punsly* line of cases and the plaintiff's non-pecuniary interests as a reason for denying fees—just as the NBRC did here. Often, the opposition may elicit an undeserved fee discount to resolve the dispute fee motion—either by settlement[9] or judicial decree—thus further discouraging public interest litigation while avoiding any appeal of the resolution of the fee motion.

The broader picture provided in the amicus letters reflects the issue's true importance which amply justifies this Court's review.

III

THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING WHETHER A NON-PECUNIARY INTEREST MAY DISQUALIFY A PLAINTIFF FROM OBTAINING AN AWARD UNDER SECTIN 1021.5

Contrary to the NBRC's final argument (Ans., 9-12), this case provides the Court an appropriate vehicle for deciding whether the *Williams-Punsly* line of authority should be disapproved in favor of *Press'* more limited weighing of financial burdens and benefits of public interest litigation.

The NBRC does not and cannot deny that the Court of Appeal opinion affirms the denial of private attorney general fees solely on the ground that Maldonado had such a strong personal, non-pecuniary interest

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[9] Here, for example, Maldonado repeatedly offered to settle her fee application even at a substantial discount from the lodestar that the NBRC conceded was reasonable recompense for her attorneys' work on the appeal. It is only because the NBRC has scorned all settlement overtures on the merits and on the fees that this case has twice required the attention of the appellate courts.

that the $177,000+ financial burden of her successful appeal was justified, precluding a fee award under section 1021.5. (See Pet., Ex. A, pp. 7-9.)

This Court may and should grant review of that issue. After resolving it and reversing the Court of Appeal's judgment, the Court may remand the case to the Court of Appeal for that court to consider whether the trial court's order denying fees should be affirmed on the other ground it mentioned, namely, benefit to an insufficiently large class of the general public.[10]

The NBRC cites no authority for its unarticulated premise that this Court does not or should not grant review unless its decision will resolve all disputed issues in a case, bringing the entire litigation to a final conclusion.

Of course, there is no such authority. This Court often decides an important issue on review and then remands for further proceedings in the Court of Appeal or trial court to resolve other disputed issues.[11]

For example, in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, this Court granted review and decided that the

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[10] Since neither Maldonado nor the NBRC has sought review of the issue, Maldonado will not burden this Court with her evidence and argument showing that the class of persons benefited by the Court of Appeal's published decision is more than large enough to justify a fee award under section 1021.5. That evidence and argument can be found at pages 13-20 of Maldonado's opening brief and pages 5-9 of her reply brief in the Court of Appeal.

Maldonado is confident that, on remand, the Court of Appeal will resolve the public benefit issue in her favor. But even if the Court of Appeal rules otherwise, this Court's decision on the separate issue presented for review would still stand, resolving an important issue for the guidance of litigants and courts throughout the state in many cases other than this one.

[11] See, e.g., *Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, ___, 213 P.3d 132, 141; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 911-912; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 306, 328-329; *Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th at p. 584.