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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SYLVIA COTTON et al., Plaintiffs and Respondents, v. STARCARE MEDICAL GROUP, INC., et al., Defendants and Appellants.	G045538 (Super. Ct. No. 30-2008-00101022) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Reversed.

Doll, Amir & Eley, Michael Amir, Jason B. Baim; Brownstein Hyatt Farber Schreck, Edward A. Stumpp; Greines, Martin, Stein & Richland, Timothy T. Coates and Alison M. Turner for Defendants and Appellants.

Balisok & Associates and Russell S. Balisok for Plaintiffs and Respondents.

* * *

In *Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437 we reversed judgments of dismissal entered after the superior court sustained defendant StarCare Medical Group, Inc.'s demurrer to plaintiffs' complaint and defendant PacifiCare of California, Inc.'s demurrer to their first amended complaint without leave to amend. As to StarCare, we held the trial court abused its discretion by denying the parties' stipulated continuance of the hearing on the demurrer. (*Id.* at pp. 443-445.) The partial reversal of the judgment for PacifiCare was based on our conclusion a provision of the federal Medicare Act (42 U.S.C. § 1395 et seq.; Medicare Act) that declared "standards established under th[e Act's Medicare Advantage plans] shall supersede any State law or regulation . . . with respect to" plans offered by Medicare Advantage organizations (42 U.S.C. § 1395w-26(b)(3)) preempted only one of plaintiffs' state common law and statutory causes of action for monetary damages. (*Cotton v. StarCare Medical Group, Inc., supra*, 183 Cal.App.4th at pp. 445-456.)

Upon remand of the case, plaintiffs successfully moved for an award of attorney fees against both StarCare and PacifiCare under the private attorney general doctrine (Code Civ. Proc., § 1021.5; section 1021.5) for litigating the federal preemption issue. Both defendants appeal challenging plaintiffs' entitlement to fees and the validity of the factors cited by the trial court to use a multiplier to increase the award. We reverse the fee award in its entirety. Our prior decision merely reversed the dismissal of plaintiffs' lawsuit which sought only monetary damages and remanded the matter for further proceedings. Consequently, "[n]othing in the way of relief to the [plaintiffs] was secure following issuance of our opinion reversing the entry of [the judgment dismissing the action]." (*Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1844.)

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs are the children of T.J. Jackson. Prior to his death in 2007, Jackson was enrolled in a Medicare Advantage plan operated by PacifiCare. StarCare is alleged to have contracted with PacifiCare to provide physician services to its enrollees and to oversee the operation of a rehabilitation center named St. Edna's Subacute and Rehabilitation Center. In December 2006, Jackson broke his leg. He underwent surgery at a hospital and was ultimately moved to St. Edna's to recuperate. In late January 2007, Jackson was transferred to Fountain Valley Regional Hospital, a hospital that provided hospitalization services to PacifiCare's Medicare Advantage plan enrollees. A week later, he died while still in the hospital.

The original complaint named StarCare and three other parties as defendants and sought compensatory and punitive damages on causes of action for negligence, willful misconduct, breach of fiduciary duty, constructive fraud, fraudulent concealment, and wrongful death. StarCare filed a demurrer to the complaint, in part arguing the Medicare Act preempted plaintiffs' causes of action against it. The parties stipulated to continue the hearing on the demurrer, but the trial court refused to continue the matter and sustained StarCare's demurrer without leave to amend.

In their first amended complaint, plaintiffs added several defendants, including PacifiCare, and alleged two additional causes of action, a third willful misconduct claim and one for bad faith. As with the original pleading, the amended complaint sought recovery of compensatory and punitive damages, plus attorney fees under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, §§ 15600 et seq., 15657.) PacifiCare demurred to the first amended complaint also arguing the Medicare Act preempted the claims asserted against it. The trial court sustained PacifiCare's demurrer without leave to amend on this ground.

Plaintiffs appealed from the judgments dismissing both StarCare and PacifiCare. In *Cotton v. StarCare Medical Group, Inc., supra,* 183 Cal.App.4th 437, we consolidated the appeals and reversed both judgments. (*Id.* at pp. 441-442, 457.) As for the judgment for StarCare, we held the trial court abused its discretion because it "effectively barred plaintiffs from responding to the demurrer[] . . . ." (*Id.* at p. 445.) The dismissal of PacifiCare was also reversed as to all but one cause of action based on our conclusion the remaining counts were neither expressly nor impliedly preempted by title 42 United States Code section 1395w-26(b)(3). (*Cotton v. StarCare Medical Group, Inc., supra,* 183 Cal.App.4th at pp. 450-456.)

After issuance of the remittitur, plaintiffs moved for an award of attorney fees under section 1021.5. They argued "[t]he appeal as to PacifiCare and Star[C]are resulted in a published opinion . . . establishing . . . an important right affecting the public interest," in that "enrollees in Medicare-financed HMOs . . . may now sue their health plans under California common law principles and . . . statutes of general application . . . . " In support of the motion, plaintiffs' attorney submitted a declaration stating he "agreed to represent the [p]laintiffs as a vehicle for testing whether the [Medicare Act's] preemption provision . . . would bar personal injury actions . . . against HMOs."

PacifiCare and StarCare opposed the motion. The trial court granted it, awarding plaintiffs' counsel $354,398 in fees.

DISCUSSION

1. Introduction

"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 interest of justice be paid out of the recovery, if any." (§ 1021.5.) "'"[T]he normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law."' [Citations.]" (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025-1026.) As will be noted, this case concerns an interpretation of the statute and is thus subject to de novo review.

Defendants challenge the award of fees on several grounds. We conclude the award must be reversed because plaintiffs cannot yet establish they are successful parties in this litigation. Consequently, we express no opinion on whether plaintiffs might otherwise be entitled to an award of attorney fees under section 1021.5 or the amount of any such award.

2. Successful Party

"A threshold requirement for a fee award under section 1021.5 is the party seeking fees must be 'a successful party against one or more opposing parties in any action[.]' [Citations.]" (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 649.) Since plaintiffs are "part[ies] to [the] litigation" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 570), they satisfy one aspect of this requirement. However, the necessary showing of being a successful litigant is absent.

"In assessing whether a party is a successful party, a 'broad, pragmatic view' is applied. [Citation.] It is not necessary that the party seeking fees have obtained a final favorable judgment. [Citation.] 'The critical fact is the impact of the action, not the manner of its resolution. If the impact has been the "enforcement of an important

right affecting the public interest" and a consequent conferral of a "significant benefit on the general public or a large class of persons" a section 1021.5 award is not barred because the case was won on a preliminary issue [citation] or because it was settled before trial. [Citation.]' [Citation.] . . . The trial court must, in its discretion, 'realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award.' [Citation.]" (*County of Colusa v. California Wildlife Conservation Bd., supra*, 145 Cal.App.4th at p. 649.)

The Supreme Court has recognized section 1021.5 "requires the claimant to show that the principal action 'has resulted' in the enforcement of an important right and that a significant benefit 'has been conferred[,]'" and "[t]hat showing cannot be made until the benefit is secure . . . ." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 679.) In this regard, "it is the objective of the *lawsuit* that is critical to recovering fees under section 1021.5, not the success of an ancillary part of the action. By its terms, section 1021.5 authorizes attorney fees if the *action* results in the enforcement of an important public right affecting the public interest. Likewise, the purpose of section 1021.5's authorization of a fee award is to give private citizens an incentive to bring *lawsuits* enforcing important public rights. [Citations.] To be sure, an individual may fulfill his or her role as a private attorney general in a variety of ways . . . . In all cases, however, whether a party has been successful is measured by the resolution of the *action*, not an ancillary part of the litigation. [Citations.]" (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 402; see also *Savaglio v. Wall-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 603 ["The measure of success qualifying a litigant for fees under the private attorney general statute is determined with regard to the impact and outcome of the underlying action"].)

This case is analogous to *Urbaniak v. Newton*, *supra*, 19 Cal.App.4th 1837. There the plaintiff sued Newton, a physician, plus an insurance company and two lawyers

retained by the insurer for monetary damages based on the defendants' dissemination of a medical report disclosing the plaintiff was HIV positive. One theory of recovery alleged by the plaintiff was that the disclosure violated his constitutional right to privacy. The trial court dismissed the action after granting defendants' summary judgment motion.

The Court of Appeal affirmed the judgment in favor of the insurer and the attorneys on all causes of action. But it reversed the judgment as to Newton, finding a triable issue of fact existed concerning whether his actions violated the plaintiff's state constitutional right to privacy. (*Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1140-1141.)

During the pendency of the appeal, the plaintiff died and his estate took over prosecution of the lawsuit. Upon remand, the estate successfully obtained recovery of attorney fees under section 1021.5 as against all defendants. In a second appeal from this ruling, the Court of Appeal reversed.

As to the insurer and its attorneys, the appellate court noted "plaintiff herein confined his tort action to a prayer for civil damages. He did not request a declaration of privacy rights of other similarly situated people, nor did he seek injunctive relief to protect such rights. 'By tactical design, the litigation was not intended to promote the rights of [others] by obtaining a judicial declaration of those rights. . . . [I]n light of the narrow focus of [plaintiff's] tort pleadings, it is clear our published opinion was simply fortuitous.' [Citation.] . . . [¶] The court assessing a claim for attorney fees under section 1021.5 must determine that the action served to vindicate an important right of the plaintiff. This need not be accomplished by a judgment, but there must be some causal connection between the lawsuit and a change in the defendant's conduct . . . . The instant case indicates no change in the conduct of the lawyers or [the insurer] resulting from affirmance of the summary judgment in their favor." (*Urbaniak v. Newton, supra,* 19 Cal.App.4th at pp. 1842-1843, fn. omitted.)

Although the appellate court had reversed the summary judgment as to Newton, it agreed the award of attorney fees against him was premature. "Although a case need not be completely final prior to an award of section 1021.5 fees, the benefit obtained must be 'secure' before the fees may be awarded. [Citation.] Nothing in the way of relief to the estate was secure following issuance of our opinion reversing the entry of a summary judgment. [¶] Reversal of a summary judgment leaves the parties '"in a position no different from that they would have occupied if they had simply defeated the defendants' motion . . . in the trial court." [Citation.]' [Citation.] Merely reversing a summary judgment and remanding a matter for trial does not establish the showing necessary to support an award of attorney fees under section 1021.5." (*Urbaniak v. Newton, supra,* 19 Cal.App.4th at p. 1844.)

The same analysis applies in this case. Plaintiffs sued StarCare and PacifiCare for only monetary relief. Their complaint and first amended complaint did not seek declaratory or injunctive relief concerning the preemptive effect of the title 42 United States Code section 1395w-26(b)(3). By design, plaintiffs only sought recovery for the injuries suffered by decedent and themselves, not a judicial resolution on federal preemption that arguably would promote the rights of others. In fact, as to StarCare we reversed on a procedural ground and did not reach the merits of the preemption claim.

Furthermore, as in *Urbaniak*, reversal of the judgments for both defendants simply returned the parties to the positions they occupied before the trial court sustained each defendant's demurrer without leave to amend. It is as if the trial court had initially overruled defendants' demurrers to the original and first amended complaints. Plaintiffs have not yet achieved anything in the way of the relief sought in their pleadings.

Plaintiffs argue "the evidence showed that one of the (necessary) goals of th[is] action was to challenge and explore the limits of the federal preemption statute in a reviewing court." In support of this contention, they cite the statement from their attorney's declaration quoted above.

It is well settled that "[f]ederal pre-emption is ordinarily a . . . defense to the plaintiff's suit." (*Metropolitan Life Ins. Co. v. Taylor* (1987) 481 U.S. 58, 63 [107 S.Ct. 1542, 95 L.Ed.2d 55].) As noted, plaintiffs' original and first amended complaints sought to recover only damages while the latter pleading added a request for attorney fees under the elder abuse act. Although it was likely defendants would assert a federal preemption defense in this case, there was no guarantee they would do so. Had counsel wanted to ensure he obtained a judicial determination of the Medicare Act's preemptive effect on his clients' state law claims, he could have included a cause of action for declaratory relief on that issue. But neither pleading included such a cause of action.

Consequently, the trial court erred in granting their motion for attorney fees under section 1021.5.

DISPOSITION

The order awarding attorney fees to respondents is reversed. Appellants shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.