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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VENTURA OFFICE SUITES, Plaintiff and Respondent, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Appellant.	2d Civil B269664 (Super. Ct. No. 56-2011-00406799-CU-WM-VTA) (Ventura County)

This is an appeal from the trial court's award of attorney fees arising from an earlier case we decided between the same parties. (*Ventura Office Suites v. California Unemployment Insurance Appeals Board* (Nov. 26, 2014, B248108) [nonpub. opn.] (*VOS I*).) The California Unemployment Insurance Appeals Board (Board) contends the trial court erred in awarding fees to Ventura Office Suites (VOS) because VOS failed to meet the criteria for such an award under the private attorney general fee

statute. (Code Civ. Proc., § 1021.5).[1] We conclude to the contrary and affirm.

FACTS AND PROCEDURAL BACKGROUND

VOS leased office space to Naomi Del Rio, a massage therapist, who subsequently sought unemployment insurance (UI) benefits based on her employment with VOS. VOS contested her status as an employee and, ultimately, it was determined she was an independent contractor.

Del Rio successfully appealed that determination. An administrative law judge (ALJ) found she was, in fact, an employee and thus eligible for UI benefits. VOS appealed to the Board, which affirmed the ALJ's decision.

VOS filed a petition for writ of mandate under section 1094.5 challenging the determination that Del Rio was an employee. Citing *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770 (*Interstate Brands*), VOS alleged that its "'right to be free from erroneous and/or invalid charges to its [UI] reserve account is a fundamental vested right and therefore [it] is entitled to independent judicial review of the evidence.'" The Board claimed that petition was unripe for review under the doctrine of "pay now, litigate later," which requires that a tax or UI contribution be paid before it can be challenged. The trial court agreed with the Board and dismissed the petition without prejudice. VOS appealed.

In *VOS I*, we were required "to reconcile the trial court's application of the 'pay now, litigate later' rule to postpone judicial review of the Board's decision until after VOS pays a tax or UI contribution, which has not been and may never be

[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

assessed, with the holding in *Interstate Brands* that an employer has a fundamental vested right to be free of erroneous benefits charges to its UI reserve account." (*VOS I*, *supra*, B248108, slip opn. at p. 2.) After considering three rounds of "complex" briefing, we determined there was "no evidence that [immediate] judicial review of the Board's decision will prevent or enjoin the collection of a tax or UI contribution." We reversed and remanded the matter for further proceedings on the petition.[2] (*Id.* at p. 3.)

On remand, the trial court denied the petition, ruling that (1) the Board had jurisdiction to re-open the earlier decision that Del Rio was an independent contractor, (2) good cause existed for re-opening the matter and (3) VOS was not denied a fair hearing.

Even though the trial court ruled in its favor, the Board offered to settle the case by giving VOS the relief it had sought in the writ petition. Accordingly, a stipulated judgment was entered that reinstated the Board's decision that Del Rio was an independent contractor and not an employee of VOS.

VOS filed a motion for attorney fees pursuant to section 1021.5. It sought fees for the work performed by its counsel to vindicate the right to judicial review of the Board's employee status determination. The Board argued there was no factual or legal basis for an award of fees, and questioned whether VOS was the prevailing party in *VOS I*. The trial court

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[2]VOS requests that we take judicial notice of our May 8, 2014 order granting its motion for permission to file a supplemental brief, and our June 16, 2014 letter requesting that the Board submit a letter brief addressing certain points. We grant the unopposed request. (See Evid. Code, § 452, subd. (d).)

responded, "Well, is there any doubt about that?" The Board's counsel conceded: "I don't think there is any doubt about that . . . ."

The trial court observed that "the bulk of the hours here involve the appeal, I do find that they [VOS] prevailed on that for reasons that I think are pretty obvious, and that again it fits under [section] 1021.5 in terms of what's required under the case law." The court rejected the Board's argument that the requirements of section 1021.5 were not met because *VOS I* was not published and because it did not establish new law. The court did, however, reduce the requested amount of attorney fees from $201,308.13[3] to $68,526.80. The Board appeals.

DISCUSSION

Section 1021.5 is "'a codification of the "private attorney general" attorney fee doctrine that had been developed in numerous prior judicial decisions. . . . [T]he fundamental objective of the private attorney general doctrine of attorney fees 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 benefits to a broad class of citizens.'" [Citation.] The doctrine rests upon the recognition 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.'" (*Conservatorship of*

[3] The requested amount of attorney fees included a lodestar amount of $123,158.75, enhanced by a fee multiplier of 1.5, plus motion drafting fees totaling $16,570.00.

Whitley (2010) 50 Cal.4th 1206, 1217-1218 (*Whitley*), italics omitted.)

To recover attorney fees under section 1021.5, the successful party must prove each of the following: (1) its lawsuit has resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement make the award appropriate. (§ 1021.5; *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933-935 (*Woodland Hills*).)

A. Standard of Review

An award of fees under section 1021.5 generally is reviewed for an abuse of discretion. (*Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521, 541.) The Board argues the standard of review is de novo because the determination of whether the criteria for an award of attorney fees have been met is an issue of statutory construction. (See *Whitl*ey, *supra*, 50 Cal.4th at p. 1213.) Courts also have held that where, as here, the basis for an attorney fee award is a prior appellate decision, the trial court's ruling on the request may be reviewed de novo "because we are 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; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427.)

We need not decide which standard of review applies in this case because, under either standard, we affirm the trial court's order granting the motion for attorney fees.

B. Statement of Reasons

The Board contends the fee award must be reversed because the trial court failed to adequately state its reasons for awarding attorney fees to VOS. We disagree. We indulge every presumption and draw all reasonable inferences to support the court's ruling. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.) The court reviewed the moving and opposing papers, and entertained oral argument, before granting the fee request. VOS's moving papers provide ample reasons supporting the order. The Board did not request a statement of decision and the trial court was not required to issue one in the absence of such a request. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.)

C. Application of Statutory Criteria

1. Enforcement of Important Public Right

Section 1021.5 permits an attorney fee award "'"in any action which has resulted in the enforcement of *an important right affecting the public interest*" regardless of its source--constitutional, statutory or other.' [Citation.]." (*Folson v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683.) In adopting section 1021.5, "the Legislature was focused on public interest litigation in the conventional sense: litigation designed to promote the public interest by enforcing laws that a governmental or private entity was violating, rather than private litigation that happened to establish an important precedent." (*Adoption of Joshua S.* (2008) 42 Cal.4th 945, 956; see *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 218; *Woodland Hills*, *supra*, 23 Cal.3d at p. 939 ["the public always has a significant interest in seeing that legal strictures are properly enforced"].)

The issue before us in *VOS I* was not whether the Board correctly decided that Del Rio was an employee. It was whether an employer may obtain immediate review in the trial court of the Board's finding that an applicant for UI benefits was an employee rather than an independent contractor. The Board took the position, as it has in other cases (e.g., *West Hollywood Community Health & Fitness Center v. California Unemployment Ins. Appeals Bd.* (2014) 232 Cal.App.4th 12 (*West Hollywood*)), that judicial review of the Board's determination is not available unless and until the employer has paid a tax or UI contribution. The rationale for its position is the "pay first, litigate later" doctrine, which prohibits an employer from filing an action to prevent or enjoin the collection of a tax or UI contribution. (See *First Aid Services of San Diego*, *Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th 1470, 1479-1482.) The doctrine requires the employer to first pay the assessed tax or contribution and then seek an administrative refund. (See Unemp. Ins. Code, § 1851; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213.)

The problem with this position, however, is that the Board's determination that an applicant is an employee does not result in the employer's payment of a tax or UI contribution. Instead, the employee's UI "benefits are paid from a pooled fund contributed to by all employers, and then 'charged' to the specific employer's UI 'reserve account' for the sole purpose of calculating the employer's future rate of contribution to the pooled fund." (*VOS I*, *supra*, B248108, slip opn. at p. 2.) VOS contended, and we agreed, that "the imposition of the 'erroneous' charge to its reserve account for Del Rio's benefits, with the attendant increase in its future contribution rate, constitute[d] a wrongful

deprivation of property, entitling it to immediate review of the Board's decision." (*Ibid.*)

In so ruling, we reconciled the trial court's application of the "pay now, litigate later" rule to postpone judicial review of the Board's employee status decision with the Supreme Court's holding in *Interstate Brands, supra,* 26 Cal.3d at page 776 that an employer has a fundamental vested right to be free of erroneous benefits charges to its UI reserve account. (*VOS I*, *supra*, B248108, slip opn. at p. 2.) We concluded that in the absence of evidence that judicial review of the Board's decision will prevent or enjoin the collection of a tax or UI contribution, VOS was entitled to immediate judicial review of the Board's decision. (*Id.* at pp. 10-11.)

It is apparent, therefore, that the Board's tactical decision to challenge immediate judicial review of its employee status determination was factually insupportable. At no point during the appellate process, which included three rounds of comprehensive briefing, was the Board able to articulate when VOS's petition would become ripe for review so that it could contest the benefits charges to its reserve account. Accordingly, we agree with the trial court that VOS's decision to appeal the ruling prohibiting judicial review vindicated an important public right, i.e., the right to obtain immediate judicial review of the Board's decision that an applicant is an employee rather than an independent contractor. Indeed, the Board acknowledged during briefing that VOS's "reserve account will be charged with benefits that may result in a higher future employer contribution rate." (*VOS I*, *supra*, B248108, slip op., at p. 10.) Our opinion in *VOS I* assured that the public interest would be served by the immediate judicial review of the administrative decision which

caused this specific harm. (See *Adoption of Joshua S.*, *supra*, 42 Cal.4th at p. 956-957; *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1259 (enforcing right to "swift judicial review of alleged violations of . . . basic procedural rights").)

2. Significant Public Benefit

The Board contends that even if *VOS I* vindicated an important public right, there is no evidence that it resulted in a significant public benefit. We disagree.

While it is true that *VOS I* is not a published opinion, "it is not necessary . . . that the [legal victory] be 'binding precedent' in order to confer a significant benefit on the general public." (*MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 10; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318.) In *Press*, for example, the defendant supermarket ordered the plaintiffs to stop gathering signatures for a ballot initiative at one of its stores. (*Press*, at p. 316.) The plaintiffs obtained a preliminary injunction restraining the supermarket from denying plaintiffs access to the premises. (*Ibid.*) When the plaintiffs sought attorney fees under section 1021.5, the supermarket argued that no significant benefit was conferred on the public because the trial court applied principles already established in an appellate case and because it extended only to patrons of the store who signed the petitions. (*Id.* at p. 318.) The Supreme Court rejected these contentions, observing that "plaintiffs were able to use the injunction obtained . . . to gain access to additional shopping centers throughout the state," but that "even if the impact of plaintiffs' lawsuit were limited to the access gained at the [one] store, the litigation would still have benefitted a 'large class of people.'" (*Id.* at pp. 320-321; accord *MBNA America*, at p. 10 ["Although the [applicable] order does

not formally enjoin appellant from enforcing the arbitration agreement against other customers, it should effectively deter appellant from doing so at least with regard to customers similarly situated to respondent"].)

In moving for attorney fees, counsel for VOS, William Hays Weissman, submitted a declaration stating that he "had previously litigated the very issue here -- whether the anti-injunction rules prevent an employer from seeking judicial review of a final Board decision involving [UI] benefits -- against the Board in other cases, but never reached a definitive ruling from the courts." In February 2010, Weissman published an article in which he stated:

"Recently, the [B]oard has taken the position that employers, but not claimants or the EDD, have no right to administrative review in UI benefit cases, particularly in benefits cases involving the status of workers as employees or independent contractors. That's because of the general prohibition against injunctive and declaratory relief in tax matters found both in the California Constitution and the Unemployment Insurance Code . . . . While UI contributions are taxes, taxes are not at issue in a UI benefit case, and thus the anti-injunction provisions do not apply.

"The [B]oard's change in policy appears to be the result of the court of appeal decision in *First Aid Services of San Diego, Inc. v. California Employment Development Dept.* [*supra*, 133 Cal.App.4th 1470]. That case involved a challenge to a worker's status in a UI benefit case, in which the court held that the suit was barred by the anti-injunction provisions. But *First Aid* is distinguishable from any normal UI benefit case that might arise and was likely wrongfully decided. Taxpayers faced with the

argument that their writ of administrative mandamus is not allowed should push back in court." (Weissman, *Employers' Rights in California UI Benefits Decisions,* State Tax Notes (Feb. 8, 2010), p. 443.) Weissman concluded that the Board should "recognize" that the doctrine of "pay now, litigate later" "is not a valid argument and not assert it." (*Id.* at p. 448.)

But the Board did continue to assert it. Indeed, VOS estimates that the Board has asserted the defense in most, if not all, employer writ proceedings involving UI reserve account charges since 2005. The Board asserted it in *VOS I* and also in *West Hollywood*, a published decision that issued nine days after *VOS I.* The Board in that case similarly determined that a massage therapist was an employee. (*West Hollywood*, *supra*, 232 Cal.App.4th at p. 16.) The employer challenged the decision through a writ petition. (*Ibid.*) The trial court granted the Board's motion to strike all allegations based on the "pay now, litigate later" doctrine. (*Ibid.*) The court of appeal reversed, holding that "there is no allegation or evidence subject to judicial notice that the action is one to restrain the collection of a tax allegedly due, or imminently due. Therefore, at this early stage in the proceedings, we must assume that no tax was assessed or was allegedly due. Therefore, [the employer] may seek judicial review of the Board's determination that [the massage therapist] was an employee, not an independent contractor." (*Id.* at p. 22.)

We conclude that both *VOS I* and *West Hollywood* significantly benefitted California employers by forcing the Board to reverse its unlawful policy of denying employers the right to immediate judicial review of UI benefits cases. The record reflects that the Board has successfully asserted the "pay now, litigate later" defense in a number of cases, and that *VOS I* and

West Hollywood, taken together, will deter the Board from doing so in the future. Because *VOS I* was instrumental in providing a significant benefit to similarly situated California employers, the second criterion under section 1021.5 was met. (*MBNA America Bank, N.A. v. Gorman*, *supra*, 147 Cal.App.4th Supp. at p. 10.)

3. Financial Burden

The necessity and financial burden component is satisfied when the attorney fees incurred are "out of proportion to [a party's] individual stake in the case." (*County of San Diego v. Lamb* (1998) 63 Cal.App.4th 845, 853; see *Millview County Water District v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 768-769.) As VOS points out, this case did not involve any actual out of pocket expense or recovery, because no actual tax or UI contribution was at issue. Rather, the benefit was to prevent an improper potential increase in VOS's future UI contribution rate. VOS claims that a savings of "$1,120.00 per year, is the maximum pecuniary benefit [it] could hope to receive as a result of this litigation."[4]

To obtain this relatively minor benefit, VOS had to appeal the trial court's ruling that the case was not ripe for review and then engage in multiple rounds of briefing in this court. VOS's counsel provided evidence that if he were billing the client on an hourly basis, VOS would have incurred fees totaling more than $120,000. Thus, VOS's individual stake in this litigation is demonstrably out of proportion to the attorney fees at issue. (*County of San Diego v. Lamb*, *supra*, 63 Cal.App.4th at p. 853.) VOS has established that an award of attorney fees under section 1021.5 is appropriate.

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[4] The record reflects that VOS's attorneys represented VOS for a flat $3,500 fee plus the recovery of attorney fees, if any.

DISPOSITION

The order awarding attorney fees is affirmed. VOS shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Vincent J. O'Neill, Judge
Superior Court County of Ventura

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