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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALEC ZUBARAU,

Plaintiff and Appellant,

v.

CITY OF PALMDALE,

Defendant and Respondent.

B236406

(Los Angeles County
Super. Ct. No. BS114330)

APPEAL from an order of the Superior Court of Los Angeles County, Ann I.
Jones, Judge. Reversed and remanded.

Leonard J. Shaffer for Plaintiff and Appellant.

Meyers, Nave, Riback, Silver & Wilson, Deborah J. Fox and Dawn A. McIntosh
for Defendant and Respondent.

INTRODUCTION

This case returns to us following our prior opinion in *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289 in which we affirmed and reversed parts of the trial court's judgment and remanded the matter to allow plaintiff and appellant Alec Zubarau to move for an award of attorney fees with respect to two of his three causes of action. On remand, the trial court denied Zubarau's motion for attorney fees pursuant to Code of Civil Procedure section 1021.5 (section 1021.5). Zubarau appeals the trial court's ruling. We reverse the trial court's ruling and remand the matter for the trial court to consider whether the claimed attorney fees were necessary and reasonable.

BACKGROUND¹

Zubarau obtained a permit from defendant and respondent City of Palmdale² to erect a radio tower antenna at his home. Thereafter, following complaints about that and another antenna on Zubarau's property, the City Planning Commission revoked Zubarau's permit. Zubarau appealed to the City Council. The City Council denied part of the appeal. (*Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th at pp. 294-298.)

Zubarau then filed a verified petition for writ of mandate and declaratory relief in the trial court challenging the City's order that he remove the antenna from his yard and a City zoning ordinance that regulated antennae. (*Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th at p. 298.) Zubarau's first cause of action sought a writ of mandate directing the City Council to grant his appeal and reinstate SFMM 05-139—the City's initial approval of his application to construct a tower antenna at his home—and permit number B05-00722 for the tower antenna. (*Ibid.*) Zubarau's second cause of action sought a writ

¹ We briefly summarize the factual and procedural background of the underlying action. The factual and procedural background for the underlying action prior to the attorney fees motion at issue here is stated fully in our opinion in *Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th 289.

² The City of Palmdale and its agencies are referred to as the City.

of mandate striking portions of the City's zoning ordinance, asserting that state and federal law preempted City Zoning Ordinance section 95.03 B.1, which limited the height of the active element of an antenna array to a maximum height of 30 feet, and City Zoning Ordinance section 95.03 B.3, which concerned the regulation of radio frequency interference. (*Ibid.*) Zubarau's third cause of action sought a declaration that parts of City Zoning Ordinance sections 95.03 A and 95.03 B were unenforceable as unconstitutionally vague. (*Ibid.*)

The trial court ruled in favor of Zubarau on his first cause of action, issuing Zubarau's requested writ of mandate. (*Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th at p. 299.) The trial court ruled against Zubarau on his second and third causes of action. (*Ibid.*) Thereafter, the trial court denied Zubarau's motion for attorney fees pursuant to section 1021.5 and Government Code section 800. (*Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th at p. 299.) Both parties appealed.

On appeal, we reversed the trial court's writ of mandate with respect to Zubarau's first cause of action which writ vacated the City's order to remove Zubarau's tower antenna. (*Zubarau v. City of Palmdale, supra*, 192 Cal.App.4th at p. 304.) We held that substantial evidence supported the City's decision to revoke the zoning clearance for the antenna and that the City reasonably accommodated Zubarau's ability to participate in amateur radio communications when it allowed him to keep a roof-mounted antenna. (*Ibid.*) We reversed the trial court's ruling on Zubarau's second cause of action, holding that the regulation of radio frequency interference was an area over which the Federal Communications Commission had exclusive jurisdiction. (*Id.* at p. 306.) We also reversed the trial court's ruling on Zubarau's third cause of action, holding that Zoning Ordinance section 95.03 B.1 was unenforceable because it was unconstitutionally vague. (*Id.* at pp. 310-311.) We affirmed the trial court's denial of Zubarau's request for attorney fees in connection with his first cause of action, and remanded the matter to the trial court to allow Zubarau to move for an award of attorney fees as to his second and third causes of action. (*Id.* at pp. 311-312.)

On remand, Zubarau moved for an award of \$69,500 in attorney fees under section 1021.5. The trial court found that Zubarau was a successful party as to the second and third causes of action; the case resulted in the enforcement of important public rights as it concerned the application of federal law in the context of local ordinances, not only with respect to radio frequency interference, but also “in other instances in which ordinances impinge on matters of interstate significance”; and the case conferred a significant benefit on the general public because it assured the entire amateur radio community that local governmental agencies would not regulate in areas concerning radio frequency interference and there was “no question that the interface between local ordinances affecting radio frequency interference will recur in other settings in the future.” The trial court denied the attorney fees motion, however, finding that Zubarau was not acting as a private attorney general in bringing his action, but rather to protect his personal interests. Thus, the trial court found the attorney fees Zubarau incurred in the litigation were not disproportionate to his personal stake in the action, and Zubarau actually incurred no attorney fees in the action because he did not pay his attorney any such fees.

DISCUSSION

Zubarau Was Entitled To Attorney Fees Under Section 1021.5

Zubarau contends that the trial court abused its discretion in denying his motion for attorney fees pursuant to section 1021.5. Zubarau was entitled to recover attorney fees in connection with his second and third causes of action.

A. Standard of Review

“We review an attorney fee award under section 1021.5 generally for abuse of discretion. Whether the statutory requirements have been satisfied so as to justify a fee award is a question committed to the discretion of the trial court, unless the question turns on statutory construction, which we review de novo. [Citations.]” (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 152.)

B. Application of Relevant Principles

Section 1021.5³ “codifies the ‘private attorney general’ doctrine under which attorney fees may be awarded to successful litigants. ‘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. [Citations.]’ [Citation.] Entitlement to fees under section 1021.5 requires a showing that the litigation: ‘(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter.’ [Citation.]” (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562, 568-569, fn. omitted.)

“[T]he purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms.” (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211.) “As the statute makes clear, subdivision (b) of section 1021.5 focuses not on plaintiffs’ abstract personal stake, but on the financial incentives and burdens related to bringing suit. Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action. [Citation.]” (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 & fn. 11.) “The literal language of section 1021.5 supports the *Press* court’s focus on *financial*

³ Section 1021.5 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, or of enforcement by one public entity against another public entity, 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.”

incentives and burdens. The statute requires a court to consider the ‘financial burden of private enforcement.’ As a logical matter, a strong nonfinancial motivation does not change or alleviate the ‘financial burden’ that a litigant bears. Only offsetting pecuniary gains can do that.” (*Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1217.)

“The method for weighing costs and benefits [of litigation] is illustrated in *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1 [232 Cal.Rptr. 697] (*Los Angeles Police Protective League*). ‘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. . . . Thus, if success would yield . . . the litigant group . . . an aggregate of \$10,000 but there is only a one-third chance of ultimate victory they won’t proceed—as a rational matter—unless their litigation costs are substantially less than \$3,000. [¶] ‘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, supra*, 188 Cal.App.3d at pp. 9–10.)” (*Conservatorship of Whitley, supra*, 50 Cal.4th at pp. 1215-1216; *Press v. Lucky Stores, Inc., supra*, 34 Cal.3d at p. 321 [when the plaintiff has no pecuniary interest in outcome of the litigation, the financial burden element has been established].)

1. Vindication of important public rights

The trial court correctly found that Zubarau's action resulted in the enforcement of important public rights. The trial court stated, "The issues of federal preemption and the unconstitutionality of vague ordinances are not minor matters of little public interest. The question of whether and how to apply federal law in the context of local ordinances is of great significance. . . . [T]he Court of Appeal's approach to the question of preemption informs cases not only in this narrow bandwidth, but also in other instances in which ordinances impinge on matter of interstate significance."

The City contends that Zubarau's victory did not concern an important public right because it still retains the power to regulate radio antennae if not in a manner that concerns radio frequency interference.⁴ Thus, the City argues, the required changes to its ordinance amounted to little more than technical corrections. Moreover, any vindication of constitutional principles regarding the doctrine of preemption, the City contends, was only in a broad and theoretical sense.

Zubarau's second cause of action did not contend that the City was not permitted to regulate radio antennae on any basis. Rather, it challenged the City's regulation of radio antennae on the ground that its ordinance impermissibly regulated radio antennae on a basis preempted by federal law. The significance of the City's impermissible regulation of an area preempted by federal law is not lessened because the City has other, permissible bases on which to regulate radio antennae. Because Zubarau's action resulted in the invalidation of the offending part of the City's ordinance, Zubarau's victory was not theoretical but practical.

2. Significant benefit for the general public or large class of persons

The trial court found that Zubarau's action conferred a significant benefit on the general public because it assured the entire amateur radio community that local

⁴ The City makes no contention that Zubarau's successful third cause of action that challenged as unconstitutionally vague parts of City Zoning Ordinance sections 95.03 A and 95.03 B did not result in the enforcement of an important public right.

governmental agencies will not regulate in areas concerning radio frequency interference and there was “no question that the interface between local ordinances affecting radio frequency interference will recur in other settings in the future.” In determining whether an action conferred a significant benefit on the general public or a large class of persons, the trial court may consider both persons who presently benefit from the action’s outcome and those who will benefit in the future. (*Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 551-552.) Here, present and future amateur radio operators—in Palmdale and other California cities—will benefit from Zubarau’s action, as it resulted in our decision in *Zubarau v. City of Palmdale*, *supra*, 192 Cal.App.4th 289 that local governments may not regulate radio antennae in a way that concerns radio frequency interference. Accordingly, Zubarau’s action conferred a significant benefit on the general public or a large class of persons.

3. Financial burden

At oral argument on Zubarau’s attorney fees motion, the trial court stated, “This looks at the disproportionality of costs vis-à-vis his personal interest or personal stake. He is an avid radio operator, this is his passion. He would have brought this suit under any theory you could have cooked up to bring it in under. That really is the question here. [¶] Do I need the promise of future fees to get him to sue to vindicate these interests, his own personal interests and the interests of the public? I don’t know. In this case, I think I have to.”

Zubarau’s counsel argued that Zubarau’s personal interest was in communicating with his homeland of Belarus and that his investment in the tower antenna was \$5,000 or \$6,000. Counsel posed the question to the trial court whether Zubarau would have pursued the action, given his interest in amateur radio communication, if he knew that he would incur nearly \$70,000 in attorney fees. The trial court responded that it believed Zubarau would have pursued the matter “to the ends of the Earth.”

Following oral argument, the trial court issued a written order in which it denied Zubarau’s attorney fees motion for two reasons: (1) Zubarau brought the action to

protect his personal interest in pursuing his amateur radio hobby and not as a private attorney general, and (2) Zubarau did not personally incur attorney fees. The trial court's order stated that Zubarau's personal "interests in having a permitted antenna in pursuit of his amateur radio hobby . . . provided him with sufficient motivation to prosecute this matter even without attorneys' fees. [¶] In this case, Zubarau was not acting as a private attorney general. He was, instead, acting to protect his personal interests. Therefore, fees incurred by him in the litigation are not disproportionate to his personal stake here. Also, the financial burden on Petitioner was non-existent. . . . Petitioner did not incur any legal fees in defending this action." (Footnote omitted.)

In denying Zubarau's attorney fees motion because the financial cost of the litigation far outweighed any financial stake Zubarau had in the litigation, the trial court erred. (*Conservatorship of Whitley, supra*, 50 Cal.4th at pp. 1215-1216; *Press v. Lucky Stores, Inc., supra*, 34 Cal.3d at p. 321.) The asserted cost of the litigation was \$69,500. Zubarau arguably had no or little financial interest in the outcome of the litigation—he brought the action to preserve his right to operate a radio antenna for which the City had granted a permit. At most, Zubarau's financial interest in the litigation was the \$5,000 or \$6,000 that Zubarau's attorney estimated was the cost of the antenna.

That Zubarau may have acted out of self-interest and may not have been motivated by "altruistic or lofty motives," contrary to the trial court's ruling, does not disqualify him from an award of attorney fees. (*Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1211; *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1320, citing *Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1211 ["a litigant's personal nonpecuniary interests may not be used to disqualify the litigant from obtaining fees under section 1021.5"].) The financial burden aspect of section 1021.5 does not focus on a plaintiff's personal interest in litigation, but on the financial incentives and burdens to pursuing the litigation. (*Press v. Lucky Stores, Inc., supra*, 34 Cal.3d at p. 321 & fn. 11; *Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1211.) As discussed above, Zubarau's litigation vindicated important public interests and conferred a significant benefit on the general public or large class of persons. That Zubarau also had a strong

nonpecuniary interest in the litigation—i.e., to keep his radio antenna—did not change or alleviate the financial cost of such litigation. (*Conservatorship of Whitley, supra*, 50 Cal.4th at p. 1217.) Only an award of attorney fees can alleviate that cost. (*Ibid.*) The monetary value of the case was small; Zubarau had negligible pecuniary interest in the outcome of the case; and the value of the decision is such that it is desirable to offer a bounty. Thus, in denying Zubarau’s attorney fees motion, the trial court erred in focusing on Zubarau’s personal interest in the litigation and not on the financial incentives and burdens to pursuing the litigation.

Zubarau was not disqualified from an award of attorney fees under section 1021.5 because he was not personally liable for the attorney fees. (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 370-371.) In *Lolley v. Campbell*, the Supreme Court reversed a Court of Appeal’s holding that an employee who was represented without charge by the Labor Commissioner was ineligible for an award of attorney fees under Labor Code section 98.2 because the employee had not “incurred” any attorney fees. (*Ibid.*) The court stated, “‘A party’s entitlement to fees is not affected by the fact that the attorneys for whom fees are being claimed were funded by governmental or charitable sources or agreed to represent the party without charge.’ (Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 1999) § 3.3, p. 48 (rev. 11/01).)” (*Id.* at p. 373.) The court observed, “Our appellate courts have repeatedly affirmed awards of attorney fees under various fee-shifting provisions for legal services provided at no personal expense to the client. Thus, *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 681 [186 Cal.Rptr. 589, 652 P.2d 437], rejected the contention that statutory fees under Code of Civil Procedure section 1021.5 could not be awarded to pay for legal services provided to the plaintiffs because they ‘incurred no personal liability for the services of their attorneys, several of whom were employed by agencies funded primarily with public monies.’” (*Id.* at p. 374.) Accordingly, the trial court erred in denying Zubarau’s attorney fees motion on the ground that Zubarau had not personally incurred any attorney fees.

Because Zubarau satisfied the requirements of section 1021.5, he was entitled to recover his necessary and reasonable attorney fees with respect to his second and third

causes of action. As the trial court ruled that Zubarau was not entitled to any award of attorney fees, it did not reach the issue of to what extent the attorney fees claimed were necessary and reasonable. We remand the matter for the trial court to make those determinations.

DISPOSITION

The order denying Zubarau attorney fees is reversed. The matter is remanded to the trial court to determine to what extent the attorney fees requested were necessary and reasonable. Zubarau is awarded his costs on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.