Filed 1/28/26 Howard v. The Roman Catholic Archbishop of L.A. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM HOWARD et al., Plaintiffs and Appellants, v. THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Defendant and Appellant.	B333546 (Los Angeles County Super. Ct. No. BC655179)

APPEALS from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

The Spencer Law Firm and Jeffrey P. Spencer; Lakeshore Law Center, Jeffrey N. Wilens, and Macy Wilens; Law Offices of Scott E. Schutzman and Scott E. Schutzman for Plaintiffs and Appellants.

Clyde and Co, Alison K. Beanum, Douglas J. Collodel, and Alyssa Telles Wyatt for Defendant and Appellant.

Plaintiffs William Howard (William),[1] Jodi Howard (Jodi), and Martha Hernandez (Hernandez) (collectively, plaintiffs) filed a class action complaint alleging defendant The Roman Catholic Archbishop of Los Angeles (defendant) violated the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) by charging deceptive fees in burial contracts. Following a bench trial, the trial court determined the contracts were deceptive but plaintiffs failed to prove they were entitled to restitution. Litigation over attorney fees ensued. The court found defendant was the prevailing party but still made an attorney fees award for plaintiffs under a public benefit catalyst theory because defendant had removed the deceptive language from its contracts. In these cross-appeals from the trial court's ruling, we chiefly consider whether it was error to deny plaintiffs restitution and whether the trial court's decision to award attorney fees under a catalyst theory was an abuse of discretion.

I. BACKGROUND

A. Defendant's Burial Contracts and Funding for Cemetery Maintenance

Defendant operates 11 cemeteries and mortuaries. As a religious corporation, it is exempt from statutes requiring cemeteries to maintain endowments for prospective care and maintenance. (Health & Saf. Code, §§ 8250, subd. (a), 8726.) Nonetheless, between 1992 and 2020, defendant used form burial contracts that characterized portions of the total contract price as

---

[1] William died during the litigation and was replaced by Steven P. Howard, acting as his personal representative and successor in interest.

relating to "Fees, Care & Maintenance" or simply "Care & Maintenance." According to Brian McMahon (McMahon), an employee of defendant since 1991 who currently serves as Director of Community Outreach in the Catholic Cemeteries and Mortuaries Department, defendant eliminated this language from its burial contracts in March 2020 after this lawsuit "brought to [defendant's] attention . . . that it was an issue."

Defendant's typical form contract from the relevant period when the maintenance language was still being used included a table with columns labeled, among other things, "Item Description," "Item Price," "Sales Tax," "Fees, Care & Maintenance," and "Total." Handwritten entries in the "Item Description" column vary. Taking the contract that plaintiff Hernandez signed in 2006 to bury her father as an example, there are rows with descriptions including "Grave," "Interment Fee," "Vault," and "Flower Vase." The Item Price for the Grave is $1,912.50, plus Fees, Care & Maintenance of $337.50, for a Total of $2,250. $337.50 is 15 percent of $2,250. According to McMahon, defendant generally "br[oke] out" 15 percent of the total price of a grave in the Fees, Care & Maintenance column "for accounting purposes." This case primarily concerns that 15 percent, which we will refer to as the care and maintenance charge.

According to Margaret Graf (Graf), defendant's General Counsel since 2003, funds attributable to the 15 percent care and maintenance charge were moved from defendant's general operating fund to an account designated the "Care Fund" once a burial contract was paid in full. Defendant's burial contracts did not mention the Care Fund or any other endowment. According to McMahon, defendant's sales representatives were trained to

respond to any questions regarding future care of the cemeteries in general terms, telling customers "the Archdiocese is committed to the care of the cemeteries."

Defendant's contributions to the Care Fund were voluntary. According to Graf, defendant established the Care Fund "to set aside funds for the future when the cemeteries would no longer be accepting patrons, when they would be full, to be sure that there would be funding to take care of the maintenance of the cemeteries . . . ." To this end, defendant paid for current maintenance through its general operating funds, as opposed to the Care Fund. Nonetheless, defendant did not regard the Care Fund as restricted in any way, and it withdrew $80 million in 2007 to resolve sexual abuse claims. This withdrawal left the Care Fund with a balance of approximately $3.5 million, but its balance at the time of trial was approximately $140 million.

Charles Lenz (Lenz), an actuary engaged to analyze the Care Fund in 2007 and several times since then, testified he never determined the Care Fund was inadequate to cover future maintenance costs. He further testified defendant would be able to cover future maintenance through its 15 percent contributions even if the Care Fund had no assets today, provided it made no withdrawals until the cemeteries were full.

B. Complaint, Class Certification, and Other Pre-Trial Matters

Plaintiffs William and Jodi filed their putative class action complaint in March 2017 alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, fraud by concealment, violation of the UCL, and declaratory relief/imposition of constructive trust. The original

complaint generally alleged defendant failed to maintain its cemeteries, including by failing to use "15% of the amount[ ] paid for burials" that "was paid into accounts for the general care and maintenance of the cemeteries." In a first amended complaint filed a few months later, William and Jodi dropped the UCL cause of action but continued to seek both monetary and injunctive relief. In their second amended complaint filed in February 2019, plaintiffs once again asserted a UCL cause of action and alleged defendant improperly used money from the Care Fund to settle sexual abuse claims.

In January 2020, the trial court certified a class as to the UCL cause of action only. The parameters of the class as certified were "[a]ll persons and their successors in interest who paid money for interment services pursuant to the SUBJECT CONTRACTS, which is a defined term. [The term 'SUBJECT CONTRACTS' is defined as any agreement for interment services at [defendant's] cemeteries that includes a discrete charge for 'care and maintenance.']" (Brackets in original.) William was initially appointed class representative, but Hernandez was appointed class representative after he died. A couple months after this class was certified, defendant stopped using burial contracts that included a column specifying a charge for care and maintenance of their cemeteries.

After class certification, the trial court granted plaintiffs' motion for leave to file a third amended complaint, which is the operative complaint. Among other things, the operative complaint focused the UCL cause of action on allegations that defendant fraudulently represented the care and maintenance charges would be used strictly for the perpetual care and maintenance of the cemeteries. The operative complaint also

included individual causes of action for breach of contract, breach of the covenant of good faith and fair dealing, negligence, and declaratory relief/imposition of constructive trust.

C. Trial

Trial was bifurcated to permit the class-certified and individual claims to proceed separately. The trial court held a bench trial on the class-certified UCL claim first, in August 2022.

Plaintiffs presented testimony by purchasers of burial contracts, including Hernandez, Michael Oppelt (Oppelt), Gregory Kellingsworth (Kellingsworth), Deborah Ann DeGrazia, Carol Ramos, Luz Solis, Ida Manno, Yvonne Luna, Maureen Carrell, and William (whose deposition testimony was read into the record). Nearly all testified they would not have paid care and maintenance charges if they had known defendant was not required to spend these funds on cemetery maintenance. Some of the same witnesses, however, were reluctant to testify they had lost money. Hernandez testified she did not "technically" lose money, but later clarified she believed she did not get what she paid for with respect to care and maintenance. Oppelt testified it was "too soon to say" whether he lost money. Kellingsworth testified he did not "think [he] lost any money." Some of the witnesses were also disappointed by maintenance standards at the cemeteries, but Hernandez acknowledged defendant did perform some maintenance.

In addition to the testimony of McMahon, Graf, and Lenz, which we have already mentioned, defendant presented testimony by purchasers of burial contracts who were satisfied with defendant's maintenance of its cemeteries and did not feel they were misled by the care and maintenance charges.

Defendant also presented testimony by Dr. Jon Krosnick, who designed and conducted a survey assessing more than 1,600 randomly selected American adults' understanding of the burial contracts. Dr. Krosnick reported 88.51 percent of respondents believed at least some of the money charged as "Fees, Care & Maintenance" would be used for cemetery maintenance, 27.64 percent of these respondents understood the contracts to promise these funds would be segregated in an account to be spent only on maintenance, and 72.03 percent of the respondents who held these two beliefs also believed it would not be acceptable for any extra funds in this account to be used for other purposes.

D. The Trial Court's Statement of Decision

Following the trial of the UCL cause of action, the trial court ruled via a statement of decision.

The trial court found that, "[b]ased on the layout and text of the burial contracts, a reasonable consumer who read these contracts would likely believe that the [care and maintenance] charges are identified in a separate column to inform the consumer that these amounts will be spent for the dedicated purpose of care and maintenance of cemetery plots." Nothing in the contracts indicated these funds could be used for other purposes, but defendant placed the funds into the unrestricted Care Fund, which "was a reserve account item that was not used for care and maintenance of the cemeteries and could be spent in any manner [d]efendant chose," including the withdrawal of $80 million in 2007 to resolve sexual abuse claims. The court found defendant never actually spent money charged for care and maintenance on cemetery maintenance, but these funds were not needed for current maintenance, which was paid for from the

general operating fund. The court further found anticipated contributions to the Care Fund would be adequate to cover future maintenance. The trial court determined the care and maintenance language in the contracts was "deceptive because it was likely to cause members of the public to believe the charge was for the care and maintenance of the cemeteries and their burial sites, when it was not needed for or used for that purpose." Moreover, members of the public were not informed the funds were "not required to be spent on care and maintenance of the cemeteries but w[ere] and could be spent on anything the [d]efendant chose."

Notwithstanding its determination that the burial contracts were deceptive, the trial court concluded "[p]laintiffs did not present evidence that the Class suffered any harm . . . ." Hernandez and other class members testified they did not have any evidence that they lost money as a result of the burial contracts. And plaintiffs "did not establish, by substantial evidence, that they are entitled to restitution because they did not offer evidence of any difference between what any class member paid and the value of what any class member received." Moreover, the court found there was no need for it to order injunctive relief because defendant had (in 2020) already "changed its burial contracts and policies; has ceased listing any separate charges on burial contracts for [care and maintenance]; is not using the money in the Care Fund for matters other than care and maintenance of cemetery plots; and future care and maintenance is fully funded . . . ."

Although the trial court determined no injunctive or restitutionary relief was warranted under the UCL, the trial court entered a judgment "in favor of . . . Hernandez and the

Class against [d]efendant" because it found defendant's burial contracts were deceptive and violated the UCL. The court believed "the class action claim for violation of the [UCL] against [d]efendant . . . benefited the public by causing [d]efendant to eliminate the deceptive . . . charge from its burial contracts," and the judgment provided plaintiffs would be entitled to attorney fees under a catalyst theory.

E. Defendant's Motion to Vacate the Judgment

Defendant moved for a new trial and to vacate the judgment. Among other things, defendant argued in both motions that the trial court erred in entering judgment in favor of plaintiffs because, having suffered no harm, they lacked standing under the UCL. Further, defendant argued plaintiffs were not entitled to attorney fees under a catalyst theory.

The trial court granted defendant's motion to vacate the judgment and expressed agreement with the proposition that defendant was the prevailing party because plaintiffs did not have standing under the UCL. The court ordered defendant to prepare a modified judgment indicating "plaintiff is not the prevailing party" but without prejudice to plaintiffs filing a motion for attorney fees.[2]

F. Plaintiffs' Motion for Attorney Fees

Plaintiffs requested a total of $2,649,141 in attorney fees. Defendant opposed the motion, arguing plaintiffs had not made the necessary showing to merit an award of public interest

---

[2] The trial court denied defendant's motion for a new trial as moot.

litigation attorney fees under Code of Civil Procedure section 1021.5 and, in any case, they claimed fees that were unrelated to work on the UCL cause of action and post-dated defendant's removal of the care and maintenance language from its burial contract.[3] With respect to plaintiffs' eligibility for attorney fees, defendant argued the catalyst theory did not apply because the UCL claim was litigated to a final judgment, plaintiffs were not successful by any measure (including because they lacked standing and failed to achieve their primary goal in the action), and because they made no prelitigation demand.

The trial court disagreed and awarded plaintiffs $1.5 million in attorney fees. The court reasoned it was indisputable—based on the chronology, discovery responses, and trial testimony—that defendant revised its burial contract in response to the litigation. The court further found that "end[ing] this misleading practice . . . was the primary purpose for the lawsuit," it conferred "a significant benefit" on "the public and the class," and its finding that the burial contracts were deceptive "established that the litigation had some merit." The court

---

[3] Code of Civil Procedure 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 . . . [and] 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 . . . ."

Undesignated statutory references that follow are to the Code of Civil Procedure.

excused plaintiffs' lack of a pre-litigation demand to defendant to modify its burial contracts because it "would have been futile." The court found "defendant altered its conduct only after several years of unwavering litigation" and defendant "[did] not claim that it would have changed its contracts . . . had it received any such pre-litigation demand."

G. Dismissal of Individual Claims and Entry of Judgment

The trial court entered a revised judgment in October 2023. The judgment was "in favor of [d]efendant" but included the $1.5 million award of attorney fees to plaintiffs. The judgment states "[a]n award of attorney[ ] fees through trial is appropriate as obtaining the findings at trial and [j]udg[ ]ment that the fees were deceptive for purposes of the UCL will deter . . . [d]efendant from reinstating the deceptive contract terms and increase[ ] the odds that the public will continue to benefit from the change into the future . . . ."

The judgment provided each side was to bear its own costs in the interest of justice. The parties then settled plaintiffs' remaining individual claims.

II. DISCUSSION

Both sides appeal from the trial court's ruling. Plaintiffs challenge the trial court's denial of restitution. Defendant challenges the award of attorney fees to plaintiffs and the trial court's failure to award it costs as the prevailing party. We hold neither appeal has merit.

Any tension between the trial court's rulings that the burial contracts were deceptive but restitution was not warranted

is resolved by the court's finding that plaintiffs presented insufficient evidence concerning the difference in value between what class members paid for (essentially, burial contracts with funds earmarked for long-term maintenance) and what they received (burial contracts with no formal provision for long-term maintenance). Plaintiffs' position on appeal that *every* dollar characterized as going toward care and maintenance represents an "overcharge" for which they are entitled to restitution lacks evidentiary support, and it was accordingly within the trial court's discretion to deny restitution.

Defendant's various challenges to the award of attorney fees to plaintiffs are equally unavailing. (Defendant does not challenge the *amount* of the fees award.) A section 1021.5 catalyst award of attorney fees is not precluded, as defendant argues, because the UCL cause of action was litigated to a final judgment. The trial court's finding that plaintiffs paid money pursuant to deceptive burial contracts establishes plaintiffs had UCL standing notwithstanding the trial court's subsequent contrary conclusion that rests on its conflation of the concept of standing and the requirements to obtain a restitutionary remedy. The trial court also did not err in determining the prerequisites of a catalyst attorney fees award were met: plaintiffs' lawsuit benefited a large class of persons because it prompted defendant to modify its deceptive burial contracts, plaintiffs achieved their primary objective in the litigation by establishing defendant's burial contracts were deceptive, and plaintiffs' failure to make a pre-litigation settlement demand is excused because it would have been futile.

Defendant additionally argues it should have been awarded costs under section 1032, but the trial court's ruling that each

side would bear its own costs was not an abuse of discretion in light of its finding that the burial contracts were deceptive.

A. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs Restitution

1. Overview of standing and remedies under the UCL

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' ([Bus. & Prof. Code,] § 17200.) Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' [Citations.] In service of that purpose, the Legislature framed the UCL's substantive provisions in '"broad, sweeping language"' [citations] and provided 'courts with broad equitable powers to remedy violations' [citation]." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.)

Private standing to prosecute a claim under the UCL is limited to those who have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204; *Kwikset*, *supra*, 51 Cal.4th at 320-321.) "[P]roof of injury in fact will in many instances overlap with proof of the [other] element of standing, to have 'lost money or property.' [Citations.] Accordingly, litigants and courts may profitably consider whether injury in fact has been shown in conjunction with the allegations and proof of having lost money or property . . . ." (*Kwikset*, *supra*, at 323.) Among other things, a plaintiff may demonstrate economic injury resulting from unfair competition by showing they "surrender[ed] in a transaction

more, or acquire[d] in a transaction less, than he or she otherwise would have . . . ." (*Ibid.*)

Remedies available in private UCL actions are generally limited to injunctive relief and restitution. (Bus. & Prof. Code, § 17203; *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 790.) "'[T]he equitable remedies of the UCL are subject to the broad discretion of the trial court. [Citation.] The UCL does not require "restitutionary or injunctive relief when an unfair business practice has been shown. Rather, [Business and Professions Code section 17203] provides that the court 'may make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property."'" [Citation.]" (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 790.) "The amount of restitution ordered under the UCL 'must be supported by substantial evidence. Although a trial court has broad discretion under [the UCL] to grant equitable relief, that discretion is not "unlimited" [citation], and does not extend beyond the . . . parties' evidentiary showing.' [Citation.]" (*Id.* at 792.)

2. Analysis

Defendant suggests we can dispose of plaintiffs' challenge to the trial court's denial of restitution based solely on the trial court's determination that plaintiffs lacked standing. In making this finding, however, the trial court appears to have conflated standing and eligibility for restitution. (*Kwikset*, *supra*, 51 Cal.4th at 335-336 ["the standards for establishing standing . . . and eligibility for restitution . . . are wholly distinct"]; *id.* at 330, fn. 15 ["Because the issue here is only the

threshold matter of standing, not whether and how much to award in restitution, a specific measure of the amount of this loss is not required"]; *California Medical Assn. v. Aetna Health of California, Inc.* (2023) 14 Cal.5th 1075, 1088 [where "the issue is one of standing, rather than the amount of restitution due, 'a specific measure of the amount of this loss is not required. It suffices that a plaintiff can allege an "'identifiable trifle'" [citation] of economic injury"']; *Clayworth*, *supra*, 49 Cal.4th at 789.) Having found that the burial contracts were deceptive—i.e., that plaintiffs paid for a maintenance endowment that defendant did not maintain—the trial court necessarily found plaintiffs lost money or property in these transactions. (*Kwikset*, *supra*, at 322-323.)

It was nevertheless within the trial court's discretion to deny plaintiffs restitution. There is nothing inconsistent in the trial court's implied findings that plaintiffs paid for a dedicated maintenance fund—which they valued because cemeteries eventually stop generating revenue through sales—but did not present adequate evidence of the specific amount they paid pursuant to the deceptive charge.[4] (See *In re Vioxx Class Cases*

---

[4] Plaintiffs discuss an "alternative" formula for restitution under the UCL: the difference between what the consumer paid and "what a purchaser would have paid at the time of purchase had the purchaser received all [relevant] information." (*Pulaski & Middleman, LLC v. Google, Inc.* (9th Cir. 2015) 802 F.3d 979, 989.) Framing the issue in this manner still does not assist plaintiffs because there was no evidence at trial concerning what a reasonable consumer would have paid for the burial contracts without the "fees, care & maintenance" column. Plaintiffs' assertion that a reasonable consumer would have paid no more

(2009) 180 Cal.App.4th 116, 131 ["The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution. [Citation.] In order to recover under this measure, there must be evidence of the actual value of what the plaintiff received"].) Plaintiffs did not produce consumer survey data or even take the simpler step of comparing price totals in defendant's burial contracts before and after March 2020.

Class member testimony that they would not have paid for care and maintenance if they had known defendant was not required to spend these funds on cemetery maintenance does not, as plaintiffs believe, establish the amount of money lost. There is no evidence the amount consumers paid for care and maintenance is equivalent to the value of having those specific funds set aside for care and maintenance. If, for instance, defendant's customers continue to pay a similar total price under the revised burial contracts with no suggestion that 15 percent will be set aside for care and maintenance, class members did not pay a 15 percent premium for that assurance.

Plaintiffs, however, now assert they are entitled to restitution under another, different theory: that they lost every dollar paid for care and maintenance that was not set aside for care and maintenance. In plaintiffs' words, the care and maintenance charge was "simply a deceptive overcharge resulting in extra profit." This argument, however, rests on an assumption that defendant failed to maintain the cemeteries or to make provision for their future maintenance through the total

---

than the total contract price minus the amount of "fees, care & maintenance" has no basis in the record.

price of its burial contracts. The trial court found the opposite was true. The trial court reasoned the care and maintenance charges were deceptive *not* because defendant failed to provide care and maintenance, but because specific funds were not *reserved* for care and maintenance. When the trial court reasoned plaintiffs "did not offer evidence of any difference between what any class member paid and the value of what any class member received," it correctly focused on the potential value that class members assigned to having funds earmarked for care and maintenance.

The authority plaintiffs cite to argue the contrary, i.e., to argue they are entitled to restitution of every dollar paid toward care and maintenance as an "overcharge," do not support that proposition. In *Sepanossian v. National Ready Mixed Concrete Co.* (2023) 97 Cal.App.5th 192, for instance, the defendant concrete company charged "energy" and "environmental" fees "separate from the set rate" that allegedly bore "no relationship" to its costs. (*Id.* at 197.) In reversing a judgment on the pleadings on the plaintiffs' UCL cause of action, the Court of Appeal did not rule on the amount of restitution to which the plaintiffs might ultimately be entitled. (*Id.* at 208.) In *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796 (another judgment on the pleadings case), the Court of Appeal held the plaintiffs alleged sufficient facts to state a cause of action under the UCL based on several theories, including that the defendant truck rental company's refueling fee constituted a fraudulent business practice "because the fuel is not in fact replaced and this fact is not disclosed to the consumer." (*Id.* at 806.) Crucially, however, in rejecting the defendant's arguments that "there is a clear connection between the fee and whether the

customer . . . replace[d] fuel provided by [the defendant]" and it was "no concern" to customers what defendant did with refueling fees, the Court of Appeal determined there was "no connection between the imposition of a fee or cost and whether the customer has in fact refueled the vehicle" because the alleged use of fuel gauge readings to assess the fee was unreliable. (*Id.* at 805-807.) The Court of Appeal did not hold that every invoice line-item must precisely reflect a business's actual costs. Finally, in *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 (a demurrer case), the Court of Appeal held the plaintiffs stated a cause of action under the UCL based on allegations that certain mortgage closing costs exceeded the defendant lender's actual costs because "[l]ooking at [the relevant] documents, [the] plaintiffs reasonably would conclude that the fees charged were the costs [the defendant] incurred in providing these services." (*Id.* at 1472.) The circumstances here are different because the lender in *McKell* allegedly disclosed its purported costs whereas defendant made no representation that it was providing care and maintenance at cost.

With these cases properly set aside, we end where we began: the trial court did not abuse its discretion in denying plaintiffs restitution because plaintiffs did not present evidence establishing the amount they paid for the (false) assurance that a specific portion of the total contract price would be set aside for care and maintenance.

B. The Trial Court Did Not Abuse its Discretion in Awarding Plaintiffs Attorney Fees

1. Overview of section 1021.5 and the catalyst theory

"An important exception to the American rule that litigants are to bear their own attorney fees is found in section 1021.5," which "'codifi[es] . . . the private attorney general doctrine of attorney fees developed in prior judicial decisions. . . . [Citation.]'" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.) As we have already described in the margin, the statute allows a court to award attorney fees to a successful party against one or more opposing parties in an action enforcing an important right affecting the public interest if a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons and the necessity and financial burden of private enforcement are such as to make the award appropriate. (§ 1021.5.)

The "'fundamental objective'" of section 1021.5 "'is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases.' [Citation.]" (*Graham*, *supra*, 34 Cal.4th at 565.) "In order to effectuate that policy, [our Supreme Court] ha[s] taken a broad, pragmatic view of what constitutes a 'successful party.'" (*Ibid.*) A favorable final judgment is not necessary and, under the catalyst theory, "courts look to the practical impact of the public interest litigation in order to determine whether the party was successful, and therefore potentially eligible for attorney fees." (*Id.* at 565-566.) In other words, the catalyst theory is rooted in a construction of the phrase "successful party" in section 1021.5 to mean "the party to litigation that achieves its objectives," which

may be "by means of [the] defendant's 'voluntary' change in conduct in response to the litigation." (*Id.* at 571-572.)

Our Supreme Court has set forth several "sensible limitations" on the catalyst theory intended to discourage extortionate lawsuits "without putting a damper on lawsuits that genuinely provide a public benefit." (*Graham*, *supra*, 34 Cal.4th at 575.) "In order to obtain attorney fees without . . . a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . ; and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.)

We review the trial court's award of attorney fees under section 1021.5 for abuse of discretion. (*Graham*, *supra*, 34 Cal.4th at 578.)

2. Analysis

Defendant contends the trial court abused its discretion in awarding plaintiffs attorney fees because (1) the catalyst theory does not apply when a case has been litigated to a final judgment; (2) plaintiffs cannot be deemed a successful party in light of the trial court's finding that they lacked standing; (3) plaintiffs did not confer a significant benefit on the general public or a large class of persons; (4) plaintiffs' primary objective in the litigation was to recover money paid by class members, not to change defendant's burial contracts; and (5) plaintiffs' failure to make a

pre-litigation settlement demand is not excused by futility. All of these arguments are unconvincing, for reasons we now explain.

a. applicability of the catalyst theory after trial

In *Skaff v. Rio Nido Roadhouse* (2020) 55 Cal.App.5th 522, the Court of Appeal remarked it was "not convinced that the catalyst theory should . . . apply" because it "is generally not invoked in cases where the merits have been fully litigated to a final judgment." (*Skaff v. Rio Nido Roadhouse* (2020) 55 Cal.App.5th 522, 540.) The Court of Appeal reasoned awarding attorney fees under a catalyst theory in these circumstances would not promote judicial efficiency. (*Id.* at 540; see also *Graham*, *supra*, 34 Cal.4th at 577 ["the abolition of the catalyst theory" would "giv[e] plaintiffs the incentive to prolong the litigation until a judicial determination is made"].) The *Skaff* court's observation, however, was not a holding; the court instead reversed the fees award because the plaintiff's lawsuit had no merit.[5] (*Skaff*, *supra*, at 542.)

Even if the concerns regarding judicial efficiency highlighted in *Skaff* may find purchase in some cases, they do not apply here. The litigation continued after defendant revised its burial contracts because plaintiffs sought additional relief in the

---

[5] Similarly, in *Council for Education & Research on Toxics v. Starbucks Corp.* (2022) 84 Cal.App.5th 879, the Court of Appeal cited *Skaff* in "question[ing] whether [the plaintiff] could be deemed a successful party under the catalyst theory after litigating and losing its case on the merits," but declined to decide the issue because it concluded the plaintiff conferred no significant benefit on the public. (*Id.* at 901, fn. 15.)

form of restitution for class members—not because they believed continued litigation was necessary to recover attorney fees. Moreover, conditioning the availability of catalyst attorney fees on plaintiffs settling for the minimum concession needed to trigger those fees would needlessly place the interests of class counsel in conflict with those of class members.

b. the trial court's "standing" observations are not dispositive

As we have already mentioned, the trial court's conclusion that plaintiffs lacked standing under the UCL rests on the mistaken view that because they did not establish they were entitled to restitution, they also lacked standing. (*Kwikset*, *supra*, 51 Cal.4th at 335.) And defendant's attempt to cast this conclusion as a more general determination that the UCL claim lacked merit is belied by the finding that the burial contracts were deceptive. The latter finding demonstrates plaintiffs' UCL cause of action "achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . ." (*Tipton-Whittingham*, *supra*, 34 Cal.4th at 608.)

c. plaintiffs' action conferred a significant benefit on a large class of persons

Defendant's argument that plaintiffs did not confer a significant benefit on the general public or a large class of persons reduces to an argument that the pre-2020 burial contracts were not deceptive.[6] Defendant argues purchasers of

---

[6] To the extent this argument includes a suggestion (not raised elsewhere in defendant's briefs) that plaintiffs' action was not the catalyst for the removal of the care and maintenance

burial contracts received the care and maintenance for which they paid, they did not know about the Care Fund, and some class members would have purchased burial contracts regardless of their interpretation of the care and maintenance charge.

Defendant's arguments do not address the trial court's determination that the pre-2020 contract was deceptive insofar as purchasers were likely to believe money paid for care and maintenance would be set aside for those purposes—and impliedly, that they paid for this assurance. Several class members testified they interpreted the burial contracts in this manner. Dr. Krosnick's survey confirmed an overwhelming majority of people viewing the contracts believed some portion of these funds would be used for care and maintenance, and a substantial minority of this population believed the funds would be placed in an account dedicated to that purpose. Substantial evidence supports the trial court's determination that consumers were likely to be deceived, regardless of the actual maintenance defendant performed and other considerations motivating consumers to choose defendant's cemeteries.

There is therefore no disputing defendant's removal of deceptive terms from its burial contracts benefited consumers. The scale of defendant's cemetery operations—11 cemeteries, capable of generating tens of millions of dollars of care and maintenance fees—demonstrates this benefit extends to a large class of persons.[7]

---

charge from defendant's burial contracts, it is refuted by McMahon's candid testimony to the contrary.

[7] In a joint status report filed in 2021, defendant indicated the class included more than 100,000 individuals. In its 2022

d. the UCL classwide claim catalyzed obtaining the primary relief sought

"In cases where judicial relief was obtained, it is sufficient [for a fee award under section 1021.5] if the plaintiff achieved partial success or succeeded on any significant issue in the litigation which achieved some of the benefit the plaintiff sought in bringing suit. [Citation.] However, in catalyst cases, the defendant must have provided the plaintiff with the *primary* relief sought. [Citation.]" (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 878.) In analyzing this issue, "courts generally must conduct the following inquiry: (1) identify the plaintiff's primary litigation objectives, (2) compare the results obtained to determine whether the plaintiff in fact achieved those objectives, and, if so, (3) decide whether the lawsuit was a material factor or contributed in a significant way to those results." (*Dept. of Water Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556, 572; accord *City of San Clemente v. Dept. of Transportation* (2023) 92 Cal.App.5th 1131, 1149.)

Defendant contends plaintiffs' primary objective in this litigation was not the elimination of care and maintenance charges from defendant's burial contracts, but the recovery of money class members paid for care and maintenance. Defendant points to the evolution of plaintiffs' pleadings and the fact that plaintiffs continued to prosecute the action after defendant revised its burial contracts.

---

trial brief, defendant suggested the case involved "100,000+ contracts."

It is not clear why defendant believes plaintiffs' focus on defendant's alleged neglect of its cemeteries in early versions of their complaint reveals their primary objective in the litigation. By the time the class was certified, plaintiffs were focused on their UCL cause of action addressing payments for care and maintenance. This shift in focus dramatically raised the stakes for both sides, and proving the care and maintenance charges violated the UCL was not a minor skirmish incidental to some more central objective. The circumstances here are thus unlike those in *Marine Forests Society*, in which the Court of Appeal held the plaintiff did not achieve its primary litigation objective—preserving an artificial reef it planted on the ocean floor—despite prompting changes to statutes governing the composition of the Coastal Commission. (*Marine Forests Society*, *supra*, 160 Cal.App.4th at 878-880.)

Defendant's suggestion that plaintiffs cannot have been primarily concerned with eliminating care and maintenance charges because they continued to litigate the UCL cause of action after defendant revised its burial contracts takes too narrow a view of plaintiffs' objectives and the concept of primacy. The record, including plaintiffs' decision to continue litigating to obtain a judicial finding that the care and maintenance charges were deceptive, reveals plaintiffs' primary objective was stopping defendant—on an enduring basis—from employing the deceptive (i.e., unfair) care and maintenance charges, not a specific form of relief that would achieve this objective. (See, e.g., *The Kennedy Com. v. City of Huntington Beach* (2023) 91 Cal.App.5th 436, 458 ["The City insists the fact [that] Kennedy dismissed its remaining causes of action when the Petition was granted by the trial court on the first cause of action—that the Amended BECSP was

void—supports this was the sole relief that Kennedy sought. This is not evidence that this was the sole purpose of the litigation"].) On that score, plaintiffs succeeded. Further, nothing in the record here suggests that the purpose of the "primary relief" element of catalyst attorney fees recovery (reducing the risk of "extortionate lawsuits" (*Graham*, *supra*, 34 Cal.4th at 575)) is offended; there is no possibility that awarding fees here would prompt other plaintiffs to pursue "shakedown" lawsuits. Plaintiffs did not dismiss the UCL cause of action and seek catalyst fees the moment defendant revised its burial contracts. Instead, they continued to litigate the case through trial, which underscores plaintiffs' commitment to vindicating the rights of class members and the bona fides of their objectives.

e. making a pre-litigation demand was reasonably found to have been futile

In *Graham*, our Supreme Court explained that "a plaintiff seeking attorney fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation" because such a requirement "is fully consistent with the basic objectives behind section 1021.5 and with one of its explicit requirements—the 'necessity . . . of private enforcement' of the public interest. . . . Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time. [Citation.]" (*Graham*, *supra*, 34 Cal.4th at 577.)

In *Cates v. Chiang* (2013) 213 Cal.App.4th 791, the Court of Appeal explained that although "the prelitigation notice

requirement is an important categorical rule in section 1021.5 catalyst cases and cannot be ignored merely because the court believes it would be equitable for the plaintiff to receive a fee award or that plaintiff had a good excuse for failing to engage in these efforts[,] . . . it should not be applied to bar an attorney fees recovery where to do so would defeat the core purpose of the statute." (*Id.* at 816.) In *Cates*, the plaintiff brought a taxpayer action alleging the California Gambling Control Commission was failing to discharge statutory duties to collect portions of tribal gaming revenues. (*Id.* at 796.) The Court of Appeal affirmed the trial court's ruling that timely pre-litigation notice to the Commission would have been futile because, among other things, "[t]he evidence showed that for several years after [the plaintiff] filed the action, the Commission continued to strongly assert that its practices were appropriate and the tribes did not owe the state any money. There [was] no evidence that the Commission would have agreed to change its procedures in response to a prelitigation settlement offer or that negotiating with the Commission was a reasonable alternative to the lawsuit." (*Id.* at 816.)

It is not clear that the pre-filing demand requirement practically maps well onto this case; plaintiffs may not have developed the theory that ultimately catalyzed the defendant's remedial action when they filed their original complaint. Nonetheless, assuming the requirement applies, or at least that plaintiffs were required to make a comparable demand prior to filing their second amended complaint, the record still supports the trial court's determination that such a settlement demand would have been futile. More than a year passed between plaintiffs filing the second amended complaint and defendant

revising its burial contracts. The impetus for defendant's remedial action was obviously class certification sought by plaintiffs and, like the defendant in *Cates*, there is no indication defendant would have changed its practice but for this development in the litigation.

C. The Trial Court Did Not Abuse Its Discretion in Declining to Award Costs to Defendant

Section 1032, subdivision (b) provides that, "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Section 1032, subdivision (a)(4) defines "prevailing party" to "include[ ] the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ."

Contrary to defendant's reading of the statute, section 1032 does not establish *every* prevailing party is entitled to an award of costs as a matter of right.[8] In cases where "any party recovers

---

[8] Defendant is also mistaken that plaintiffs' failure to address the issue of costs in their respondents' brief must be construed as a concession. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 557, fn. 48 ["a respondent's failure to address an issue raised in the opening brief is not a concession"].)

other than monetary relief and in situations other than as specified," the trial court determines the prevailing party and awards costs in its discretion. The trial court did not abuse its discretion in deciding this case was one "other than as specified."[9] As the court explained in entering judgment, "obtaining the findings at trial and [j]udg[ ]ment that the fees were deceptive for purposes of the UCL will deter . . . [d]efendant from reinstating the deceptive contract terms and increased the odds that the public will continue to benefit from the change into the future . . . ." Under these circumstances, the trial court correctly determined defendant's status as the prevailing party was a matter of discretion, and it reasonably determined not to award costs.

---

[9] In *In re Tobacco Cases II*, the Court of Appeal rejected the argument that a finding that a defendant "was guilty of deceptive advertising under the UCL" meant the defendant was not the prevailing party. (*In re Tobacco Cases II*, *supra*, 240 Cal.App.4th at 805-806.) Although the Court of Appeal held the defendant fell "squarely" within two of the categories enumerated in the first sentence of section 1032, subdivision (a)(4), it did not hold that a liability finding may never suffice to make the prevailing party a matter of discretion under the second sentence of that subdivision. (*Ibid.*)

DISPOSITION

The judgment is affirmed. All parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

HOFFSTADT, P. J.

MOOR, J.