Pichler v. Simmons

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NOT TO BE PUBLISHED

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Defendant Lester A. Simmons, who operated a series of chiropractic clinics throughout the San Joaquin Valley, was sued by former patient Adolph Pichler on behalf of himself and the general public for fraud and deceptive business practices under California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). The trial court gave Pichler only a nominal money award, but also issued an injunction preventing Simmons and his business entities from engaging in specified business practices. Following the judgment, the trial court awarded Pichler attorney fees and costs of approximately $272,810 under the "private attorney general" doctrine (Code Civ. Proc., § 1021.5).

Simmons appeals from the fee award only, claiming the court abused its discretion in finding that this lawsuit satisfied the three elements necessary for an award of attorney fees under Code of Civil Procedure section 1021.5 (section 1021.5). We disagree and affirm the judgment.

BACKGROUND

This case began when Pichler, who was experiencing back and neck pain following a rear-end automobile collision, walked into one of Simmons's clinics, having been attracted by a sign offering a "free back/spinal exam." Following a cursory "free exam," Pichler was scheduled for a series of appointments over several weeks. Although he informed clinic employees that he could not afford extensive care and had no insurance, Pichler was billed for more than $1,300 after only one further visit.

Upset because he had no medical insurance, Pichler filed an in propria persona petition in superior court. The allegations are difficult to decipher, but the clear objective of the petition was to prevent Simmons's clinic from harassing Pichler and to relieve him from any obligation for payment.

In March 1998, Superior National Insurance Company (Superior) commenced an action against Simmons and his various business entities (the Simmons-Superior suit). Superior charged that defendants "intentionally, systematically and routinely engaged in unlawful, unfair and fraudulent business practices to profit from false, fraudulent, inflated and exaggerated chiropractic and medical

bills submitted to plaintiffs by defendants, . . ." Superior sought recoupment of illicit profits as well as injunctive relief.

On September 14, 1998, Pichler, now represented by counsel, filed an amended complaint for fraud, elder abuse, unjust enrichment, and unfair business practices. In addition to disgorgement of all illegal profits earned by the Simmons defendants, Pichler sought injunctive relief on behalf of himself and the public generally, prohibiting Simmons and his business entities from engaging in specified unlawful, deceptive, and fraudulent business practices. The prayer included a request for attorney fees under section 1021.5.

On March 12, 1999, a stipulated judgment was entered in the Simmons-Superior case. The judgment took the form of an injunction, prohibiting Simmons and his various entities from committing various illegal practices in connection with the operation of his chiropractic clinics. However, several months later, Simmons filed a motion for relief from the judgment on the ground that he had not authorized his attorneys to enter into it. In the same month as the Simmons-Superior stipulation was filed, an administrative law judge, in disciplinary proceedings before the state chiropractic board, issued a decision recommending revocation of Simmons's chiropractic license, based on findings that he engaged in numerous violations of the Chiropractic Act, including acts of moral turpitude, insurance fraud, improper advertising, and engaging in the practice of chiropractic without a license.

In August 1999, the case at bar went to trial before Judge Bob W. McNatt, sitting without a jury. [1] Judge McNatt ruled against Pichler on the causes of action for fraud and/or constructive fraud, but in Pichler's favor on the causes of action for false advertising and unfair business practices. Specifically, the court ruled that the "free exam" sponsored by Simmons was cursory, worthless, and intended primarily to turn patients coming into his clinics into paying customers. Judge McNatt also found Simmons violated a regulation promulgated by the chiropractic board (Cal. Code Regs., tit. 16, § 319) by billing for the supposed free exams; that patients entering the clinics for free exams were "turn[ed]" (i.e., converted) into customers paying for chiropractic care regardless of whether they needed it; that the chief focus of Simmons's business was profit rather than patient care; and that clinic doctors were "coach[ed]" or pressured into billing for as many services as possible regardless of medical need, including procedures which were redundant or unnecessary.

Pichler was awarded the sum of $332, the amount paid to Simmons, which the court found was reaped from false advertising. However, the court also deemed it appropriate to issue an injunction to protect the public and restrain Simmons from engaging in certain enumerated unfair practices. The court therefore enjoined Simmons from benefiting financially from, or directly or indirectly committing any of the following acts:

1. Advertising a "free exam" when the exam was cursory only and consists primarily into turning patients into paying customers.

2. Applying pressure of any kind to treating chiropractors to over-treat patients, or conduct treatment modalities without regard for patients' needs.

3. Charging patients for services which include a portion of the "free exam."

4. Failing to make clear the demarcation between free services and those which are billed.

Following entry of judgment, Pichler applied for an award of "private attorney general" fees pursuant to section 1021.5. The application claimed $256,300 in attorney and paralegal fees which Pichler asked the court to multiply by a lodestar factor of 1.5. Including expert fees and miscellaneous litigation costs, Pichler's requested award totaled $428,696. Simmons vigorously opposed the motion.

The trial court awarded attorney fees of $225,000 plus litigation costs of $47,810.45. In its statement of decision, the court concluded, "Plaintiff has proven each element of entitlement [to section 1021.5 fees] and the Court, in its discretion, find[s] the award appropriate. Specifically, . . . the Plaintiff has shown a significant benefit to a large class of persons, the necessity and burden of private enforcement, and that the fees should not be paid out of any recovery."

APPEAL

Simmons's Claim and the Standard of Review

Simmons challenges the award of attorney fees on the stated ground that Pichler's lawsuit did not satisfy any of the three statutory criteria for such an award under the private attorney general theory.

As Simmons acknowledges, "`[a]n award of attorney fees under section 1021.5 lies within the trial court's discretion and will not be reversed on appeal absent a showing of abuse.'" (Williams v. San Francisco Bd. of Permit Appeals (1999) 74 Cal.App.4th 961, 964 (Williams), quoting Committee to Defend Reproductive Rights v. A Free Pregnancy Center (1991) 229 Cal.App.3d 633, 645.) In practical terms, this means that the fee award will be upheld "unless `the record establishes there is no reasonable basis' for the trial court's action." (Williams, supra, at p. 965, quoting Feminist Women's Health Center v. Blythe (1995) 32 Cal.App.4th 1641, 1666.)

Our state Supreme Court has "set forth the three requirements which must be met in order for a plaintiff to recover attorneys fees pursuant to section 1021.5. The private attorney general theory, as codified in this section, authorizes an award of attorneys fees when: (1) the action has resulted in the enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement are such as to make the award appropriate." (Schwartz v. City of Rosemead (1984) 155 Cal.App.3d 547, 555, citing Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 934-935 (Woodland Hills), italics added.)

"The trial court, `utilizing its traditional equitable discretion (now codified in § 1021.5) must 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 under a private attorney general theory.'" (Williams, supra, 74 Cal.App.4th at p. 966, citing Woodland Hills, supra, at p. 938.)

With these precepts in mind, we discuss Simmons's challenges to each of the three statutory criteria.

1. Important Right Affecting the Public Interest

The first criterion is whether the litigation resulted in the enforcement of an important right affecting the public interest. In answering this question affirmatively, Judge McNatt found that Simmons and his business entities had perpetrated unfair and deceptive business practices on the general public and would continue to do so unless restrained by injunctive relief.

The sufficiency of the evidence to support these findings is not challenged. Simmons nevertheless tries to minimize their impact by asserting that the only specific violation of law was a "technical" one, based not on a statute but on a chiropractic regulation (Cal. Code Regs., tit. 16, § 319), that of offering a free exam without disclosure of the cost of additional treatment. He concludes that Pichler's suit involved "no constitutional or important statutory right affecting the general public involved here."

Simmons reads the court's judgment far too narrowly. In addition to the "free exam" scam, the court found Simmons and his entities engaged in a broad range of deceptive and unfair business practices in violation of the UCL. Simmons operated his chiropractic clinics like cash machines, whose number one goal was to turn patients into paying customers, regardless of need. Pressure was applied to chiropractors to over-treat patients, and patients were commonly overbilled, or billed for services never rendered.

The UCL was designed, in part, to protect the public from future conduct likely to deceive or mislead. (Payne v. United California Bank (1972) 23 Cal.App.3d 850, 855.) As a representative of the general public, Pichler successfully pursued injunctive relief to restrain these practices, as he was authorized to do by Business and Professions Code section 17203 [2] and section 17204. [3] The California Supreme Court has recently reiterated the importance of such private enforcement efforts. (Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 950.) The trial court did not abuse its discretion in ruling that the lawsuit enforced an important right affecting the public interest.

2. Significant Benefit to Public or Large Class of Persons

Simmons next challenges the court's finding that Pichler's action benefited the public or a large class of persons. He first contends there was "no showing whatever as to the size of the class of persons

receiving any alleged public benefit." The short answer is that such a mathematical showing is unnecessary. "The evidence of the size of the population benefited by a private suit is not always required. The substantial benefit may be conceptual or doctrinal, and need not be actual and concrete, so long as the public is primarily benefited." (Planned Parenthood v. Aakhus (1993) 14 Cal.App.4th 162, 171 (Planned Parenthood).)

Here the fact that the injunction vindicated the paramount right of the public to be free of deceptive, harmful, and unscrupulous business practices was itself sufficient. But the record also shows the number of persons affected by the injunction against Simmons was significant in its own right: During the subject period, Simmons operated at least 10 chiropractic clinics throughout the Sacramento and San Joaquin Valley region, with revenues in the millions of dollars. As the court stated: "I believe that . . . the plaintiff's action here has bestowed a significant benefit on a large class of persons based on the statistics that I saw during trial. Those statistics reflect that the practices which were applied to Mr. Pichler apparently were also commonly applied to the other patients of the clinics as well. And that then actually constitutes a significant class of persons, per [section] 1021.5."

Taking a different tack, Simmons urges that the injunction issued by the trial court was superfluous because of other actions taken by other parties, which had the practical effect of putting him out of business. He specifically cites the injunction in the Simmons-Superior lawsuit and the administrative law judge's order recommending suspension of Simmons's chiropractic license, both of which occurred in March 1999. According to Simmons, Pichler merely "jumped on the bandwagon" in bringing this suit and therefore should not be rewarded for his efforts.

The record fails to support Simmons's contention that entities other than Pichler "climbed the mountain" in exposing his unethical and pilfering business practices through litigation. Pichler's suit was well under way by the time the Simmons-Superior judgment was filed. Moreover, the Superior case was resolved by way of stipulation, not a contested trial, as was the case here. Pichler's attorneys put in over 1,000 hours in litigating this case, which involved numerous motions and intensive discovery. According to the expert declaration of legal auditor Jim Schratz, the hours spent by plaintiff's law firm were "reasonably and necessarily incurred by the Plaintiff in pursuit of this litigation," and were in large part caused by the fact that Simmons's attorneys "bitterly contested" the case and engaged in "unseemly behavior."

There is yet another reason why this argument fails: Simmons was attempting to overturn the Simmons-Superior judgment when Judge McNatt issued his ruling awarding fees. Specifically, Simmons had filed a motion for relief from the stipulation on the ground that his attorneys had entered into it without his knowledge or authority. This led the judge to declare that he had "no faith" in the Simmons-Superior judgment as a mechanism for preventing Simmons from continuing his sleazy business practices, and that injunctive relief in this case was both appropriate and necessary to restrain Simmons as well as his multifarious agents and alter egos.

Nor are we convinced that the chiropractic board's disciplinary action against Simmons's license rendered the present injunction unnecessary. As the trial court noted, Simmons was in the process of appealing the board's decision -- if such an appeal were successful, there was a serious risk that Simmons would continue to operate his clinics, using the same tactics which were found to be unlawful. Simmons cannot be heard to complain that the chiropractic board's disciplinary action sufficiently protected the public, while at the same time pursuing legal action to nullify that very same disciplinary action. [4]

We take note of the court's unchallenged finding that many of the unfair practices were committed by Simmons through "corporate vehicles and agents operating on [his] behalf," and which he did not need a chiropractic license to orchestrate. Therefore, as the court found, civil injunctive relief was necessary to prevent the public from being victimized again, regardless of whether Simmons was ever able to regain his chiropractic license. We have no difficulty upholding the trial court's determination that the "significant benefit" element has been satisfied.

3. Necessity and Financial Burden of Private Enforcement

Finally, Simmons claims that Pichler's large financial stake in this litigation and limited success in the outcome precluded the trial court from finding that the financial burden of private enforcement fell disproportionately on Pichler. To support this argument, Simmons contends that Pichler, who originally sought to recover huge sums in compensatory and punitive damages, wound up losing most of his case when the court ruled against him on the fraud and elder abuse causes of action.

Simmons's argument fails because it ignores the injunctive aspect of the judgment. The "private burden" element of section 1021.5 is met "when the cost of the claimant's legal victory transcends his personal interest in the subject of the suit" (Planned Parenthood, supra, 14 Cal.App.4th at pp. 172-173), or when the necessity of pursuing the lawsuit placed a burden on the plaintiff out of proportion to his individual stake in the matter. (Williams, supra, 74 Cal.App.4th at p. 967.)

That is clearly the case here. Pichler's personal financial stake was minimal, since his out-of-pocket loss amounted to only a few hundred dollars. By contrast, the cost of litigation was substantial, as it included the pursuit of an injunction preventing Simmons from continuing his illegal business practices. The injunction issued by the court did not merely benefit Pichler. It procured a victory for all present and future patients of Simmons's chiropractic clinics. It also protected the public from being further victimized by deceptive and disreputable business practices which Simmons had perpetrated throughout the region on a multi-million dollar scale.

In sum, substantial evidence supports the finding that the burden of this litigation disproportionately fell on Pichler such as to make an award of attorney fees equitable. "The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to

encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action." (Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 114.)

Although Pichler's individual stake in this suit was minor, the injunctive relief issued by the court carried out strong public policy objectives and benefited a large class of citizens. The court acted within its discretion in deeming it appropriate to compensate Pichler for his efforts by awarding attorney fees under section 1021.5.

DISPOSITION

The order awarding fees and costs is affirmed.

We concur:

KOLKEY, J.

ROBIE, J.

1. By the time of trial, Adolph Pichler had died and the action was prosecuted in his stead by his widow, Lidia Pichler. We use the name "Pichler" generically throughout this opinion to designate the plaintiff.

2. Section 17203 states in part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, . . ."

3. Section 17204 states, in part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." (Italics added.)

4. Without citation to the record, Simmons recites that, more than a year after the fee award here, his petition for administrative mandate to overturn the license revocation was tossed out by the court. The argument goes nowhere. Factual assertions unsupported by citation to the record on appeal are improper and may be disregarded. (Kendall v. Barker (1988) 197 Cal.App.3d 619, 625.) In addition, a party is not permitted to challenge an appealed order or judgment based on the happening of subsequent events. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 8:176, p. 8- 98.8.)