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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT GRAHAM et al., Plaintiffs and Respondents, v. DAIMLERCHRYSLER CORPORATION et al., Defendants and Appellants.	B152928 (Super. Ct. No. BC 21564)

APPEAL from an order of the Superior Court of Los Angeles County. Bruce E. Mitchell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Bryan Cave, Sheldon Eisenberg, Charles A. Newman and John W. Rogers for Defendants and Appellants.

Law Offices of Richard M. Pearl and Richard M. Pearl; Kemnitzer, Anderson, Barron & Ogilvie, Andrew J. Ogilvie, Mark F. Anderson, and Bryan A. Kemnitzer for Plaintiffs and Respondents.

Robert Graham, Truman Trekell, and Daniel Hawkins (plaintiffs) bought 1999 Dakota R/T trucks from DaimlerChrysler Corporation (Chrysler). Chrysler temporarily incorrectly marketed its 1999 Dakota R/T truck as able to tow 6,400 pounds when it actually could tow only 2,000 pounds. When plaintiffs learned of their trucks' actual towing capacity, they, like other such truck owners, complained to Chrysler. Plaintiffs later sued Chrysler for warranty breach. When plaintiffs filed suit, Chrysler already had acknowledged the error and begun responding to related customer complaints. Moreover, the California Attorney General and Santa Cruz County District Attorney already had told Chrysler they had started investigations of the marketing error as a potential consumer fraud.

Shortly thereafter, Chrysler offered to buy back or replace with new vehicles all Dakota R/Ts sold during the erroneous marketing campaign, including those sold to plaintiffs. Chrysler then obtained a mootness dismissal of plaintiffs' case with prejudice. The propriety of that ruling is not before us.

However, after protracted litigation, the trial court awarded plaintiffs $762,830 in private attorney general attorney fees. (Code Civ. Proc., § 1021.5; all further undesignated section references are to the Code of Civil Procedure.)

Chrysler appeals from the fee order. Chrysler contends plaintiffs failed to satisfy any of the elements required to entitle them to such attorney fees. Alternatively, Chrysler contends that even if plaintiffs were entitled to fees, the court gave them excessive fees.

We reject these contentions and affirm the fee award.

FACTS

Chrysler incorrectly marketed its 1998 and 1999 Dakota R/Ts as having a 6,400-pound towing capacity when it actually could tow only 2,000 pounds. The error occurred because the Dakota R/T was a sporty version of an existing truck model which could tow 6,400 pounds. However, to obtain a sporty design, Chrysler lowered the suspension on the Dakota R/T, thus reducing its towing capacity.

The reduced towing capacity was a potential risk factor. The lowered suspension meant that towing more than 2,000 pounds would cause the suspension to bottom out, stressing the frame and increasing fatigue and wear. The Chrysler response team considered this a potential safety issue.

Buyers who wanted to tow more than 2,000 pounds were told they could do so only if their Dakota R/T was modified with a trailer hitch costing $300. The factory installed some of these hitches, while other buyers who wanted to tow had dealer-installed or after-market hitches attached.

Nationwide, Chrysler sold or leased fewer than 7,000 of the Dakota R/Ts in the two relevant years. Fewer than 1,000 affected R/Ts were sold in California during the two years.

By February of 1999, Chrysler set up a response team to address the problem. By June 1999, Chrysler had replaced the incorrect marketing materials, owners manuals, and engine and door labels for not-yet sold Dakota R/Ts. Chrysler also had notified existing buyers of the error, told them not to attempt to tow more than 2,000 pounds, and provided

them with the same modified materials. Simultaneously, Chrysler began to address remedial measures for customers who had bought or leased their Dakota R/Ts under the incorrect marketing program.

Many Dakota R/T buyers never intended to tow more than 2,000 pounds. When informed by Chrysler of the error, most of those customers were satisfied with Chrysler's offers of cash and merchandise.

Initially, Chrysler offered buyers who had bought the hitches refunds of the $300 cost. By the summer, Chrysler authorized dealers to repurchase or replace Dakota R/Ts on a case-by-case basis, but only for customers who demanded such a remedy.

On July 29, 1999, the Santa Cruz County District Attorney contacted Chrysler about the problem, threatened legal action, and requested Chrysler's input before acting. On August 10, 1999, the California Attorney General notified Chrysler it had joined the Santa Cruz County District Attorney. The public agencies requested a response by the end of August 1999.

Plaintiffs filed their case on August 23, 1999, in Los Angeles County Superior Court. Plaintiffs alleged they all bought 1999 Dakota R/Ts from various Chrysler dealers. Only Graham lived and bought his truck in California. Plaintiffs alleged Chrysler marketed, sold, and warranted their 1998 and 1999 Dakota R/Ts as capable of towing 6,400 pounds when the trucks actually could tow only 2,000 pounds. Plaintiffs alleged Chrysler acknowledged the error by letter to all purchasers dated June 16, 1999. Plaintiffs alleged they notified Chrysler of their 1) trucks' failure to comply with the

warranted towing capacity, and 2) revocation of their acceptance of their trucks on July 19, 1999. Plaintiffs sought (but never obtained) class certification for all who bought Dakota R/Ts nationwide. Plaintiffs alleged a single breach of express warranty cause of action. Plaintiffs sought return of their purchase or lease payments, compensatory damages, and attorney fees.

Also on August 23, 1999, the Detroit News contacted Chrysler's legal counsel about plaintiffs' case. Chrysler's counsel claimed Chrysler had responded appropriately to the marketing error, including offering buybacks to customers who requested it. Plaintiffs faxed their complaint to Chrysler the same day. The next day, August 24, 1999, Chrysler's employee newsletter ran an article on the plaintiffs' case.

Chrysler's response team met throughout August 1999. The team knew about both public agency inquiries and the response deadline. Indeed, Chrysler wrote the public agencies that its internal approval process prohibited a response by August 31, but promised a response by September 8, 1999. When asked later whether they knew about the class action lawsuit filed in California before Chrysler's September 10, 1999, letter offering repurchase or replacement to all Dakota R/T buyers, team members said, "yes."[1]

As noted, on September 10, 1999, Chrysler issued its offer to all previous Dakota R/T buyers of repurchase or replacement. Chrysler demurred to the complaint. Plaintiffs

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[1] We reject Chrysler's argument that the team members confused the public agency inquiries (in which no litigation had begun) with plaintiffs' class action lawsuit, and actually meant they knew about the public agency inquiries but not plaintiffs' case. The trial court rejected that argument and found the team knew about plaintiffs' case before Chrysler issued the September 10, 1999, offer. That finding is supported by substantial evidence.

filed an amended complaint, acknowledging Chrysler's offer of, among other remedies, repurchase or replacement of the trucks for all previous buyers. The trial court sustained the demurrer without leave to amend and dismissed the case, finding it was moot because Chrysler already had offered all purchasers the relief plaintiffs sought. In late 2000, Chrysler settled the public agency investigations by paying a $75,000 fine and agreeing to continue to assure that the marketing error did not reoccur. The agencies discovered the erroneous marketing was continuing as late as September 1999.

Nationwide, 2,549 Dakota R/T buyers opted for repurchase or replacement. Another 3,101 buyers opted for service contracts and parts coupons. The total value of these offers exceeded $15 million. Less than 1,000 of the R/T buyers were Californians.

Although plaintiffs' case was dismissed, the parties continued to litigate plaintiffs' entitlement to attorney fees. Chrysler insisted throughout that plaintiffs were not entitled to attorney fees, contending plaintiffs had no effect on Chrysler's recognition of the problem and decision to offer all buyers repurchase or replacement. Over a year of hotly-contested discovery and other motions occurred to clarify the facts described above.

The court held three contested hearings on the fee request. On October 18, 2000, the court held a lengthy evidentiary hearing and made factual findings rejecting Chrysler's claim that it had at least decided to offer all buyers repurchase or buybacks before plaintiffs filed their case. The court found plaintiffs' case was a catalyst for Chrysler's eventual offer. The court approved most of plaintiff's attorneys' work hours and tentatively awarded a 3.0 multiplier to account for risk and success. The court held

additional hearings on April 23 and June 19, 2001, to address the recent *Ketchum v. Moses* (2001) 24 Cal.4th 1122 case.

The trial court found the lodestar fee amount was $329,620 through the October 18, 2000, hearing. The court reduced its multiplier from 3.0 to 2.25 for the fees until the October 18, 2000, hearing, and applied no multiplier for time thereafter. The court awarded no fees for work after April 23, 2001. The total award was $762,830.

DISCUSSION

As relevant, section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery . . . ." Orders awarding or denying section 1021.5 attorney fees are appealable. (*Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 964; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.)

"Section 1021.5 provides for court-awarded attorney fees under a private attorney general theory. [Citation.] . . . [T]he private attorney general 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 . . . .

[W]ithout 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.]'

"The decision as to whether an award of attorney fees is warranted rests initially with the trial court. [Citation.] '[U]tilizing its traditional equitable discretion,' that court 'must realistically assess the litigation and determine, from a practical perspective' [citation] whether or not the statutory criteria have been met. In this case, the trial court had to evaluate whether plaintiffs' action: (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. [Citations.]

"Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. '"To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . ."' [Citation.] However, 'discretion may not be exercised whimsically and, accordingly, reversal is appropriate "where no reasonable basis for the action is shown." [Citation.]' [Citations.]" (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143, fn. omitted.)

"'To obtain an award of fees under section 1021.5, one must be a successful party in an action resulting in the enforcement of an important right affecting the public interest. A significant benefit, whether pecuniary or nonpecuniary, must have been

conferred on the general public or a broad class of persons, and the necessity and financial burden of private enforcement must transcend the litigant's personal interest in the controversy. [Citations.]

"'"'Whether a party has met the requirements for an award of fees and the reasonable amount of such an award are questions best decided by the trial court in the first instance. [Citations.] That court, utilizing its traditional equitable discretion, must realistically assess the litigation and determine from a practical perspective whether the statutory criteria have been met. [Citation.] Its decision will be reversed only if there has been a prejudicial abuse of discretion. [Citation.] To make such a determination, we must review the entire record, paying particular attention to the trial court's stated reasons in denying or awarding fees and whether it applied the proper standards of law in reaching its decision." [Citation.]' [Citation.]" (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 543-544.)

"The trial court found these elements were met. Its determination may not be disturbed on appeal absent a showing that the court abused its discretion in awarding attorney fees, i.e., the record establishes there is no reasonable basis for the award. [Citations.] 'The pertinent question is whether the grounds given by the court for its [grant] of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and

policy of the statute.' [Citation.]" (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1666-1667.)

Likewise, in setting the amount of fees, the trial court must make "a careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case. . . . Using these figures as a touchstone, the court then [should take] into consideration various relevant factors, of which some militate[] in favor of augmentation and some in favor of diminution. Among these factors [are]: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award . . . . [¶] The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49.)

First, we dispose of Chrysler's arguments that the trial court abused its discretion in finding the marketing error potentially hazardous, Chrysler did not offer all buyers repurchase or replacement before plaintiffs filed their case, and Chrysler's decision to make the September 10, 1999, global offer was influenced by plaintiffs' case, not a response to Chrysler's own attempts to address the problem. The contention lacks merit. Before September 10, 1999, Chrysler had only offered repurchase or replacement on a

case-by-case basis, and only to customers who insisted on that remedy. Indeed, one of the plaintiffs maintained Chrysler had refused his request for exactly that remedy. Moreover, Chrysler had not unequivocally offered that remedy to all buyers who had purchased tow hitches, and who thus clearly intended to tow more than 2,000 pounds. Chrysler unquestionably knew about plaintiffs' case a few weeks before its September 10, 1999, offer. Its response team also admitted knowing about the lawsuit as it formulated a response to a multi-tiered problem. Chrysler personnel admitted the error had potential safety hazards. Chrysler's argument that the trial court abused its discretion in so finding amounts to nothing more than a request that we reweigh the evidence and substitute our judgment for that of the trial court. Doing so is not our function. The trial court's factual findings are supported by substantial evidence.

In determining the sufficiency of the evidence, "a 'reviewing court is without power to substitute its deductions for those of the trial court.' . . . 'In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*" [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.' [Citations.]" (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

Second, these trial court findings supported its finding that plaintiffs were a catalyst for Chrysler's action, although their case was dismissed and they did not secure a

favorable judicial ruling. The catalyst theory is well-recognized under California law as justifying an award under section 1021.5. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 353.) While section 1021.5 is similar to comparable federal statutes, and federal cases are instructive, the California rule is independent. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639, fn. 29.) We reject Chrysler's claim that a recent U.S. Supreme Court opinion rejecting the catalyst theory for fee awards under a federal statute (*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598, 600) compels us to reject them under our separate California statute, at least until the California Supreme Court so orders. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Third, we reject Chrysler's claim that the trial court abused its discretion in holding plaintiffs' action vindicated an important public right, despite each individual plaintiff's relatively small stake in the overall benefit. Although each plaintiff was seeking an individual remedy, and although the number of those directly affected was only a few thousand, plaintiffs' action vindicated the public's interest in fair consumer contracts and the prevention of possible safety hazards. Those interests support the court's finding. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1413-1418.)

Fourth, the court did not abuse its discretion in permitting an award of fees for seeking fees, and calculating a lodestar and a multiplier. This is particularly true where Chrysler vigorously litigated plaintiffs' entitlement to any fees. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at pp. 1136-1141; *Beasley v. Wells Fargo Bank*, *supra,* 235 Cal.App.3d

at pp. 1418-1419.) Here, the trial court carefully analyzed the fee request. It only used a multiplier for the period until plaintiffs' entitlement to fees was secured, and the court lowered the multiplier. The court expressly declined to punish Chrysler for its conduct, but merely noted that Chrysler's prolonged litigation of whether plaintiffs were entitled to any fees was responsible for the increase. The court then awarded no fees for the last two months of work. Chrysler has failed to show the court abused its discretion in calculating the fee award.

DISPOSITION

We affirm the fee award order. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.