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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

AMY STANLEY, Plaintiff and Respondent, v. CALIFORNIA STATE LOTTERY COMMISSION, Defendant and Appellant.	C041036 (Super. Ct. No. 00AS05463)

APPEAL from a judgment of the Superior Court of Sacramento County, Morrison C. England, Jr., J. Reversed.

Bill Lockyer, Attorney General, Jacob Appelsmith, Senior Assistant Attorney General, Vincent J. Scally, Jr., Supervising Deputy Attorney General, and David I. Bass, Deputy Attorney General, for Defendant and Appellant California State Lottery Commission.

Hagens Berman, Kevin P. Roddy; Law Office Of Tracey Buck-Walsh and Tracey Buck-Walsh for Plaintiff and Respondent Amy Stanley.

In this appeal, we address whether a plaintiff may be deemed a "successful party" entitled to recover attorney fees

under Code of Civil Procedure section 1021.5 (hereinafter section 1021.5)[1] -- the "private attorney general" statute -- where all of plaintiff's claims have been denied as a matter of law and plaintiff has never received any type of judicial relief during the proceeding. We conclude that the term, "successful party," cannot be stretched that far.

Plaintiff Amy Stanley brought this action against the defendant, the California State Lottery Commission (the Lottery Commission), alleging that the Lottery Commission sold instant scratch game tickets ("Scratchers") long after all represented and advertised grand prizes had been awarded or claimed. The

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[1] Code of Civil Procedure section 1021.5 states: "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. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

"Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest* [(1977)] 20 Cal.3d 25, 49." (Italics added.)

trial court rejected each of plaintiff's claims as a matter of law, never granted plaintiff any interim relief during the course of the proceeding, and entered judgment in favor of the Lottery Commission.

The trial court nonetheless awarded plaintiff $351,717.38 in attorney fees under section 1021.5 on the theory that plaintiff's lawsuit had served as a "catalyst" to the Lottery Commission's decision to take certain voluntary corrective actions while the action was pending, such as adding a disclaimer to its Scratchers game tickets that some prizes may have already been claimed and withdrawing Scratchers tickets from retailers for those games in which the top prizes had been claimed.

Although our state Supreme Court has ruled that "an attorney fee award may be justified even when plaintiff's legal action does not result in a favorable final judgment" where the action has nonetheless "served to vindicate an important right" (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1290-1291), the statutory language in section 1021.5 that the party must be "successful" in order to be entitled to an award cannot be stretched so far as to cover a plaintiff *against* whom judgment was entered *as a matter of law*, and to whom no interim judicial relief was ever awarded. To conclude otherwise would deem a legally meritless action the catalyst for the enforcement of a right that the action was determined inadequate to enforce and would award attorney fees expended by the plaintiff in *losing*

the action at every stage of the litigation. The trial court's finding to the contrary in this case was error, and its order awarding attorney fees to plaintiff's counsel must therefore be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Litigation

In her complaint, plaintiff alleged that the Lottery Commission and its licensed retailers routinely and knowingly "[sold] instant scratch games well after all represented and advertised grand prizes ha[d] been awarded or claimed," and that players "who purchase[d] scratch tickets during that time ha[d] no chance of winning the prizes that [were] the primary inducement for those games."

According to plaintiff, the Lottery Commission "kn[e]w[] when the last prize ha[d] been claimed because it monitor[ed] the dates when each prize [was] given away, [was] aware of how many prizes exist[ed] and how many remain[ed] for each scratch game," and yet "d[id] not instruct or require the retailers to cease selling prize-less scratch game tickets or to inform the scratch players that such tickets [did] not conform" to the Lottery Commission's representations and advertisements.

Based on these facts, the complaint sought damages and equitable relief on a variety of theories, including breach of contract, breach of express warranty, breach of implied warranty, breach of the implied covenant of good faith and fair dealing, and breach of the Lottery Commission's duty under

Government Code section 8880.24 to ensure that the State Lottery complied with the letter and spirit of the laws governing false advertising.[2]

The Lottery Commission demurred to the complaint, and the trial court sustained, without leave to amend, the demurrer to all causes of action, except the cause of action based on the Lottery Commission's duty under Government Code section 8880.24.

Plaintiff thereafter filed a first amended complaint and a petition for writ of mandate (collectively referred to as the petition), which sought a writ of mandate directing the State Lottery "to comply with the provisions of [s]ection 8880.24 of the Government Code" and the laws governing false advertising, a declaration that the State Lottery "refrain from representing or advertising grand prizes [that] are not available unless it notifies lottery players at the time of purchase of the non-availability of each represented and advertised prize," and other related relief, including attorney fees.

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[2] In relevant part, Government Code section 8880.24 provides: " . . . [¶] (b) In decisions relating to advertising and promotion of the California State Lottery, the commission shall ensure that the California State Lottery complies with both the letter and spirit of the laws governing false and misleading advertising, including Section 17500 et seq. of the Business and Professions Code. The commission shall also ensure that the overall estimated odds of winning some prize or prizes in a particular lottery game are posted on all television and print advertising, exclusive of outdoor advertising displays, signs, or banners, related to that game."

The Lottery Commission demurred to the petition on the ground that the injunctive relief sought by plaintiff had been rendered moot by "recent procedures formally instituted by the Lottery" since the filing of the action. These included a direction by the Lottery Commission that all Scratchers tickets bear a disclaimer (which stated that "some prizes, including top prizes, may have been claimed" once the game started) and that point of sales advertising bear the same disclaimer. The Lottery Commission also stated that it had "instituted the proper procedures to amend its regulations to reflect this ticket language" and that it had initiated the monitoring of all Scratchers games to determine when the last top prize was claimed, so that tickets would not be sold thereafter. The Lottery Commission argued that its recent actions had "render[ed] moot plaintiff's allegation that the Lottery advertises Scratchers games 'well after all represented and advertised grand prizes have been awarded or claimed.'"

The trial court overruled the demurrer because the adequacy of "any future notification to lottery contestants . . . raises factual issues not properly decided on demurrer."

Nonetheless, later, in a bifurcated proceeding, the trial court determined that Government Code section 8880.24 imposed no mandatory duty on the Lottery Commission which could be enforced by private parties and that as a result, the Lottery Commission, a state entity, was immune from suit pursuant to Government Code section 815.6.

The trial court thereupon entered judgment in favor of the Lottery Commission. The trial court awarded the Lottery Commission its costs as the prevailing party.

II. Plaintiff's Motion for Attorney Fees

After the trial court entered judgment against plaintiff, plaintiff filed a motion for attorney fees under section 1021.5, on the ground that her action nonetheless succeeded because it "only sought to force the [Lottery Commission] to admit to its wrongdoing and reform its behavior." She claimed that that goal had been realized by the Lottery Commission's voluntary corrective actions.

Plaintiff submitted news reports of the State Lottery's corrective actions to support her claim that the lawsuit was responsible for prompting reform by the State Lottery. She also drew the court's attention to an open letter from the State Lottery's chief executive officer to the public. In it, the State Lottery acknowledged that "[r]ecent news articles have cited problems with the . . . Lottery's Scratchers games" (including "the unfortunate situation" that "tickets were still on sale after the last top prize had been claimed" in some Scratchers games), and announced that "the Lottery deeply regrets having done anything that may make even one citizen lose confidence in the integrity of the games" because "even one mistake is very regrettable." The State Lottery disclosed that it now endeavors to "ensure that all games currently on the market still have top prizes available" and announced plans for

"a special Scratchers promotion . . . where players at no cost [could] enter a second chance drawing with tickets from any game -- past or present" -- in which prizes totaling $1 million would be offered.

The Lottery Commission opposed plaintiff's motion for attorney fees, arguing (among other things) that plaintiff had failed to meet the requirements of section 1021.5.

The trial court granted plaintiff's fee request. It reasoned: "Following review of the papers submitted, and after entertaining oral argument, the [c]ourt is convinced that Plaintiff's lawsuit served as the 'catalyst' in prompting significant changes in the operation of [the Lottery Commission's] instant scratch ticket games. Because this conferred a significant benefit on all those playing these popular games, attorney's fees are justified even where, as here, plaintiff's litigation did not ultimately lead to a favorable final judgment. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352 [(*Westside*)].) The voluntary corrective action on [the Lottery Commission's] part induced by Plaintiff's litigation constitutes a 'benefit' for purposes of determining the propriety of an attorney's fee award under Section 1021.5 irrespective of the case's final outcome. (*Northington v. Davis* (1979) 23 Cal.3d 955, 960, fn. 2 [(*Northington*)])."

The trial court awarded plaintiff $351,717.38 in attorney fees. It declined, however, to apply any multiplier to this

lodestar fee amount because "[p]laintiff's initial objectives in bringing the litigation were not completely realized, her lawsuit was terminated prior to trial, and the matter's formal disposition was adverse to Plaintiff."

DISCUSSION

This case requires us to decide whether a plaintiff may be deemed a "successful party" for purposes of an award of attorney fees under the private attorney general statute -- section 1021.5 -- where every claim brought by the plaintiff was denied as a matter of law and plaintiff never received any judicial relief of any kind during the proceeding.

Whether a plaintiff has proved all of the prerequisites for an award of attorney fees under section 1021.5 is a determination for the trial court, whose "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; *Planned Parenthood*

of Santa Barbara, etc. v. Aakhus (1993) 14 Cal.App.4th 162, 170.)

In this case, the trial court found that plaintiff was a successful party under the "catalyst theory," which posits that a plaintiff may be a "successful party" within the meaning of the statute, despite the failure to obtain a favorable final judgment, if that party's lawsuit "'was a *catalyst* motivating defendants to provide the primary relief sought . . . .'" (*Westside*, *supra,* 33 Cal.3d at p. 353; *Californians for Responsible Toxics Management v. Kiser* (1989) 211 Cal.App.3d 961, 967.)

On appeal, the Lottery Commission contends that the trial court's determination that the plaintiff was a successful party within the meaning of section 1021.5 is contrary to law and thus an abuse of discretion.

We are persuaded that in light of the language and purposes of the section 1021.5 as well as the case law construing it, the award of attorney fees was error.

I.

The "American rule" requires that each litigant pay his or her own attorney fees. (*Buckhannon Home v. West Va. Dep't* (2001) 532 U.S. 598, 602 [149 L.Ed.2d 855, 861] (*Buckhannon*).)

This concept is embodied in section 1021 of the Code of Civil Procedure, which leaves each party to bear his or her own

attorney fees unless a statute or the parties' agreement provides otherwise.[3]

Section 1021.5 is a statutory exception that provides otherwise. Section 1021.5 states: "[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, if any. . . ." (See footnote 1, *ante,* for the full text.)

To determine whether the plaintiff here is entitled to an award of fees under section 1021.5, we first examine the words of the statute. "When interpreting statutes, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.) Indeed, "'[t]he statutory language

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[3] Code of Civil Procedure section 1021 provides: "Except as attorney's fees are specially provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided."

. . . is the best indicator of legislative intent.'" (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350, quoting *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826.) Statutory language is given "its usual, ordinary import," "[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

Since "successful party" in the statute is not defined, as has the term "prevailing party" in other contexts (Civ. Code, § 1717; Code Civ. Proc., § 1032, subd. (a)(4)), "it can be assumed to refer not to any special term of art, but rather to a meaning that would be commonly understood . . . ." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302; *Valley Circle Estates v. VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 608-609.)

Black's Law Dictionary defines "successful party" as the equivalent of "prevailing party," which is defined as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . ." (Black's Law Dict. (7th ed. 1999) p. 549.)

But our Supreme Court has more broadly interpreted the reach of section 1021.5, explaining that "an attorney fee award may be justified even when plaintiff's legal action does not result in a favorable final judgment," as long as "the action

served to vindicate an important right so as to justify an attorney fee award' under section 1021.5." (*Maria P. v. Riles, supra,* 43 Cal.3d at pp. 1290-1291.)

We therefore turn to a broader definition of successful party. The lay dictionary defines "successful" more consistently with our high court's construction, as "resulting or terminating in success" or "gaining or having gained success." (Merriam-Webster's Collegiate Dict. (10th ed. 1998) p. 1175.) And "success" is defined as a "favorable or desired outcome." (*Ibid.*) Thus, using this definition, under section 1021.5, a court may award attorney fees to a party who has gained a favorable or desired outcome "in any action which has resulted in the enforcement of an important right affecting the public interest . . . ." (§ 1021.5.)

While there may be an ambiguity in whether the success must be achieved "in" the action or whether the action need merely result in the "enforcement of an important right," the word "enforcement" in section 1021.5 necessarily requires that the action "compel" the result in some fashion. (Merriam-Webster's Collegiate Dict., *supra*, p. 383 ["enforce" is defined as "CONSTRAIN, COMPEL," or "to carry out effectively"].) Black's Law Dictionary likewise defines "enforcement" as "[t]he act or process of compelling compliance with a law, mandate, or command." (Black's Law Dict., *supra*, p. 549.)

Accordingly, even if a successful party need not be a party in whose favor a judgment is rendered (Black's Law Dict., *supra*,

p. 549), the plain language of section 1021.5, giving the words their usual, ordinary import, requires that a successful party be one who has achieved a desired outcome (that is, the enforcement of an important right affecting the public interest) in an action that has compelled such an outcome. But an *action* can hardly "compel" such an outcome where the *action* is deemed meritless as a matter of law and has never resulted in the issuance of any judicial relief.

While broadly construing the term "successful party" under section 1021.5, our state Supreme Court has nonetheless required that the action result in the "enforcement" of an important right affecting the public interest. For instance, in *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685, our state Supreme Court explained that "[t]he critical fact is the impact of the action, not the manner of its resolution. If the impact has been the 'enforcement of an important right affecting the public interest' and a consequent conferral of a 'significant benefit on the general public or a large class of persons' [fn. omitted] a section 1021.5 award is not barred because the case was won on a preliminary issue [citation] or because it was settled before trial. [Citation.] [Fn. omitted.]" (*Folsom v. Butte County Assn. of Governments, supra,* 32 Cal.3d at p. 685.)[4]

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[4] While the state high court in *Maria P. v. Riles*, *supra*, 43 Cal.3d at pages 1291-1292, referred to "vindicat[ion]" of an

(CONTINUED.)

Applying this broad standard, California appellate courts have upheld attorney fee awards under section 1021.5 to plaintiffs who (1) obtained relief under a settlement agreement containing defendant's promise to provide a portion of the relief sought in the lawsuit, despite a failure to secure a favorable final judgment (*Folsom v. Butte County Assn. of Governments, supra,* 32 Cal.3d at pp. 673-675, 681, 686, fn. 34; *Wallace v. Consumers Cooperative of Berkeley, Inc*. (1985) 170 Cal.App.3d 836, 842-843); (2) obtained an interim stay that "ha[d] the practical *effect* of giving the plaintiff a substantial amount of the relief sought" (*Coalition for Economic Survival v. Deukmejian* (1985) 171 Cal.App.3d 954, 957-958, 961); (3) obtained a preliminary injunction against the offending conduct (*Maria P. v. Riles, supra,* 43 Cal.3d at pp. 1290-1291); or (4) obtained a declaration from the court that the complained-of conduct was unlawful, even if injunctive relief was denied because the conduct had stopped (*California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 739-740, 742; see also *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1299-1305 [reversing denial of attorney fees to plaintiff who obtained

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important right, it also referred to enforcement of the right, and the case did not turn on this distinction. Not only is language used in an opinion not authority for a proposition not considered (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2), but the language of section 1021.5 uses "enforcement," not "vindication," and thus the former, not the latter, should control.

judgment after his motion for summary judgment was granted on a basis not raised by original moving papers]).

But we are aware of no case that has deemed a plaintiff "successful" within the meaning of section 1021.5 where the trial court has denied all of the plaintiff's claims *as a matter of law* and granted plaintiff no interim relief during the course of the proceedings. Instead, in each case cited above, the court issued some form of relief (which therefore enforced a right) or the successful party achieved a binding settlement to resolve the action (which therefore enforced the right).

It is true that in *Westside, supra,* 33 Cal.3d at page 353, and an earlier case, *Northington*, *supra*, 23 Cal.3d at page 960, footnote 2, our state Supreme Court endorsed the catalyst theory, which allows recovery of fees where the relief is obtained through a voluntary change in defendant's conduct, whether through settlement or otherwise:

"Numerous federal decisions have . . . [held] that attorney fees may be proper whenever an action results in relief for the plaintiff, whether the relief is obtained through a 'voluntary' change in the defendant's conduct, through settlement, or otherwise. [Citations.] [¶] Thus, an award of attorney fees may be appropriate where 'plaintiffs' lawsuit was a *catalyst* motivating defendants to provide the primary relief sought . . . .'" (*Westside, supra,* 33 Cal.3d at p. 353.)

But even if the catalyst theory remains viable in California,[5] we are aware of no case that has deemed a plaintiff "successful" within the meaning of section 1021.5 on the basis of defendant's voluntary action where the trial court has denied all of the plaintiff's claims *as a matter of law.*

In fact, in *Westside, supra,* 33 Cal.3d at pages 353 to 355, our state high court did not rule that voluntary action warranted an award of attorney fees, but instead reversed the attorney fee award because there was no causal connection between plaintiff's action and the relief obtained.

In *Northington, supra,* 23 Cal.3d 955 (the only other California Supreme Court decision upon which the court in *Westside* relied in recognizing the catalyst theory), the plaintiffs had been granted summary judgment and obtained an injunction. The issue of voluntary action only involved whether plaintiffs could take credit for that part of the relief to which the defendant voluntarily acceded after the action was filed. (*Northington*, *supra*, at pp. 959-960 & fn. 2.) And our state high court there merely remanded for a determination whether plaintiffs were entitled to attorney fees under section

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[5] The question whether California should reconsider the catalyst theory under section 1021.5 in light of the United States Supreme Court's decision in *Buckhannon*, *supra*, 532 U.S. 598 [149 L.Ed.2d 855] is presently pending before our state Supreme Court. (*Graham v. DaimlerChrysler Corp.*, review granted Feb. 19, 2003, S112862.)

1021.5 in light of its enactment during the pendency of the appeal. (*Id.* at p. 962.) Thus, *Northington* cannot be cited for the proposition that the catalyst theory allows an award of attorney fees to a party whose claims have been denied as a matter of law and to whom no judicial relief has been awarded.

Some courts have suggested that a plaintiff may be deemed a successful party under section 1021.5 if that party's entire action is rendered moot by virtue of the defendant's voluntary modification of its behavior. (E.g., *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1136-1137; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 312-315.) But in such an instance, the court never determines the ultimate legal merits of the action, leaving open the prospect that the action was legally capable of enforcing an important right affecting the public interest.

Another court was willing to entertain the argument that plaintiff's action induced defendants to enter a separate consent order. (*Californians for Responsible Toxics Management v. Kiser, supra,* 211 Cal.App.3d at pp. 965-969.) But there, the plaintiff's action was not dismissed on its merits but pursuant to stipulation; plaintiff's motion for preliminary injunction was denied only because the consent decree that was entered after the institution of the action afforded the plaintiff protection; and the Court of Appeal remanded for specific findings on the issue of causation.

Accordingly, none of these cases have deemed a plaintiff "successful" within the meaning of section 1021.5, based on a defendant's voluntary action, where the trial court has denied all of the plaintiff's claims *as a matter of law.*

To the contrary, appellate courts have held that a plaintiff cannot be deemed "successful" under section 1021.5 when the courts have determined that the lawsuit is an unqualified failure.

In *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, plaintiff obtained a determination that his HIV status should have been protected from disclosure and was awarded fees under section 1021.5, despite the fact that the defendants were adjudged immune from liability and prevailed on summary judgment, and the judgment in their favor was affirmed on appeal. (*Id.* at p. 1840-1841.) On appeal, the fee award was reversed. The court ruled that notwithstanding the rule that "to be a 'successful party' a plaintiff need not achieve a favorable final judgment[,] . . . we can find no case where the party who actually obtained an affirmance on appeal of a dismissal in its favor was held responsible for attorney fees under any theory." (*Id.* at pp. 1842, citation omitted.)

Similar reasoning prevailed in *Macias v. Municipal Court* (1986) 178 Cal.App.3d 568 (*Macias*). In *Macias*, the Court of Appeal reversed a fee award to the plaintiff whose petition for a writ of mandate directing the court to provide attorney counseling services to indigent individuals at arraignments was

denied, even though the court had agreed before the writ was denied to modify its arraignment admonishment procedures. (*Id.* at pp. 570-571, 579-580.) The Court of Appeal explained: "[T]he important right sought by Breeze [plaintiff's attorney], the right of all misdemeanants to the presence and assistance of a counseling attorney, was not achieved. The trial court denied the writ. Breeze appealed. We affirm and deny Breeze the relief he sought. While arraignment procedures may have been modified, the changes in fact did not satisfy Breeze despite his statement the court need not make further orders with respect to the petition. He pursued his appellate remedy. [¶] . . . *Neither the statute nor the case law authorize the award of attorney fees to a party who has been adjudicated the loser*." (*Id.* at pp. 579-580, italics added; see also *National Parks & Conservation Assoc. v. County of Riverside* (2000) 81 Cal.App.4th 234, 238, 239 [because the plaintiff "did not receive even a partial victory" in this litigation, it "is not entitled to the requested fees"].)

As *Urbaniak* and *Macias* recognize, it is one thing to deem a litigant "successful" when he has not quite achieved a favorable judgment but has obtained some other judicial relief or the action has otherwise "enforced," that is compelled, compliance with a right. It is quite another to deem as successful, for purposes of attorney fees, a litigant whose claims have been denied *as a matter of law* and who has received no judicial relief throughout the proceeding. To conclude otherwise

stretches the catalyst theory beyond its logical breaking point because it would make a legally meritless action the catalyst for the enforcement of a right the action was deemed unable to enforce.

In *Buckhannon, supra,* 532 U.S. at page 600 [149 L.Ed.2d at p. 860], the United States Supreme Court more narrowly held that the term "prevailing party" in federal attorney fee statutes did not "include[] a party that ha[d] failed to secure a judgment on the merits or a court-ordered consent decree, but ha[d] nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." In rejecting the catalyst theory, the Supreme Court noted that Black's Law Dictionary defined "prevailing party" as a party in whose favor a judgment is rendered, and that "[o]ur '[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.'" (532 U.S. at p. 603 [149 L.Ed.2d at p. 862].) It surveyed its past decisions and concluded as follows:

"These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees. [Citations.] [¶] We think, however, the 'catalyst theory' falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties.

Even under a limited form of the 'catalyst theory,' a plaintiff could recover attorney's fees if it established that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.' . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." (*Buckhannon, supra,* 532 U.S. at pp. 604-605 [149 L.Ed.2d at p. 863].)

We need not decide whether California should overrule the catalyst theory in light of the United States Supreme Court's decision in *Buckhannon*.[6] However, respect for our Legislature's use of the term "successful party" in the context of an action that "has resulted in the enforcement of an important right" precludes an interpretation of section 1021.5 that authorizes an award of attorney fees incurred by a party whose claims have all been denied as a matter of law, against whom a judgment has been entered, and to whom no interim judicial relief has been granted. Such a meritless action cannot be deemed to have itself "enforce[d] . . . an important right . . . " (§ 1021.5),

[6] See footnote 5, *ante*.

and thus the party who brings such an action cannot be deemed "successful."[7]

II.

Our conclusion is bolstered by the fact that the purpose of section 1021.5 is not furthered by granting fees to a plaintiff whose claims have been denied as a matter of law and to whom the court has granted no judicial relief at any point in the action.

In construing a statute, we construe its words in context, "keeping in mind the statutory purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing*, *supra*, 43 Cal.3d at p. 1387.)

Section 1021.5 codified the private attorney general doctrine developed in prior judicial decisions, which 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

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[7] Looking at this issue in another way, a meritless action that is dismissed as a matter of law and does not result in any interim judicial relief cannot be the proximate cause of voluntary corrective action because proximate cause not only requires cause in fact but also must be consistent with public policy, which deems the act responsible for the result. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316.) A meritless action cannot be deemed responsible for enforcement of a right that the courts have deemed the action inadequate to enforce.

be infeasible.' Thus, the fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases. [Citation.]" (*Maria P. v. Riles, supra,* 43 Cal.3d at pp. 1288-1289; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504-505; *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.)

But to award attorney fees in an action which the courts have deemed meritless as a matter of law and which has not resulted in any judicial relief would encourage nuisance suits that may elicit action, but not as the result of the lawsuit's merit. To award fees for an action that is legally incapable of enforcing an important right would not promote the public interest. To the contrary, such suits can alter statutory or constitutional rights without the imprimatur of the Legislature or the judiciary, to the detriment of the public.

III.

Finally, "[w]here uncertainty exists [in the interpretation of the plain language of a statute] consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.)

Assuming some uncertainty in the reach of section 1021.5, sound policy reasons also argue against stretching the word "successful" to include "unsuccessful."

First, any such interpretation would encourage legally meritless, nuisance actions. The law should not encourage that which it disdains.

Second, such an interpretation will entail significant satellite litigation to determine whether an unsuccessful party should nonetheless recover some portion of its attorney fees expended in losing a legally meritless action because such litigation will require substantial findings concerning matters occurring outside the litigation. As the United States Supreme Court explained in *Buckhannon,* "'[a] request for attorney's fees should not result in a second major litigation.'" (*Buckhannon, supra,* 532 U.S. at p. 609 [149 L.Ed.2d at p. 866], quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437 [76 L.Ed.2d 40].) Unlike an action where some form of judicially sanctioned relief is granted and thus affords some objective evidence of a party's success in the litigation, applying the catalyst theory to an action that has been judicially determined to lack legal merit at every stage would necessarily require a mini-trial to determine matters outside the record of the action, including (1) the defendant's subjective motivation in changing its behavior despite the plaintiff's weak case, (2) proof of causation that distinguishes what was done in response to the perceived merits of the plaintiff's action as opposed to the cost of litigation, public relations, and other factors that have nothing to do with the action's merits, and (3) a determination of the extent to which attorney fees expended in

losing a legally meritless action are nonetheless responsible for the "enforcement of an important right" (§ 1021.5) and thus recoverable.

As the United States Supreme Court stated in *Buckhannon*, "[A] 'catalyst theory' hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that 'will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct.' [Citation.]" (*Buckhannon, supra,* 532 U.S. at p. 609 [149 L.Ed.2d at p. 866].) The burden of that analysis is heightened when there is no objective evidence of the party's success in the litigation.

Accordingly, we conclude that a plaintiff whose claims are denied as a matter of law, against whom a judgment is entered, and to whom no interim judicial relief has been granted, cannot be deemed a successful party under section 1021.5. Such a determination in this case constituted an abuse of discretion. (See *Feminist Women's Health Center v. Blythe, supra*, 32 Cal.App.4th at pp. 1666-1667.)[8]

[8] Our disposition of this issue makes it unnecessary to address the Lottery Commission's remaining contentions.

DISPOSITION

The order awarding attorney fees is reversed. The Lottery Commission shall recover its costs on appeal. (Rule 27(a), Cal. Rules of Court.)

KOLKEY, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.