

MICHAEL SCHMIER, Plaintiff and Appellant,  
v.  
THE SUPREME COURT OF CALIFORNIA et al., Defendants and Respondents.  
**No. A094408.**

Court of Appeal, First District, Division 5, California.  
Mar. 4, 2002.

SUMMARY

An individual who was unsuccessful in his action to require the publication of all appellate court opinions and to enjoin enforcement of rules governing publication of opinions (Cal. Rules of Court, rule 976) nevertheless moved to recover attorney fees under the private attorney general doctrine (Code Civ. Proc., § 1021.5), alleging that the action conferred a significant benefit on the public by restricting the discretion of Courts of Appeal to publish or not publish opinions. The trial court entered an order denying the motion. (Superior Court of the City and County of San Francisco, No. 995232, A. James Robertson II, Judge.)

The Court of Appeal affirmed. The court held that plaintiff's action did not achieve his objective. The rules governing publication have not been deleted or even altered since plaintiff's action became final, so his litigation did not motivate appellate courts either to provide the primary relief he sought or to modify their behavior. Nor did the action establish new law. (Opinion by Jones, P. J., with Stevens and Simons, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

**(1) Costs § 17--Attorney Fees--Private Attorney General Doctrine.**

Code Civ. Proc., § 1021.5, permits a court to award attorney fees to a successful party against an opposing party in any action that has resulted in the enforcement of an important right affecting the public interest if a significant benefit has been conferred on the general public or a large class of persons and the necessity and financial burden of private enforcement make the award appropriate. Whether to award fees under this statute lies within the trial court's traditional equitable discretion, which will not be disturbed on appeal absent a showing of abuse.

**(2) Costs § 17--Attorney Fees--Private Attorney General Doctrine-- Prerequisites.**

The threshold requirement for a fee award under Code Civ. Proc., § 1021.5 (private attorney general), is to be a successful party. As used in § 1021.5, "successful" is synonymous with "prevailing." A favorable final judgment is not a prerequisite for successful party designation under § 1021.5; the critical fact in ascertaining successful party status is the effect of the action. The trial court must assess the litigation realistically and determine, from a practical perspective, whether the action served to vindicate an important right so as to justify a fee award. Successful party status requires a causal connection between the plaintiff's lawsuit and the relief obtained. An award of attorney fees under § 1021.5 is appropriate when a plaintiff's lawsuit was a catalyst motivating the defendants to provide the primary relief sought, or when the plaintiff vindicates an important right by activating the defendants to modify their behavior. The inquiry is an intensely factual, pragmatic one that frequently requires courts to go outside the merits of the precise underlying dispute and focus on the condition that the fee claimant sought to change. Using that condition as a benchmark, the court asks if the outcome of the litigation is one to which the fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when

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measured against the benchmark condition.

**(3a, 3b, 3c) Costs § 19--Attorney Fees--Private Attorney General Doctrine--Failure to Attain Litigation Objective of Requiring Publication of All Appellate Court Opinions.**

An individual who was unsuccessful in his action to require the publication of all appellate court opinions and to enjoin enforcement of rules governing publication of opinions (Cal. Rules of Court, rule 976) was not entitled to attorney fees under the private attorney general doctrine (Code Civ. Proc., § 1021.5), where his action did not achieve his objective. The rules governing publication have not been deleted or even altered since his action became final, so his litigation did not motivate appellate courts either to provide the primary relief he sought or to modify their behavior. Nor did the action establish new law. On appeal of the action, the court simply recognized the directive of the United States Supreme Court, that publication is constitutionally required in a narrow range of cases to avoid selective prospectivity, and observed that the rules at issue were structured in a way that allowed compliance with that directive in such circumstances.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 242, 244; West's Key Number Digest, Costs 94.42.]

**(4) Courts § 37--Decisions and Orders--Stare Decisis--Selective Prospectivity:Words, Phrases, and Maxims--Selective Prospectivity.**

“Selective prospectivity” occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule. This method of overruling precedent can violate the constitutional guaranties of due process and equal protection.

**(5a, 5b) Costs § 19--Attorney Fees--Private Attorney General Doctrine-- No Public Benefit.**

An individual who was unsuccessful in his action to require the publication of all appellate court opinions and to enjoin enforcement of rules governing publication of opinions (Cal. Rules of Court, rule 976) was not entitled to attorney fees under the private attorney general doctrine (Code Civ. Proc., § 1021.5). The opinion on appeal did not confer a significant public benefit by recognizing that unpublished opinions may be cited and discussed as persuasive authority. Language in the opinion stating that opinions not published in the Official Reports cannot be cited as precedent by other litigants who are not parties thereto, could not be read to mean that unpublished opinions could be cited as persuasive authority even if they could not be cited as precedent. In prohibiting courts and parties from citing or relying on opinions not certified for publication, except in the limited circumstance when the nonpublished opinion has a particular historical relationship to a subsequent case, Cal. Rules of Court, rule 977, does not distinguish between binding and persuasive precedent.

**(6) Courts § 37--Decisions and Orders--Stare Decisis--Precedent--Binding and Persuasive:Words, Phrases, and Maxims--PrecedentBinding and Persuasive.**

There is a distinction between “binding” and “persuasive” precedent: the former must be followed, but the latter need not be. However, “authority” is an integral element of the general definition of “precedent” when there is no qualifying adjective. In law, a precedent is an adjudged case or decision of a court of justice, considered as furnishing authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle that governed the first case is applicable to the variant facts.

**(7) Courts § 40.5--Decisions and Orders--Stare Decisis--Nonpublished Court Opinions on Internet.**

Electronic availability of appellate court opinions cannot be equated with “publication” as the term is used in Cal. Rules of Court, rule 976, which governs the publication of opinions with precedential value. Opinions available electronically, but designated “not for publication” are not synonymous with “publication” under rule 976.

COUNSEL

Kenneth J. Schmier for Plaintiff and Appellant.

(Cite as: **96 Cal.App.4th 873**)

Bill Lockyer, Attorney General, Manuel M. Medeiros, Assistant Attorney General, Kenneth R. Williams and Tom Blake, Deputy Attorneys General, for Defendants and Respondents.

### **JONES, P. J.**

Plaintiff and appellant Michael Schmier appeals the order denying his request for attorney fees under the “private attorney general” statute. (Code Civ. Proc., § 1021.5.<sup>FN1</sup>) He contends that even though he was not, technically, the successful party in the underlying action, his litigation to require publication of all California Court of Appeal opinions conferred a significant benefit on the public, thereby entitling him to such fees.

FN1 All further section references are to the Code of Civil Procedure.

#### Background

The California Rules of Court provide that no opinion of the Court of Appeal may be published in the Official Reports unless it meets one of four criteria. Briefly stated, the criteria are: establishment of a new rule of law, resolution of a conflict in the law, issue of continuing legal interest, or substantial review of the history of a common law rule or statute. (Cal. Rules of Court,<sup>FN2</sup> rule 976(b).) In order to be published in the Official Reports, appellate<sup>FN3</sup> opinions must be certified for publication. If they are not certified they may not be subsequently cited as legal authority. (Rule 977.) The rules establish a procedure for requesting publication of appellate opinions, first from the Court of Appeal, and then from the Supreme Court. (Rule 978.)

FN2 Unless otherwise indicated, all further rule references are to the California Rules of Court.

FN3 For purposes of this appeal, “appellate opinions” refers to opinions of the Court of Appeal in appeals from lower court judgments or orders and in original proceedings such as petitions for extraordinary relief. The term does not refer to opinions or other rulings of the Supreme Court.

Appellant sought injunctive relief and a writ of mandate to compel respondents, the Supreme Court of California, the Courts of Appeal of \***877** California and the Judicial Council of California, to publish all appellate opinions and to enjoin them permanently from enforcing the rules governing publication. (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 706[93 Cal.Rptr.2d 580])(*Schmier I*.) The trial court dismissed the action after sustaining respondents' demurrer without leave to amend, this court affirmed the dismissal, and the California Supreme Court denied appellant's petition for review. (*Id.* at pp. 707, 712.)

After the remittitur issued, entitling respondents to recover costs, appellant moved for an award of attorney fees under section 1021.5 on the ground *Schmier I* secured an important right affecting the public interest. He identified the important right as “a restriction on the previously unfettered discretion of the appellate courts' decision to publish or not publish appellate[] opinions.” The trial court concluded that appellant's litigation of *Schmier I* did not meet the criteria of section 1021.5 and denied the motion.

#### Discussion

##### *Standard of Review*

(1) Section 1021.5 permits a court to award attorney fees “to a successful party” against an opposing party “in any action which has resulted in the enforcement of an important right affecting the public interest” if a significant benefit has been conferred on the general public or a large class of persons and the necessity and financial burden of pri-

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vate enforcement make the award appropriate. Whether to award fees under this statute lies within the trial court's traditional equitable discretion, which will not be disturbed on appeal absent a showing of abuse. (*Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397, 1405-1406[246 Cal.Rptr. 806]; *Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 964[88 Cal.Rptr.2d 565].)

#### *Successful Party Status Under Section 1021.5*

(2) The threshold requirement for a fee award under section 1021.5 is to be a “successful party.” (*Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1842[24 Cal.Rptr.2d 333].) As used in section 1021.5, “successful” is synonymous with “prevailing.” (19 Cal.App.4th at p. 1843, fn. 4.)

A favorable final judgment is not a prerequisite for “successful party” designation under section 1021.5; the critical fact in ascertaining “successful party” status is the impact of the action. (*Maria P. v. Riles* (1987) 43 Cal.3d \*878 1281, 1291[240 Cal.Rptr. 872, 743 P.2d 932](*Maria P.*.) The trial court must assess the litigation realistically and determine, from a practical perspective, whether the action served to vindicate an important right so as to justify a fee award. (*Ibid.*)

“Successful party” status requires a causal connection between the plaintiff’s lawsuit and the relief obtained. (*Maria P.*, *supra*, 43 Cal.3d at p. 1291.) “An award of attorney fees under section 1021.5 is appropriate when a plaintiff’s lawsuit ‘ ’ was a *catalyst* motivating defendants to provide the primary relief sought, ‘ ’ or when plaintiff vindicates an important right ‘ ’ by activating defendants to modify their behavior. ‘ ’ [Citations.]” (43 Cal.3d at pp. 1291-1292.)

“At bottom, the inquiry is an intensely factual, pragmatic one that frequently requires courts to go outside the merits of the precise underlying dispute and focus on the condition that the fee claimant sought to change.” (*Crawford v. Board of Education*, *supra*, 200 Cal.App.3d at p. 1407.) Using that condition as a benchmark, the court asks if the outcome of the litigation is one to which the “fee claimant’s efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.” (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685[186 Cal.Rptr. 589, 652 P.2d 437].)

(3a) The “condition” appellant’s action sought to change was the enforcement of the Rules of Court governing the publication of appellate opinions, alleged by appellant to be unconstitutional under various provisions of the federal and state Constitutions and violative of Civil Code section 22.2. (*Schmier I*, *supra*, 78 Cal.App.4th at pp. 706-707.) Appellant’s litigation objective, in essence, was the elimination of these rules so that publication would be mandatory for all appellate opinions. (*Ibid.*) His action did not realize this objective. The rules governing publication have not been deleted or even altered since *Schmier I* became final, so his litigation did not motivate respondents either to provide the primary relief he sought or to modify their behavior. (*Maria P.*, *supra*, 43 Cal.3d at pp. 1291-1292.)

#### *Schmier I Did Not Announce New Law*

Appellant contends that he is nevertheless a “successful party” under criteria articulated in *Leiserson v. City of San Diego* (1988) 202 Cal.App.3d 725[249 Cal.Rptr. 28](*Leiserson II*). \*879

The *Leiserson* plaintiff was a news photographer arrested while photographing a disaster scene, who, after the criminal charge was dismissed, sued the city under various tort theories. (*Leiserson II*, *supra*, 202 Cal.App.3d at p. 730.) The appellate court ultimately determined that he had been properly excluded from the disaster scene, but in so doing it defined, in a published opinion, the rights of the media under Penal Code section 409.5, subdivision (d) to be present at such scenes. (202 Cal.App.3d at p. 730; *Leiserson v. City of San Diego* (1986) 184 Cal.App.3d 41[229 Cal.Rptr. 22](*Leiserson I*.)

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After *Leiserson I* became final, the plaintiff sought attorney fees under section 1021.5 on the theory that *Leiserson I* “delineated important media rights protected” by the statute. (*Leiserson II, supra*, 202 Cal.App.3d at p. 736.) *Leiserson II* concluded that the plaintiff was not a “successful” party because he failed to prevail in any manner within his chosen context. (*Id.* at p. 738.)

Before reaching this conclusion, *Leiserson II* acknowledged that a published opinion that clarifies and/or expands the law is probative of whether the fee claimant has satisfied the substantial benefit concept underlying section 1021.5. (*Leiserson II, supra*, 202 Cal.App.3d at p. 737.) *Leiserson II* also acknowledged that “if that opinion is published because it satisfies the criteria for publication under rule 976 et seq...., such status is also probative of whether the decision clearly vindicates a right where the reason for publication was to announce a rule not found in previously published opinions. [Citation.]” (*Ibid.*) It further acknowledged that litigants can be deemed successful if their actions “spur enforcement of an important public right and an enunciation of the governing rule of law precisely delineating its breadth, even though [the litigants] obtain no money damages or other requested relief.” (*Id.* at p. 733.)

Relying on this language of *Leiserson II*, appellant argues he is entitled to fees because, as a result of *Schmier I*, the publication of opinions which enunciate new rules of law is now mandatory, whereas it was previously discretionary. He correctly observes that rule 976(b), which states in relevant part that “[n]o opinion” of the Court of Appeal “may be published ... unless the opinion [inter alia] [¶] (1) establishes a new rule of law ...,” affords appellate courts discretion to publish those opinions stating new rules of law. However, rule 976(b) imposes no requirement that reviewing courts do so.

According to appellant, the Court of Appeal in *Schmier I* construed this rule to impose a mandatory standard of publication in such cases. \*880 (4)(See fn. 4.) Appellant focuses specifically on the opinion's discussion of how the rules protect litigants against selective prospectivity, the constitutionally proscribed method of judicial decisionmaking under which certain newly pronounced rules are not retroactive.<sup>FN4</sup> In *Schmier I*, we said: “[The rules] establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published.” (*Schmier I, supra*, 78 Cal.App.4th at pp. 710-711.)

FN4 Selective prospectivity “occurs when a court expressly overrules a decisional precedent, but applies the new rule only to the case in which the new rule is announced, returning to the old rule with respect to all other cases arising on facts predating the pronouncement of the new rule.” (*Schmier I, supra*, 78 Cal.4th at p. 710, citing *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, 534-537 [111 S.Ct. 2439, 2442-2444, 115 L.Ed.2d 481](*Beam*)). This method of overruling precedent can violate the constitutional guarantees of due process and equal protection.

(3b) As we have noted, the decision whether an award of private attorney general fees is warranted lies initially with the trial court. Nevertheless when ascertaining “successful party” status under section 1021.5, this court is equally well positioned to determine if its earlier opinion vindicated an important right affecting the public interest and yielded a significant benefit. (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 8[232 Cal.Rptr. 697]; see also *Leiserson II, supra*, 202 Cal.App.3d at p. 737; *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075, 1083, fn. 7[241 Cal.Rptr. 239].)

Contrary to appellant's assertion, *Schmier I* did not establish new law. We simply recognized the directive of *Beam, supra*, 501 U.S. at pages 534-537 [111 S.Ct. at pages 2442-2444], that publication is constitutionally required in a narrow range of cases to avoid selective prospectivity, and we then observed that the rules at issue are structured in a way that allows compliance with *Beam's* directive in such circumstances. (*Schmier I, supra*, 78 Cal.App.4th at pp. 710-711.) In other words, *Schmier I* was simply an explication of how the publication rules comport with the applicable constitutional requirements. As the trial court aptly observed in denying appellant's request for fees, “What you have [in *Schmier I*] is ... basically a holding that the publication rules that are used by the courts are effective.

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[¶] I think ... some[one] reading the opinion, would say: Good Heavens. If the Court of Appeal[] thought this was some new rule that was being pronounced, it is an odd way for [the Court of Appeal] to do it ....”

It is doubtless the intent of the Courts of Appeal that all opinions construing a statute (or rule) so as to uphold the statute's constitutionality will confer a significant benefit on the public by removing any doubt about \*881 the statute's constitutionality. However, the claimant of an attorney fee award under section 1021.5 must satisfy not only section 1021.5's public benefit requirement but also its requirement of enforcement (or vindication) of an important right affecting the public interest. (See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 318[193 Cal.Rptr. 900, 667 P.2d 704].) *Schmier I* did not result in the enforcement of important rights affecting due process or equal protection because, insofar as the publication rules pass constitutional muster by comporting with *Beam*, the right against selective prospectivity needed no enforcing.

#### *Issues Raised in Reply Brief*

(5a) Appellant contends for the first time in his reply brief that *Schmier I* conferred a significant public benefit because it recognized that unpublished opinions may be cited and discussed “as persuasive authority,” and it precipitated a change in court procedures concerning dissemination of opinions. Issues raised for the first time in a reply brief need not be addressed on appeal. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453[13 Cal.Rptr.2d 432].) In any case, appellant's contentions have no merit.

##### *a. Persuasive Authority*

Appellant relies particularly on language in *Schmier I* stating that opinions not published in the Official Reports “means nothing more than that they cannot be cited as *precedent* by other litigants who are not parties thereto.” (*Schmier I, supra*, 78 Cal.App.4th at p. 712, italics added.) Appellant would draw from this sentence a holding that the advisory “Not for Publication” means opinions so labeled may be cited as “persuasive authority,” even if they cannot be cited as “precedent.”

*Schmier I*, read in context with rule 977, does not allow such a strained inference. (6) We recognize that there is a distinction between “binding” and “persuasive” precedent: the former must be followed, but the latter need not be. (See Black's Law Dict. (7th ed. 1999) p. 1195, col. 2; Garner, Dict. of Modern Legal Usage (2d ed. 1995) pp. 680-681.) However, “authority” is an integral element of the general definition of “precedent” when there is no qualifying adjective: “In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing ... *authority* for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an *authority* for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant \*882 facts.’ [Citation.]” (Black's Law Dict., *supra*, at p. 1195, italics added.) (5b) In prohibiting courts and parties from citing or relying on opinions not certified for publication, except in the limited circumstance when the nonpublished opinion has a particular historical relationship to a subsequent case, rule 977 does not distinguish between binding and persuasive precedent. Therefore, “precedent,” as used in the subject sentence (*Schmier I, supra*, 78 Cal.App.4th at p. 712), had no meaning other than its customarily understood meaning that encompasses unmodified “authority.” From our simple statement describing what the nonpublication advisory proscribes, one should not infer an unstated new meaning to conjure up an imagined public benefit. Our statement simply employed one term in place of a synonym.

##### *b. Catalyst*

(7) Appellant's claim that *Schmier I* precipitated a change in court procedures concerning dissemination and availability of unpublished opinions is not demonstrated in the record. He appears to assert that as a consequence of his litigation, all unpublished opinions are now available electronically. At oral argument, he attempted to equate electronic availability with “publication” as the term is used in rule 976. We perhaps state the obvious in observing that

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opinions available electronically, but designated “not for publication” are not synonymous with “publication” under rule 976.

None of the documents to which appellant refers, some of which are not even in the record, support his catalyst theory. They do not establish that respondents were prompted or inspired or persuaded to arrange for electronic access to all opinions because of his litigation.

#### *Relief Sought*

(3c) Finally, we note that the relief sought by the claimant is probative of the claimant's entitlement to fees. (*Leiser-son II, supra*, 202 Cal.App.3d at p. 738.)The primary relief sought by appellant was not the clarification and/or expansion of the publication rules, but their eradication. Given his goal, an opinion that reinforced the publication standards articulated in the rules does not warrant fees.

#### *Conclusion*

Appellant cannot, as a practical matter, be deemed a successful party under section 1021.5. He did not obtain the relief he sought, and he has not demonstrated that his efforts in *Schmier I* contributed significantly to the \*883 conferral of an actual benefit. (*Maria P., supra*, 43 Cal.3d at pp. 1291-1292;*Folsom v. Butte County Assn. of Governments, supra*, 32 Cal.3d at p. 685.)Therefore, the trial court did not abuse its discretion in denying him attorney fees.

#### Disposition

The order is affirmed. Costs to respondents.

Stevens, J., and Simons, J., concurred. \*884

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