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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CRISTINA VASQUEZ, Plaintiff and Respondent, v. STATE OF CALIFORNIA, Defendant and Appellant.	D045592 (Super. Ct. No. GIC 740832)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Pate, Judge. Affirmed with directions.

Archer Norris, Thomas S. Clifton, Colin C. Munro, Sonny T. Lee; Niddrie, Fish & Buchanan LLP, and Martin N. Buchanan for Defendant and Appellant.

Law Offices of Robert Berke, Robert Berke and Joseph A. Pertel for Plaintiff and Respondent.

In *Vasquez v. State of California* (2003) 105 Cal.App.4th 849, 851 (*Vasquez I*), we held as a matter of first impression that the State of California (the State) has a duty under Proposition 139, the Prison Inmate Labor Initiative of 1990, to require a private sector manufacturer's payment of comparable or prevailing wages to inmate employees. We

reversed a judgment entered for the State after the sustaining of a demurrer to Cristina Vasquez's taxpayer waste cause of action. (Code Civ. Proc.,[1] § 526a.)

In this appeal, the State challenges the propriety of a judgment awarding Vasquez $1,257,258.60 in attorney fees, under a private attorney general theory, as the prevailing party at trial. (§ 1021.5.) The State contends Vasquez did not satisfy the elements of section 1021.5, in that, she was not a successful party within the meaning of the statute; she neither enforced an important right affecting the public interest nor conferred a significant benefit on the general public or a large class of persons; there was no necessity of private enforcement; and she made no prelitigation settlement demand. The State also contends the trial court improperly awarded her attorney fees for services rendered before she or the State were parties to the litigation and for causes of action in which they were not named, the fees awarded are duplicative of a fee award rendered against and for other parties, and the court employed an improper procedure in reviewing attorney billings. We affirm the judgment with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Under Proposition 139 (codified in Pen. Code, § 2717.1 et seq.), which the voters approved in November 1990, the Director of Corrections (the Director) is required to establish joint venture programs with prisons to allow private businesses to employ inmates to produce goods or services. (Pen. Code, § 2717.2.) Proposition 139 requires a private business to pay inmates wages comparable to those it pays noninmate employees

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

for similar work, or if the business has no such employees, to pay inmates prevailing wages in the relevant locality. (Pen. Code, § 2717.8.) Joint venture employers receive incentives such as favorable rents and utility rates at prison facilities, and they are not required to give inmate employees vacation pay or health coverage.

In February 1996 the Department of Corrections (the Department) entered into a joint venture agreement with CMT Blues for its manufacture of clothing at the Richard J. Donovan Correctional Facility (Donovan). This action commenced in August 1999 when former Donovan inmates Shearwood Fleming and Charles Ervin sued CMT Blues for unfair business practices and a variety of other causes of action. They alleged, among other things, that CMT Blues violated Proposition 139 by failing to pay them prevailing wages and overtime compensation.

In October 1999 Fleming and Ervin filed a first amended complaint, and in July 2000 they filed a second amended complaint. The former pleading added the Union of Needletrades, Industrial & Textile Employees (UNITE) as a plaintiff in causes of action for unfair business practices, and the latter pleading added class allegations for the recovery of wages on behalf of all Donovan inmates CMT Blues employed. Further, the second amended complaint added a new plaintiff, Vasquez, the international vice president for UNITE, in a cause of action against the State for taxpayer waste under

section 526a.[2]

In November 2000 a third amended complaint was filed. In May 2001 a fourth amended complaint was filed, which alleged in Vasquez's cause of action that "inmates hired into . . . joint venture programs were not permitted to receive any compensation for the work they performed . . . unless and until they had completed an unpaid 'training period' which usually lasted between thirty and sixty days. During this 'training period,' the inmate workers, including Plaintiffs Fleming, Ervin and all members of the Inmate Worker Class, were denied any and all compensation for the hours they . . . worked."

The court granted the State's demurrer to Vasquez's taxpayer cause of action in the fourth amended complaint, determining such a claim requires the actual or threatened expenditure of funds, and may not be based on the State's failure to collect funds. The court also found the State's expenditures to implement Proposition 139 did not support a section 526a action because they are not illegal or wasteful.

Vasquez appealed the resulting judgment, and during the pendency of the appeal the inmate class action against CMT Blues proceeded to a bench trial. In May 2002 the

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[2] Section 526a provides in part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, of any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, as paid, a tax therein." Section 526a is intended "to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

court entered a judgment against CMT Blues, ordering it to pay the plaintiff inmate class a total of $841,188.44 "in minimum wages, liquidated damages, waiting time and civil penalties, prevailing wages, and interest due." The court also approved a stipulated order requiring CMT Blues to pay attorney fees of $435,000 and costs of $65,000 to the inmates.

In January 2003 we issued our opinion in *Vasquez I* reversing the judgment against Vasquez and concluding she stated a valid cause of action for taxpayer waste. We explained that "an action lies under section 526a not only to enjoin wasteful expenditures, but also to enforce the government's duty to collect funds due the State. ' "A taxpayer may sue a governmental body in a representative capacity in cases involving [its] . . . failure . . . to perform a duty specifically enjoined." ' " (*Vasquez I, supra,* 105 Cal.App.4th at p. 854.) A purpose of Proposition 139 is "to defray the costs of inmates' room and board," and the Director is required to select a joint venture employer on the basis of its ability to meet that objective. We concluded that given the State's right to 20 percent of inmate wages, "it cannot sit idly by while CMT Blues violates Proposition 139 and the express terms of the joint venture agreement." (*Id.* at p. 856.)

In June 2003 a fifth amended complaint was filed, adding allegations to Vasquez's taxpayer waste cause of action that other joint venture employers, Pub Brewery, located at Donovan, and Western Manufacturing, located at Calipatria State Prison, also required inmates to complete an initial period of unpaid employment and, along with CMT Blues, failed to pay prevailing wages.

In January 2004 Vasquez's taxpayer claim proceeded to a bench trial. After the second day of testimony, the parties agreed to a stipulated injunction, which the court entered on February 17, 2004. The injunction is for an initial period of two years, and requires the State to obtain wage plans from all joint venture employers "similar to wage plans of the employer[s'] outside factories (if any) or be based on comparable wages for similar work in the locality of the prison, taking into account factors such as seniority, performance, the technical nature of the work being performed and the provisions of Proposition 139"; to take reasonable steps to identify comparable wages required under Proposition 139; to inform joint venture employers of their obligation to comply with applicable record-keeping requirements of the Labor Code and the Industrial Welfare Commission and to include the obligation in State contracts; to inform inmates of their rights under joint venture programs to prevailing wages and to file grievances; and to provide plaintiffs' counsel with payroll data for employees of each joint venture employer beginning June 1, 2004, and thereafter every 90 days for the duration of the injunction.

Further, the injunction requires the State to notify the court and plaintiffs' counsel if a joint venture employer "fails to pay the full payroll due and owing," and describe the steps it is taking to rectify the problem. The injunction also requires each joint venture employer to post a security bond or equivalent in the amount of two months' wages "for the workforce contemplated after 6 months of operation."

Vasquez then moved for attorney fees under a private attorney general theory. (§ 1021.5.) The court took the matter under submission after a hearing on July 22, 2004, and on August 11 it issued an ex parte order awarding her a lodestar amount of $967,122

and applying a multiplier of 1.3, for a total fee award of $1,257,258.60. The court held a second hearing, and on October 28 it entered a judgment on the stipulated injunction and attorney fees, confirming its previous award of $1,257,258.60 in fees and also awarding $33,195.41 in costs.

DISCUSSION

I

Standard of Review

"An important exception to the American rule that litigants are to bear their own attorney fees is found in section 1021.5" (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*)), which codifies the " 'private attorney general' " doctrine the California Supreme Court adopted in *Serrano v. Priest* (1977) 20 Cal.3d 25, 47. (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1767.) Section 1021.5 provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (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."

" '[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, 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 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.' " (*Graham, supra,* 34 Cal.4th at p. 565.)

Whether the applicant for attorney fees has proved section 1021.5's elements is a matter primarily vested in the trial court. (*Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 571.) "We review the entire record, attentive to the trial court's stated reasons in denying [or granting] the fees and to whether it applied the proper standards of law in reaching its decision. [Citation.] We will reverse the trial court's decision only if there has been a prejudicial abuse of discretion, i.e., when there has been a manifest miscarriage of justice or ' "where no reasonable basis for the action is shown." ' " (*Hull v. Rossi, supra,* 13 Cal.App.4th at p. 1767.)

II

Vasquez's Showing Under Section 1021.5

A

Successful Party

The State contends Vasquez is not entitled to attorney fees because she did not satisfy the elements of section 1021.5. It first asserts she was not the successful party within the meaning of section 1021.5 because the comparable wages required under Proposition 139 (§ 2717.8) are neither objectively identifiable nor readily ascertainable.

The State makes factual assertions that are not supported by citations to the appellate record. When a party provides a brief without citation of record references we may treat the point as waived or meritless and pass on it without further consideration. (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.) In any event, Vasquez was the successful party as she obtained a stipulated injunction requiring the State to comply with its duties under Proposition 139 to ensure the payment of comparable or prevailing wages to inmates. The State is apparently attacking the terms of the injunction, but the State stipulated to it and it is not at issue on appeal.

B

Public Interest and Substantial Benefit

The State also contends Vasquez's taxpayer action did not result in the "enforcement of an important right affecting the public interest" (§ 1021.5), as she is an officer of UNITE and "[t]here can be little doubt that her true intent . . . was to protect union jobs and not the public at large." The State asserts her claim "is substantially composed of fees expended on behalf of a relatively small number of inmates who sued a single joint venture business employer to recover exclusively personal monetary interests."

The "question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action—i.e., whether the right involved was of sufficient societal importance." (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1417.) The trial court "must realistically assess the litigation and determine, from a practical perspective, whether . . . the action served to vindicate an

important right so as to justify an attorney fee award under a private attorney general theory." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 938.) "Of course, 'important rights' are not necessarily confined to any one subject or field." (*Id.* at p. 935.)

"The purposes of Proposition 139 are to (1) require inmates to 'work as hard as the taxpayers who provide for their upkeep,' (2) provide funds from which inmates can reimburse the State for a portion of their costs of incarceration, satisfy restitution fines and support their families, and (3) assist in inmates' rehabilitation and teach skills they may use after their release from prison." (*Vasquez I, supra,* 105 Cal.App.4th at p. 851, citing Historical and Statutory Notes, 51B West's Ann. Pen. Code (2000 ed.) foll. § 2717.1, p. 223.) An inmate's wages are subject to deductions, not exceeding a total of 80 percent of gross wages, for taxes, reasonable charges for room and board, restitution fines and contributions to victims' crime funds and family support. (Pen. Code, § 2717.8.) The Director has determined that an inmate's net wages are subject to a 20 percent deduction for room and board. (Cal. Code Regs., tit. 15, § 3485, subd. (h)(3).)

The court properly exercised its discretion by finding Vasquez's litigation resulted in the vindication of important public interests. Our holding in *Vasquez I* establishes, as a matter of first impression, a taxpayer waste cause of action against the State if it fails to obtain joint venture employers' compliance with Proposition 139's wage provisions. (*Vasquez I, supra,* 105 Cal.App.4th at p. 856.)

On remand, Vasquez obtained a stipulated injunction that places the State's joint venture program under the court's supervision for an initial two-year period to ensure any

joint venture employers' compliance with Proposition 139. The payment of comparable or prevailing wages to inmates in accordance with Proposition 139 will, in turn, protect the interests of voters who approved the initiative; benefit taxpayers by further defraying the costs of inmate incarceration; allow employed inmates to pay more in restitution fines, victim compensation and family support; and protect law abiding workers from having their wages undermined by joint venture employers' payment of low wages to inmates.

Noreen Blonien, the director of the State's joint venture program between 1991 and December 2002, testified that in addition to the 20 percent of inmate wages the State obtained to defray the costs of incarceration, another "20 percent went to families, which impacted welfare costs." She also explained that ordinarily inmates do not pay ordered restitution, but those in the joint venture program "pay that right away." Further, when inmates are not subject to support or restitution orders, a portion of their wages go to "community-based organizations," which "made [a] tremendous impact in the communities of Imperial County, Blythe, wherever there was a joint venture." Blonien also explained that prisons benefit from the joint venture program because inmates remain discipline free to qualify for the program, and the program gives them skills that "allow[] them to transfer into the community, get jobs, keep jobs, and not come back to

prison." Higher wages would stimulate greater interest in the program. Vasquez's action vindicated a variety of important societal interests.[3]

We also reject the State's assertion Vasquez's action did not confer a significant benefit on the general public or a large class of persons. "The significant benefit criterion calls for an examination whether the litigation has had a beneficial impact on the public as a whole or on a group of private parties which is sufficiently large to justify a fee award. This criterion thereby implements the general requirement that the benefit provided by the litigation inures primarily to the public." (*Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at p. 1417.) Certainly, the State's voters and taxpayers constitute a large class of persons, and a significant benefit was conferred on them as discussed above. The State is incorrect in asserting that the "only potential 'benefit' that can be

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3 Vasquez provided a declaration that stated: "I initiated this litigation since I believe that employers who receive the benefits of prison labor must pay their fair share to prevent the dislocation and loss of jobs by employers who employ non-inmate labor, as set forth in Proposition 139. I also believe that the taxpayers created the Joint Venture Program to benefit important societal interests, including crime victims and inmate dependents, as set forth in State Law."

discerned was to the inmates."[4]

C

Necessity of Private Enforcement

The State also contends the attorney fees award was improper because private enforcement was not a "necessity" within the meaning of section 1021.5, subdivision (b). "This factor ' "looks to the adequacy of *public* enforcement and seeks economic equalization of representation in cases where private enforcement is necessary." ' " (*Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 639.) An important question in determining whether the services of the private party were necessary is, "Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non de minimis contribution to its judgment, which were nonduplicative of those advanced by the governmental entity?" (*Id.* at pp. 642-643.)

The State contends Vasquez's taxpayer cause of action was unnecessary because

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4 In arguing a lack of substantial benefit, the State asserts that as of January 31, 2004, only a small number of prison inmates are involved in the joint venture program. The record citation the State gives, however, is to its attorneys' written argument in opposition to a fee award, which does not constitute evidence. Blonien testified that between 1991 and 2002 approximately 1,700 inmates were involved in the joint venture program. Blonien's successor, James L'Etoile, testified that in the joint venture program's "peak year," 2000, 16 businesses operated within the prison system, and in January 2004 the number had dropped to seven.

The State also asserts that "[i]f advancing the interests of voters were sufficient in and of itself to convey a significant benefit on the public or a large group of persons, then enforcing any law would meet the 'significant benefit' requirement." Here, however, the protection of voters' expectations is not the only benefit Vasquez's litigation conferred.

"the core of this case" was "to vindicate and enforce the pecuniary interests of the inmate[] class of employees at CMT Blues," and under the judgment against CMT Blues the right was vindicated. The State asserts the taxpayer claim as "a peripheral add on."

The State's position lacks merit. As discussed, the taxpayer claim vindicated many important rights in addition to inmates' individual rights to receive comparable or prevailing wages from joint venture employers under Proposition 139. Further, when "the plaintiff must act on his [or her] own behalf because . . . the appropriate [governmental] agency has failed or refuses to act to protect his or her rights, private as contrasted with public enforcement is necessary." (*Daniels v. McKinney* (1983) 146 Cal.App.3d 42, 52 [enforcement of prisoners' rights to reasonable weekly exercise period required private action since the agency charged with their custody was the party against whom enforcement must be sought]; *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 941 ["Inasmuch as the present action proceeded against the only governmental agencies that bear responsibility for the subdivision approval process, the necessity of private, as compared to public, enforcement becomes clear"].)

Vasquez's taxpayer action was against the public entity responsible for ensuring joint venture employers' compliance with Proposition 139, and the State does not contend it met its duty to ensure such compliance. That inmates may have incentive to sue private employers for wages does not mean an action against the State to obtain compliance with its obligations under Proposition 139 lacked necessity. Vasquez's suit addressed the issue of taxpayer waste on a system-wide basis, a more effective resolution than piecemeal lawsuits inmates may bring against noncompliant joint venture employers.

D

Prelitigation Settlement Efforts

The State next contends Vasquez is not entitled to attorney fees under section 1021.5 because she did not make a reasonable attempt to settle her claim before resorting to litigation. The State relies on *Graham, supra,* 34 Cal.4th at page 560, which involves the "catalyst theory" of recovery under section 1021.5. Under the catalyst theory, "attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." (*Graham, supra,* at p. 560.) The catalyst theory "is an application of the . . . principle that courts look to the practical impact of the public interest litigation . . . to determine whether the party was successful, and therefore potentially eligible for attorney fees." (*Id.* at p. 566.)

In *Graham,* the defendant criticized the "catalyst rule [because] it could encourage nuisance suits by unscrupulous attorneys hoping to obtain fees without having the merits of their suit adjudicated." (*Graham, supra*, 34 Cal.4th at p. 574.) The defendant cited the following from the concurring opinion of Justice Scalia, joined by Justice Thomas, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598 (*Buckhannon*): " 'If the [catalyst theory] sometimes rewards the plaintiff with a phony claim (there is no way of knowing), [its absence] sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the

extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them, and a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the extortionist.' " (*Graham, supra,* 34 Cal.4th at p. 574, citing *Buckhannon, supra,* 532 U.S. at p. 618 (conc. opn. of Scalia, J.).)[5]

In *Graham,* the California Supreme Court held the catalyst theory should not be abolished in California, but clarified it to mean "a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit, . . . and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." (*Graham, supra,* 34 Cal.4th at p. 561.) The Attorney General, appearing as amicus curiae, sought the element of a reasonable settlement attempt in a catalyst theory case, and the court found it "fully consistent with the basic objectives behind section 1021.5 and with one of its explicit requirements—the 'necessity . . . of private enforcement' of the public interest. Awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance that objective and encourages lawsuits that are more opportunistic than authentically for the public good. Lengthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the

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5 In *Buckhannon,* the United States Supreme Court rejected the catalyst theory as a basis for attorney fees awards under various federal statutes. (*Buckhannon, supra,* 532 U.S. at p. 605.)

opportunity to meet its demands within a reasonable time." (*Graham, supra,* at p. 577; see also *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.)

This case, however, does not involve a catalyst theory or uncertainty as to the merits of Vasquez's taxpayer action. Rather, during trial she obtained a stipulated injunction that was reduced to a judgment. Although the court's reasoning in imposing the element of a reasonable settlement effort in *Graham* also appears applicable in the context of noncatalyst theory cases, a "decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) The court stated, "In addition to some scrutiny of the merits, we conclude that another limitation *on the catalyst rule* [reasonable settlement effort] . . . should be adopted by this court." (*Graham, supra,* 34 Cal.4th at p. 577, italics added.)

The State develops no argument that the holding of *Graham* should be extended to section 1021.5 cases not based on a catalyst theory. Indeed, the State does not mention the catalyst theory in its opening brief, and in its reply brief it ignores Vasquez's assertion in her respondent's brief that *Graham* is inapplicable because it concerns the catalyst theory. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another

ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1693, fn. 2.) The appellate court is entitled to the assistance of counsel, and it is not required to develop a party's argument. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

Moreover, the State vigorously opposed an attorney fees award to Vasquez on numerous grounds, but it did not raise a prelitigation settlement demand issue.[6] " 'Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system . . . . " 'In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his [or her] legal rights and of calling the judge's attention to any infringement of them.' " . . . [¶] The same policy underlies the principles of "theory of the trial." "A party is not permitted to change his [or her] position and adopt a new and different theory on appeal. To permit him [or her] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party." [Citation.] The principles of "theory of the trial" apply to motions . . . .' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468.) Although we have discretion to consider a belatedly raised question of pure law (*ibid.*), we decline to do so here given the lack of any cogent argument by the State

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6 In *Grimsley v. Board of Supervisors* (1985) 169 Cal.App.3d 960, 966, the court held in a noncatalyst theory case that "attorney fees under . . . section 1021.5, will not be awarded unless the plaintiff seeking such fees had reasonably endeavored to enforce the 'important right affecting the public interest,' *without litigation and its attendant expense*." The State did not raise *Grimsley* at the trial court or on appeal.

that *Graham* should be extended. Under all the circumstances, we deem the matter waived or forfeited. (*Royster v. Montanez* (1982) 134 Cal.App.3d 362, 367.)

The court properly exercised its discretion in finding Vasquez satisfied the requirements of section 1021.5.

III

Issues Pertaining to the Amount of the Fee Award

A

Fees Incurred Before Vasquez's Taxpayer Cause of Action Was Filed

The State contends the court improperly awarded Vasquez attorney fees the inmate plaintiffs incurred before she and the State became parties to the litigation. The State seeks the deduction of $119,293 in lodestar fees it asserts were billed before the second amended complaint was considered and prepared. It appears that the first billing entry pertaining to the second amended complaint is dated April 18, 2000; the pleading was filed on July 24, 2000.

In support of her motion for attorney fees, Vasquez submitted separate billings from her cocounsel, the Law Offices of Robert Berke (Exhibit A, consisting of 109 pages), and Bahan & Herold (Exhibit B, consisting of 66 pages). At the July 22, 2004 hearing on the matter, Berke explained that no billings were submitted for fees incurred on a cause of action by the inmates for a violation of their civil rights, which was unrelated to the payment of wages and was dismissed. He further explained there were depositions in which both the civil rights and the prevailing wages claims were discussed,

and in those instances the time entries were "cut . . . either by 50 percent or by a third or by two thirds depending on how much of the deposition was related to those causes of action." Berke argued that fees incurred in the action against CMT Blues pertaining to wages were sufficiently related to the Vasquez taxpayer action to justify an award to her.

The court essentially agreed with Berke's analysis. Because of the complexity of the matter, given different plaintiffs and defendants, the court decided to review the billings on a line-by-line basis in counsels' presence, and asked the parties to stipulate to undergoing that process off the record. The parties agreed, with the court granting the State's request to "put matters on the record for purposes of the record" at the end of the hearing.

The reporter's transcript resumed after the court's review of the first 68 pages of Exhibit A, which took the entire day. The court noted Vasquez's attorneys explained the nature of their work with input from the State. The court also noted "[w]e've gone through all of the requests under Exhibit A up through the time that the trial [against CMT Blues] is over and the State is now back in the case [after our remittitur in *Vasquez I*]. And so from here on out almost all the time should relate to work directly on the case against the State, and the court will review that." The court also intended to review Exhibit B on its own, explaining "we already eliminated duplication of attorneys from each of the two law firms at the same deposition, but there may be other duplication and so the State is given leave to point out, in the materials they've lodged with the court or otherwise, what . . . areas of duplication they think are [in]appropriate so the court can

address that." The court also explained its handwritten notations on Exhibits A and B would be included in the record.

It is established that in awarding fees the court has discretion to "determine that time reasonably expended on an action includes time spent on other separate but closely related court proceedings." (*Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836, 849, citing *Bartholomew v. Watson* (9th Cir. 1982) 665 F.2d 910, 912-914 (*Bartholomew*).) In *Bartholomew,* the federal court affirmed an award to inmate plaintiffs in a civil rights action under 42 United States Code section 1982 for attorney fees incurred in a state court proceeding. The court concluded the "state issues were substantially the same as those raised in the federal claim. . . . The initial determination of potentially conclusive state law issues was an integral part of the [42 United States Code] section 1983 claim and as such was a necessary preliminary to the enforcement of a provision of [that statute]." (*Bartholomew, supra,* at pp. 912-913.)

In *Webb v. Dyer County Bd. of Ed.* (1985) 471 U.S. 234, 243 (*Webb*), the court indicated that attorney fees incurred in an optional administrative proceeding before commencement of an action for civil rights violations under 42 United States Code section 1988 would have been compensable in the federal action had the work been "both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." The court, however, found that on the record there the lower court did not abuse its discretion by disallowing fees incurred in the administrative proceeding. (*Ibid.*) In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986) 478 U.S. 546 (*Pennsylvania*), relying on *Webb,* the court affirmed an award under

the Clean Air Act (42 U.S.C. § 7401 et seq.) of fees incurred in regulatory proceedings. The court explained "that participation in these administrative proceedings was crucial to the vindication of Delaware Valley's rights under the consent decree and . . . compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court." (*Pennsylvania*, *supra*, at p. 561.)

We conclude it was within the court's discretion to award Vasquez fees incurred before she and the State became parties to the action, as services rendered on the CMT Blues wage claim were useful and of the type necessary to advance Vasquez's taxpayer claim. The CMT Blues claim was based on its failure to pay comparable or prevailing wages to inmate employees in violation of Proposition 139. The taxpayer cause of action was based on the State's failure to ensure that joint venture employees comply with the wage provisions of Proposition 139. The taxpayer claim depended on proof of CMT Blues's violations of the initiative, and thus discovery and other services rendered to develop the inmates' claim directly benefited Vasquez and were a necessary element of her proof.

The State focuses on the court's use of the term "discreet" [*sic*] in referring to the taxpayer cause of action. The court, however, used that term at the very beginning of the July 22, 2004 hearing, which was approximately six months after conclusion of the Vasquez trial. Later in the hearing, the court determined the inmates' wage claims and Vasquez's taxpayer claim were sufficiently related to award her a portion of the fees incurred in the inmates' action, given adequate explanations from her counsel.

The State attempts to distinguish *Pennsylvania, supra*, 478 U.S. 536, *Bartholomew, supra*, 665 F.2d 910, and *Wallace, supra*, 170 Cal.App.3d 836, on the ground they each involved attorney fees to a single plaintiff, when this case involves a plaintiff recovering fees incurred for services rendered to other plaintiffs. Although the State's distinction is correct, it offers no authority for the notion the court lacks discretion to make the type of award the court made here, when litigation on behalf of one party is useful and necessary to another party's action, and all plaintiffs were represented by the same counsel. Obviously, the outcome in the inmates' case against CMT Blues litigation "was likely to have an important effect on the outcome" of Vasquez's taxpayer action. (*Armstrong v. Davis* (9th Cir. 2003) 318 F.3d 965, 972.) Proof that CMT Blues did not pay compensable or prevailing wages was required in both the inmates' and Vasquez's actions, and the inmates' development of that proof relieved Vasquez of that burden. Had the inmates not brought an action, Vasquez would have had to develop the evidence herself.

B

Specific Billing Entries

Additionally, the State challenges the award of certain fees incurred in representation of the inmates on grounds, for instance, that they concerned their civil rights claims rather than wage claims. Many of the challenged entries, however, appear on the first 68 pages of Exhibit A, which the court reviewed line by line with counsels' input at the July 22, 2004 hearing, a day-long process the court characterized as

"grueling."[7] [8] The court employed a thorough fact-finding process, and a mere review of the written description of a billing entry does not permit a finding of impropriety.

The court reviewed the remainder of Exhibit A and the entire Exhibit B without counsel present. It explained at the July 22 hearing, however, that after reviewing the first 68 pages of Exhibit A with counsel's assistance, "the court has set parameters as to how it thinks various matters should be handled with various types of research, because what we have is an overlay of actions against the State and then actions for private relief, civil rights relief, and various other causes of action. And it seemed pretty clear that some of the work on the one cause of action would have relation to the claim against the State and other times that work did not, and then we had a separate trial that was

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[7] The July 22, 2004 hearing was continued from May 21. The court's May 21 minutes advise, "Plaintiff's counsel is to be prepared to inform the Court how each of the billing entries claimed relates to Plaintiff Vasquez' claim against the State . . . , and Defendant is to be prepared to raise any objections to Plaintiff's billing entries at that time."

[8] At the July 22, 2004 hearing, the State offered a two-volume 535-page document entitled "Legal Audit," prepared by the Law Offices of Donald E. Brier, which apparently addressed on a line by line basis Exhibits A and B to Vasquez's fee request. The Legal Audit stated such things as, "the auditor determined that a substantial portion of the time entries (and associated fees) listed are either facially or derivatively classifiable as 'unsubstantiated,' i.e., not reimbursable absent further justification or other evidence of being compensable because they do not comport with generally accepted billing practices in the legal community." The State's counsel argued the Legal Audit is "a shortcut for the court in the sense it's summarizing overall, but also, with respect to specific entries, what our problems and issues are." The court gave the State permission to lodge the compendium, but at the October 7 hearing it advised counsel it had not read or considered it. The State assigns no error related thereto.

At the August 11, 2004 hearing, the State filed a document in which it argued certain fees billed by each of Vasquez's law firms should be disallowed as duplicative. The duplication claims, however, do not concern the alleged errors the State raises here.

interposed after the State had gotten out of a demurrer, and now the State's back in." The State is thus incorrect in asserting that with the exception of the first 68 pages of Exhibit A, the court lacked grounds on which to assess a fee award.

Further, at the October 7 hearing, the court explained it devoted several days to the fee matter, and it erred on the side of caution: "If I erred in reviewing the entries, I erred on cutting too much . . . . I don't have any doubt about that. I did not want to hold the taxpayers of this state responsible for paying for work that was done on behalf of somebody else, so I went through with the proverbial fine-tooth comb and reviewed all of the entries. I eliminated a lot of time." The court also noted, "I had to make probably 3,000 judgment calls." Exhibits A and B, for instance, indicate the court disallowed substantial fees pertaining to the CMT Blues trial.

"The appropriate test for abuse of discretion is whether the trial court exceeds the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) On this record, the State has not met its burden of proving abuse of discretion as to the amount of the attorney fees award. The court has handled this case for several years, and it engaged in a rigorous procedure to review every entry in the attorney billings, exercising caution to not saddle taxpayers with unnecessary fees. We are not in a position to second guess the court's factual findings, and there is no merit to the State's contention the procedure adopted by the trial court resulted in fees awarded arbitrarily with no reason or justification.

Additionally, the State cannot reasonably criticize the court's procedure. At the end of the July 22, 2004 hearing, the court explained that it intended to review the

remainder of Exhibit A and Exhibit B in its entirety outside the presence of the attorneys. The State raised no objection. The State first objected to the procedure in a document it filed August 11, the date the court issued its ex parte order awarding Vasquez attorney fees. The objection was untimely, as the court had already spent several more days reviewing Exhibits A and B.

C

Fee Multiplier

Next, the State contends there was no reasonable basis for awarding a multiplier on the lodestar amount of attorney fees. "The amount of fees awarded under the private attorney general doctrine must be determined by calculating a 'touchstone' or 'lodestar' figure, which is hours spent times a reasonable hourly rate, and then adjusting that figure by a multiplier based on other factors." (7 Witkin, *supra*, Judgment, § 264, p. 806.)

In *Serrano v. Priest*, *supra*, 20 Cal.3d 25, 49, the high court listed the following factors the trial court may consider in adjusting the lodestar figure: "(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; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; [and] (6) the fact that monies awarded

would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed." (Fn. omitted.)

The court applied a multiplier of 1.3 after considering the novelty and difficulty of the questions involved, the skill displayed in presenting them, the extent to which the nature of the litigation precluded other employment by the attorneys, and the contingent nature of the fee award, based on the uncertainty of prevailing on the merits and establishing eligibility for an award. The court explained in its ex parte minute order that the taxpayer action was unique and presented a case of first impression, resulting in an opinion from this court that the Department has a duty to enforce Proposition 139's comparable or prevailing wage provisions. The court noted the Supreme Court denied the State's petition for review.

The court further explained the litigation was difficult and protracted, and the inmates' incarceration posed additional burdens and obstacles. Additionally, the court praised the quality of legal representation Vasquez's attorneys provided, adding it " 'far exceed[ed] the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation.' [Citation.] [Vasquez's] counsel's exceptional skill was evident throughout the litigation and ultimately served to yield a favorable result . . . , and the time-consuming nature of the litigation would certainly serve to preclude . . . counsel from engaging in other employment. Moreover, [Vasquez's] taxpayer action has obvious public service and law enforcement attributes and benefits. . . . Risk enhancement is clearly warranted under these circumstances."

At the October 7, 2004 hearing, the court stated its use of a 1.3 multiplier "may have been a little conservative . . . , but you just happened to get stuck with the judge that's a little on the conservative side." The court also found the "litigation was extremely tough," and "the State went out of its way to [a] great extent to make [Vasquez's] job very difficult. [It] resisted [her] at every turn, [it] resisted this court at many occasions."

"The 'experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while [the] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' " (*Serrano v. Priest, supra*, 20 Cal.3d at p. 49.) The overall record amply supports the court's findings, and we need not belabor the point by addressing each of the State's grievances.

D

Joint and Several Liability

The State also complains the court's award of attorney fees to Vasquez includes fees previously awarded to the inmate defendants in the CMT Blues matter, on the ground of joint and several liability. The court noted on the record that if CMT Blues "doesn't pay it, [the] State's going to be liable." The State asserts joint and several liability is inapplicable because there was no common tort claim by the same plaintiff against the State and CMT Blues (see Civ. Code, § 1431 [joint and several liability for joint tortfeasors]), and there was no joint and several contractual obligation between them (see Civ. Code, § 1659 [joint and several liability for copromisors]).

A court has the discretion, however, to assess private attorney general fees under section 1021.5 against two or more parties on a joint and several basis. For instance, in *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 212 (*California Trout*), public interest litigation, the court held the petitioners' action met the criteria of section 1021.5 and they were entitled to an attorney fees award against two public agencies on a joint and several liability basis. Contrary to the State's view, joint and several liability for attorney fees does not necessarily hinge on multiple tortfeasor or contract principles.

We do appreciate the uniqueness of the situation here, where the court has awarded attorney fees to different parties (the inmates and Vasquez) from different parties (CMT Blues and the State). In the ordinary case, such as *California Trout,* fees are awarded in favor of the *same* prevailing parties and against the *same* opposing parties. (*California Trout, supra*, 218 Cal.App.3d at p. 212; see also *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1374-1379.) The parties have not identified any opinion addressing the type of situation at issue here.

Under the circumstances, however, we conclude the court did not abuse its discretion. The same law firms represented all the plaintiffs, and the award to Vasquez was limited to services that benefited her taxpayer action. She advised the court that her counsel received $6,000 for work performed solely on behalf of the inmates and deducted that amount from her fee request. The court advised it would entertain issues of indemnification if CMT Blues were to pay any further portion of the fee award against it, to guard against double payment and ensure the State pays only the portion of fees the

court allowed in Vasquez's motion.[9] The court fashioned a practical and fair solution in light of the unusual circumstances.

We conclude, however, that the issue of the State's joint and several liability should be expressly addressed in the judgment to avoid any uncertainty should CMT Blues pay anything more toward its attorney fees obligation.

IV

Attorney Fees on Appeal

Vasquez seeks attorney fees on appeal. " '[I]t is established that fees, if recoverable at all—pursuant either to statute or [the] parties' agreement—are available for services at trial *and on appeal*.' " (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Vasquez is thus entitled to attorney fees under section 1021.5 as the successful party on appeal. "Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The judgment is affirmed**.** The matter is remanded to the trial court for its entry of

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9 According to Vasquez, however, and undisputed by the State, indemnification issues are unlikely to arise as CMT Blues is essentially out of business.

a new judgment in accordance with this opinion, and for its determination of the amount of an award to Vasquez for attorney fees on appeal. Vasquez is also entitled to costs on appeal.

CERTIFIED FOR PUBLICATION

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MCCONNELL, P. J.

WE CONCUR:

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BENKE, J.

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MCDONALD, J.