Case No. B290379

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

CANYON CREST CONSERVANCY,
Petitioner and Appellant,

v.

COUNTY OF LOS ANGELES, ET AL,
Defendants and Respondents,

STEPHEN KUHN,
Real Party in Interest.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANTS AND RESPONDENTS COUNTY OF LOS ANGELES, ET AL

On Appeal from the Los Angeles County Superior Court
Case No. BS167311
The Honorable Mary Strobel

Jennifer B. Henning (SBN 193915)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535 Fax: (916) 443-8867
jhenning@counties.org

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Journals

I. INTRODUCTION

One of the critical questions posed by this case is what is required to be a "successful party" for purposes of eligibility for private attorney general fees under Code of Civil Procedure section 1021.5.[1] Specifically, does a temporary administrative stay order issued under section 1094.5, subdivision (g) change the legal relationship between the parties such that a fee claimant can assert it is a "successful party" and obtain attorneys' fees? This question has not yet been directly addressed in any published opinion in this State.

The trial court was correct when it concluded that the administrative stay did not make Appellant a successful party in the litigation. Unless a fee claimant is pursuing a catalyst theory, there must be a judicially recognized change in the legal relationship between the parties as a result of a court action. The administrative stay in this case did not achieve that. It did not require the County to change its regulations or processes, or to act in any particular manner in regard to the project at issue. The trial court did not reach opposing arguments of merit, stating unequivocally that its ruling in granting the stay "was not an adjudication on the merits." In fact, a section 1094.5(g) administrative stay requires no determination on the merits of the claims before the court, but merely requires the court to

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

consider whether the stay is against the public interest. That alone certainly is not a judicially sanctioned change in the relationship between the parties.

The absurdity of Appellant's argument to the contrary is highlighted by the facts of this case. Should the trial court ruling be reversed, the County of Los Angeles will be required to pay attorneys' fees to Appellant notwithstanding the fact that it has not voluntarily made any changes to its policies, practices or positions concerning the project as issue in the case, and is also not under any court order to do so. Not only does that offend principles of fundamental fairness, but it is also contrary to the intent of the private attorney general statute. For these reasons, the order of the trial court denying Appellant's request for attorneys' fees under section 1021.5 should be affirmed.

II. LEGAL ARGUMENT

A. An Administrative Stay Under Section 1094.5(g) Does Not Result in a Judicially-Recognized Change in the Relationship Between the Parties

Section 1021.5 allows attorneys' fees for a "successful party" when the action results in enforcement of an important right affecting the public interest and confers significant benefit on the public generally or on a large class of persons, and the necessity and financial burden of private enforcement makes the attorneys' fee award appropriate. (Code Civ. Proc., § 1021.5; *Press v. Lucky Stores* (1983) 34 Cal.3d 311.) Thus, a preliminary

issue for a court to resolve when considering a section 1021.5 fee claim is whether the claimant is a "successful party."

Traditional (i.e., non-catalyst) success for purposes of section 1021.5 generally requires obtaining a favorable judicial decision. (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 877.) Though a final court judgment is not required, whatever relief is provided to the fee claimant must cause the claimant to prevail by obtaining "a judicially recognized change in the legal relationship between the parties." (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608; *Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th 970, 985.)

As the Supreme Court has noted, requiring traditional fee claimants to obtain a judicially recognized change in the legal relationship between the parties comes from the United States Supreme Court's definition of "prevailing party" in *Buckhannon Board & Care Homes, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598, 604, 605. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 260, fn. 6.) The U.S. Supreme Court advised that change in the legal relationship between the parties for these purposes has only been found where there is "a judgment on the merits or a court-ordered consent decree." (*Buckhannon, supra,* 532 U.S. 598 at p. 606.) California courts similarly look for a judgment on the merits or a court-ordered consent decree, or their

equivalent, to determinate whether a traditional (non-catalyst) fee claimant can show a judicially recognized change in the legal relationship between the parties. (*Vasquez, supra,* 45 Cal.4th at p. 260 [stipulated injunction directing changes in behavior qualified for section 1021.5 fees because it was effectively equivalent to a consent decree].)

The administrative stay issued under section 1094.5(g) in this case fails to meet that standard. First, issuing a section 1094.5(g) stay "requires only that before the issuance of a stay order the court be satisfied that it is not against the public interest." (*Bd of Medical Quality Assurance v. Superior Court* (1980) 114 Cal.App.3d 272, 276.) There is no need to make any determination on the merits. Indeed, a section 1094.5(g) stay is widely held to require a lower burden of proof than a preliminary injunction, and "[c]ourts and practitioners have interpreted the statute to authorize a trial court judge to issue a stay solely if a judge determines that a stay will not be against the public interest." (Friedman, *The Use and Misuse of Motions to Stay the Project in CEQA Litigation* (May 29, 2007) Calif. Real Estate Journal, at page 1.)

The statute itself states that the order issued under section 1094.5(g) stays "the pending determination of the appeal unless the court to which the appeal is taken shall otherwise order." In other words, the 1094.5(g) stay order does not involve any *determination* of the appeal, but merely delays the action under review until the court can make a determination. The trial

court certainly understood this to be true, stating at the hearing on the stay request that "this is in no way a determination on the writ," but rather is just the court's finding that the stay is in the public's interest. (Minute Order on Motion for Award of Attorney Fees and Costs, p. 10.) While Appellant makes much of some trial court discussion on Appellant's probability of prevailing, the trial court warns against overstating the court's discussion in that regard, making clear that it was not making any determination on the merits of the case. (*Ibid.*)

This is why Appellant is incorrect in asserting that the California Supreme Court addressed this precise issue in *Maria P. v. Riles* (1987) 43 Cal.3d 1281. (Appellant's Reply Br., p. 11.) As Appellant acknowledges, the Court in that case addressed whether petitioner's success in obtaining a *preliminary injunction* made her a successful party under section 1021.5. But as noted above, the bar for granting a 1094.5(g) administrative stay is lower than a preliminary injunction because no determination on the merits is required. Section 1094.5(g) merely asks the court to consider whether the stay is against the public interest. By contrast, the "decision whether to issue a preliminary injunction requires the trial court to 'evaluate two interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his [or her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction.'" (*Brown v. Pacifica*

Foundation, Inc. (2019) 34 Cal.App.5th 915, 925, *citing Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280.)

In addition, the stay order in this case does not direct Respondent County to behave in any particular manner, nor is there any substantial evidence of a causal link between the order and any change in the County's behavior. In this way, the section 1094.5(g) stay order here is again distinguishable from *Maria P.*, where the Court found evidence of "a change in the state's posture as a result of plaintiffs' lawsuit." (*Maria P., supra,* 43 Cal.3d at p. 1293.) Instead, the stay issued in the matter before this Court is similar to the order issued in *Godinez v. Schwarzenegger* (2005) 132 Cal.App.4th 73.

In *Godinez,* plaintiffs sought section 1021.5 attorneys' fees in a challenge to school construction expenditure priorities. The trial court issued an order requiring the State to respond in writing and submit a construction expenditure ranking plan, and the litigation subsequently settled after the Legislature enacted statutory changes.

Plaintiffs then attempted to argue, much like Appellant here, that they did not need to seek fees under a catalyst theory because the order issued by the trial court sufficiently altered the legal relationship between the parties such that they could pursue traditional private attorney general fees under section 1021.5.

The Court of Appeal disagreed. The court noted that the order was "merely an interim ruling," and that plaintiffs "never obtained a preliminary injunction or other judicial relief." (*Godinez, supra*, 132 Cal.App.4th at p. 90.) The court also noted that the order did not direct the defendant to "change its regulation in any particular manner." (*Ibid.*) In light of the interim nature of the order, and the fact that it did not direct defendant to change any behavior, the Court of Appeal rejected "plaintiffs' contention the . . . order amounted to a judicially sanctioned change in the legal relationship of the parties, so as to take this matter out of the catalyst arena." (*Ibid.*)

That same logic should be applied here, where the section 1094.5(g) administrative stay was not a determination of any substantive issue in the case, was "merely interim" pending a determination on the merits, and did not direct defendant to change any behaviors. Just as in *Godinez*, the stay order here does not "take this matter out of the catalyst arena."

B. The Only Potential Avenue for Attorneys' Fees Available to Appellant is the Catalyst Theory, Which Appellant Has Waived.

Parties who are not able to show success through judicially sanctioned relief are not without a remedy for recovering attorneys' fees if their litigation vindicates important rights by activating defendants to modify their behavior. (*Schmier v. Supreme Court* (2002) 96 Cal.App.4th

873, 877-878.) Such parties can seek fees under the catalyst theory. (*Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.)

Rather than evaluating traditional judicially ordered success, the catalyst theory looks to pragmatic success. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 622.) A fee claimant seeking fees under the catalyst theory must show: (1) the lawsuit was a catalyst to the defendant providing the primary relief sought by plaintiff; (2) the lawsuit had merit and achieved its catalytic effect by threat of defendant losing the lawsuit rather than litigation cost and nuisance; and (3) the fee claimant reasonably tried to settle the litigation prior to filing the lawsuit. (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 191.)

Unfortunately for Appellant, it failed to pursue the catalyst theory for fee recovery in this case. The catalyst theory was only advanced as an alternate avenue for recovery in Appellant's reply brief below, which the trial court concluded to be improper and therefore waived. (Minute Order on Motion for Award of Attorney Fees and Costs, p. 13.)[2] Appellant similarly declined to pursue the catalyst theory in its briefing to this Court on appeal.

[2] The trial court also rejected Appellant's catalyst theory on the merits, concluding that Appellant failed to show the first two required elements. (Minute Order on Motion for Award of Attorney Fees and Costs, pp. 13-14.)

Since the administrative stay order did not result in a judicially recognized change in the relationship between the parties, the request for fees here is squarely in the catalyst arena, which Appellant has elected not to argue or pursue. As such, the trial court's denial of fees should be upheld.

C. Appellant's Argument Would Lead to the Absurd and Unfair Result of the County Paying Attorneys' Fees When it Made No Change in Policy, Practice, or Action on the Project, and When it is Under No Legal Obligation To Do So.

The reason that a section 1021.5 fee claimant must either show a judicially recognized change in the legal relationship between the parties or pragmatic success under the catalyst theory is precisely to avoid the situation that would result here if the trial court's decision is overturned.

Appellant states that the relief it sought in this case was aimed at "protecting the public's right to adequate environmental review under CEQA." (Appellant Reply Brief, p. 13.) Yet, there is nothing in the section 1094.5(g) stay order that yields such a result. Respondent County of Los Angeles has not – either as a result of any court order or on a voluntary basis – changed or committed to change behavior that would result in any additional "environmental review under CEQA" for this or any similar project. To the contrary, Respondent County has been clear that it has merely honored Real Party's request to vacate the project

permits, and that request was based on the cost of litigation and delay. (LA County Respondent Brief, pp. 24-25.)

Courts evaluate section 1021.5 "in the context of the outcome of the current litigation, and not on speculative future events." (*Center for Biological Diversity v. County of San Bernardino* (2010) 186 Cal.App.4th 866, 895.) For this reason, the trial court correctly held that without an adjudication on the merits or a judicially sanctioned consent decree or other settlement, a causal link between litigation and any particular change in behavior dependent on the merit of a claim would be "pure speculation." (Minute Order on Motion for Award of Attorney Fees and Costs, p. 11.) Such speculation fails to meet Appellant's burden of proof as to each prerequisite to an award of attorneys' fees. (*Samantha C. v. State Dept. of Developmental Services* (2012) 207 Cal.App.4th 71, 78.)

Appellant would have this Court order section 1021.5 fees against the County based solely on Real Party's decision not to pursue this litigation, without any showing that the County has changed in any way its approach to the issues in this case. Indeed, the 1094.5(g) stay required no merits determination of any kind by the trial court on the environmental review issues raised by Appellant below. All Appellant obtained from the trial court was a stay pending a dispositive future merit determination, followed by a decision by Real Party in Interest – not by the County – to no longer pursue the project.

To order the County to pay fees under these circumstances is not only fundamentally unfair, but it is contrary to the intent of the private attorney general statute. This Court should consider such intent in its construction of section 1021.5 requirements. (*Carlton Santee Corp. v. Padre Dam Municipal Water Dist.* (1981) 120 Cal.App.3d 14, 25 ["Statutes should be construed so as to be given a reasonable result consistent with the legislative purpose. [Citations.].... 'The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.'"].)

The fundamental purpose behind section 1021.5 fees is to motivate litigation that will cause a change in behavior that has benefits beyond the litigants. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, *quoting Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1288–1289.) This essential principle requires that the right a fee claimant is attempting to enforce is "vindicated 'by activating defendants to modify their behavior.'" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352-353.)

The Supreme Court has noted that the intent of the statutory scheme is that the party liable for attorneys' fees is the party "which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation." (*Connerly v. State*

Personnel Bd. (2006) 37 Cal.4th 1169, 1176-1177; *Adoption of Joshua S.* (2008) 42 Cal.4th 945, 956-957.) "The award of fees under section 1021.5 is an equitable function." (*Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, 334.) Here, however, Appellant did not succeed in persuading judicial action requiring the County to change the behavior adjudged as harmful to the public interest, nor did the "threat of success" in Appellant's theories of merit serve as a catalyst for such an outcome. If that had occurred, Appellant may have an argument for an equitable fee award against the County. However, Appellant's position would cause the County to be liable for fees where the litigation ended based solely on a decision of the property owner and resulted in no changes in how the County addresses any of the issues raised in the case. That absurd result is inequitable and contrary to statutory intent. (See *Williams v. San Francisco Board of Permit Appeals* (1999) 71 Cal.App.4th 442 [courts use traditional equitable discretion in assessing whether private attorney general statute requirements have been met].)

An order requiring the County of Los Angeles to pay attorneys' fees in this case is completely inconsistent with the intent of the statute as articulated by the principles above. Respondent County has done nothing to "modify their behavior," and is under no obligation as a result of this litigation to do so. A public agency should not be subject to a fee award based solely on the actions of a third party. The agency cannot be faulted

for failing to sustain litigation when a real party in interest elects to abandon a project for whatever reason.

III. CONCLUSION

The trial court correctly denied Appellant's request for section 1021.5 attorneys' fees. The section 1094.5(g) stay order did not amount to judicially sanctioned relief because it did not change the judicially recognized legal relationship between the parties. As a result, traditional private attorney general fees are not available to Appellant. Though Appellant could have pursued fees under the catalyst theory, it elected not to do so, and likely would have been unsuccessful in any event due to lack of evidence of the catalytic effect of the litigation. The requirement to show either a change in the legal relationship of the parties or pragmatic success under a catalyst theory is critical to avoiding the absurd result of Appellant's argument: holding the County responsible for private attorney general fees when there has been no change – either court ordered or voluntarily induced by the litigation – on the issues of environmental review the litigation was intended to address, and in which Appellant's theories of section 1021.5 are founded.

/ / /

/ / /

/ / /

For all of these reasons, Amici Curiae respectfully request that this Court affirm the trial court order on attorneys' fees.

Dated: November 26, 2019

Respectfully submitted,

/s/
By _____
Jennifer B. Henning, SBN 193915

Attorney for Amici Curiae
California State Association of Counties
and League of California Cities

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,148 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 26th day of November, 2019 in Sacramento, California.

Respectfully submitted,

/s/
By: _____
JENNIFER B. HENNING

Attorney for Amici Curiae
California State Association of Counties
and League of California Cities