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COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOHN DOE, A MINOR, etc., et al.,

Plaintiffs and Appellants,

v.

DEPARTMENT OF EDUCATION,

Defendant and Respondent.

C072145

(Super. Ct. No.
34200900033641CUCRGDS)

Taxpayer D. D., who is also attorney of record, and his minor son “John Doe” appeal from the trial court’s denial of their motion for attorney fees against Department of Education (CDE), under the private attorney general doctrine codified in Code of Civil Procedure section 1021.5. (Unless otherwise identified, statutory references that follow are to the Code of Civil Procedure.) The lawsuit alleged other parties -- Albany Unified School District and its Board of Education (collectively, AUSD) -- shortchanged John Doe’s third grade class on the minimum physical education minutes required by

Education Code section 51210, and CDE “aided and abetted” AUSD’s statutory violation.

After we allowed leave to amend to survive demurrers (*Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668 (*Doe I*)), appellants reached a settlement with AUSD, which agreed to increase the time spent on physical education and pay appellants \$75,000 in attorney fees. CDE was not a party to the settlement and instead demurred to the amended pleading, arguing plaintiffs failed to allege CDE had any ministerial duty subject to mandamus relief. Appellants did not oppose the demurrer on the merits, and the trial court entered judgment dismissing the case against CDE with prejudice. The trial court denied appellants’ subsequent motion for attorney fees, concluding CDE was not an “opposing party” against which plaintiffs were “successful,” as required by section 1021.5.

Plaintiffs appeal from the order denying attorney fees, claiming entitlement to attorney fees on the grounds that CDE had supervisory authority over AUSD yet vigorously opposed appellants’ lawsuit instead of bringing its own writ petition against AUSD or joining forces with appellants against AUSD. We affirm the trial court’s order denying attorney fees.

FACTS AND PROCEEDINGS

The Prior Appeal

Appellants incorporate by reference the record in the prior appeal of this same case, *Doe I, supra*, 190 Cal.App.4th 668 (C063271), as authorized by California Rules of Court, rule 8.124(b)(2).

The initial pleading, filed in February 2009, was a complaint for injunctive and declaratory relief against AUSD and CDE. The complaint alleged AUSD scheduled only 120 minutes of physical education every 10 school days for the third grade class, rather than the statutory minimum of 200 minutes required by Education Code section 51210,

which provides, “The adopted course of study for grades 1 to 6, inclusive, shall include instruction . . . in [¶] . . . [¶] (g) Physical education, with emphasis upon the physical activities for the pupils that may be conducive to health and vigor of body and mind, for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.” The pleading alleged CDE “aids and abets AUSD’s violation of Education Code Section 51210 and communicates to AUSD that it will do nothing if AUSD violates the law.” Three separate, unrelated causes of action were later dismissed by appellants and are not at issue in this appeal.

Appellants filed an application for a preliminary injunction against AUSD but did not serve it on CDE until told to do so by the trial court. AUSD and CDE filed separate oppositions to the application for preliminary injunction. AUSD argued Education Code section 51210 did not compel 200 minutes of physical activity and did not confer a private right of action and, even if it did, appellants failed to show likelihood of success on the merits or irreparable harm. CDE’s opposition argued the statute conferred no private right of action; appellants lacked standing; and preliminary injunction was barred by discretionary immunity.

AUSD and CDE also filed separate demurrers. AUSD argued Education Code section 51210 does not provide a private right of action, and appellants lacked standing. CDE argued the same and added that it had discretionary immunity.

The trial court denied appellants’ application for preliminary injunction and sustained the demurrers without leave to amend, concluding Education Code section 51210 does not confer a private right of action and sets a goal, not a mandate, given Education Code section 51002’s recognition that the need for a common curriculum was tempered by the need for local programming to fit the needs of pupils in light of “economic, geographic, physical, political, and social diversity” at the local level.

In the first appeal, *Doe I, supra*, 190 Cal.App.4th 668, we held that Education Code section 51210 imposes a mandatory duty “on school districts” to provide a

minimum of 200 minutes of physical education every 10 schooldays. (*Id.* at p. 678.) We made no similar holding regarding CDE but noted, “By implication, [appellants] argue CDE has a mandatory duty to enforce” the statute. (*Id.* at p. 674.) We declined to decide whether the statute confers a private right of action for the injunctive and declaratory relief sought by appellants, because “[e]ven a party who is not authorized to pursue a civil action to force compliance with a particular legislative requirement may nevertheless be able to do so through a writ of mandate” under section 1085. (*Id.* at pp. 681, 682.) Though appellants had not petitioned for mandamus, the label of the pleading was not determinative, and appellants had sufficient interest as schoolchild and taxpayer to be allowed to pursue mandamus relief. (*Id.* at pp. 683-685.)

However, we found merit in CDE’s argument -- to which appellants offered no reply -- that the complaint was deficient in failing to allege exhaustion of administrative remedies as a prerequisite for mandamus relief. (*Doe I, supra*, 190 Cal.App.4th at pp. 685-686.) CDE asserted AUSD has a grievance procedure. The complaint merely alleged appellants “repeatedly asked” AUSD to comply with the statute, and AUSD refused. We reversed and remanded to allow opportunity to amend the pleading. (*Ibid.*)

We rejected appellants’ argument that the trial court erred in denying a preliminary injunction. (*Id.* at p. 687.) “Because the complaint in its present form does not state a claim against defendants, there was no basis for the trial court to provide interim relief.” (*Ibid.*)

The Current Appeal

On remand to the trial court, appellants in May 2011 filed an amended pleading (but still got it wrong by labeling it a “COMPLAINT FOR MANDAMUS”). The pleading alleged AUSD is “responsible” for setting standards and approving the education program of the schools it owns and operates, and CDE “oversees the state’s public school system” and “is responsible for enforcing education law and regulations.”

AUSD and its board “have failed to adopt a course of study” and “failed to administer a physical education program” that meets the statutory at standard. “CDE aids and abets AUSD’s violation of Education Code Section 51210. CDE encourages school districts to treat the statutory minimum requirement of 200 minutes of physical education each 10 schooldays as a bureaucratic requirement that mandates that school districts simply be capable of producing paperwork purporting to show the scheduling of 200 minutes of physical education each 10 schooldays.”

The amended pleading alleged no administrative remedy was available, any such remedy would be futile, and AUSD refused appellants’ attempts at informal resolution. The pleading sought (1) injunctive and declaratory relief, (2) a writ of mandate, and (3) other relief including attorney fees and costs.

Appellants reached a settlement with AUSD, in which AUSD agreed to provide 200 minutes of physical education every 10 school days and to pay appellants \$75,000 in attorney fees. The trial court later approved the settlement.

CDE was not party to the settlement. CDE demurred to the amended pleading, arguing it failed to allege CDE had a clear, present, ministerial duty, which is a prerequisite for mandamus relief under section 1085, as noted in *Doe I, supra*, 190 Cal.App.4th at p. 682. Noting *Doe I* held only that Education Code section 51210 imposed a mandatory duty *on school districts*, CDE argued the amended pleading’s allegation that CDE “oversees” the public school system and is “responsible for enforcing education law and regulations” was too broad and vague to establish a specific nondiscretionary duty. CDE also sought judicial notice of AUSD grievance procedures and argued appellants failed to exhaust or excuse their failure to exhaust that remedy.

Appellants filed a “NON-OPPOSITION TO MOOT DEMURRER OF [CDE] AND OPPOSITION TO DISMISSAL WITH PREJUDICE,” asserting CDE’s demurrer was moot because, in light of the settlement with AUSD, “[t]here is no substantive relief left for [appellants] to obtain.” Appellants nevertheless objected to a dismissal with

prejudice in favor of CDE because they wanted to seek section 1021.5 attorney fees against CDE.

CDE replied to the Non-opposition, arguing it was the *complaint*, not the demurrer, that was moot, and there was no basis for attorney fees against CDE.

The trial court took judicial notice of the grievance procedures and sustained CDE's demurrer to the amended complaint without leave to amend, stating "Petitioners offer no substantive argument in opposition to either ground advanced in [CDE's] demurrer. The court deems their failure to do so, as well as their statement that the demurrer may be sustained with leave to amend, as a concession [CDE's] demurrer has merit and petitioners' amended pleading fails to state a claim for issuance of a writ of mandate. The court therefore sustains [CDE's] demurrer." The court sustained the demurrer without leave to amend because "petitioners have not shown how they could amend the petition to address the deficiencies in the [pleading]. Petitioners have not demonstrated they could amend the pleading to show exhaustion of administrative remedies, or that [CDE] has a ministerial duty regarding physical education in the Albany District." The court added that petitioners' intention to seek attorney fees had no bearing on the ruling on the demurrer.

On January 17, 2012, the trial court entered judgment of dismissal with prejudice, against appellants and in favor of CDE. Appellants did not file an appeal from the judgment.

In March 2012, appellants filed a motion for attorney fees against CDE. Despite the fact that judgment of dismissal had already been entered in favor of CDE on its demurrer, appellants sought to litigate a theory of direct liability against CDE. Appellants argued they obtained the relief they sought "against both AUSD, which will now provide the required physical education, and CDE, the government body charged with exercising 'general supervision over the courses of physical education in elementary and secondary schools of the state.' (Educ. Code § 33352(a))."

Appellants sought \$336,015 in actual attorney fees, multiplied by a lodestar of 2.5 to \$840,000 -- for D.D. as attorney and his law-partner/wife, A. O. Appellants do not dispute CDE's assertion that A.O. is D.D.'s wife. The trial court bifurcated the motion for attorney fees to determine first whether appellants were entitled to an award and, if so, to determine the amount later.

CDE opposed the motion, arguing appellants were not successful against CDE and could not recover under a catalyst theory because appellants did not seek resolution with CDE before filing suit, and the lawsuit did not cause any change in CDE's conduct.

At the hearing on the motion for attorney fees, appellants admitted they did not seek any relief from CDE separate from the relief they obtained from AUSD. Appellants argued CDE has "the task of adopting the rules and regulations of maintaining the policies that cause physical education to happen." When asked if CDE had an enforceable mandatory duty, appellants said, "We don't believe that CDE had a mandatory duty to enforce. Enforcement duties generally aren't mandatory."

The trial court denied the motion for attorney fees, concluding appellants were not "successful" against CDE as an "opposing party." The claims against AUSD and CDE were separate and distinct, given their distinct roles. Appellants were not successful in their claim against CDE for failure to exercise supervisory authority. The trial court observed we did not hold in *Doe I* that CDE had any duty to administer or enforce the physical education requirement, or to ensure local districts comply with the requirement; we did not address CDE's legal duties at all. The trial court rejected appellants' argument that CDE made itself an "opposing party" subject to a fee award by "vigorously oppos[ing]" appellants' claims.

DISCUSSION

I

Standard of Review

On review of an order on a motion for attorney fees under section 1021.5, “ ‘the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.’ ” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175 (*Connerly*)). Here, the question is whether appellants can recover attorney fees under section 1021.5 as being “successful” against an “opposing part[y]” within the meaning of that statute. “Under some circumstances, this may be a mixed question of law and fact and, if factual questions predominate, may warrant a deferential standard of review. [Citation.]” (*Id.* at pp. 1175-1176.) Where, as here, the material facts are largely undisputed, the question whether CDE was an “opposing party” within the meaning of the statute is ultimately a question of statutory construction, subject to de novo review. (*Ibid.*)

Although CDE urges deference to the trial court, we apply de novo review.

II

Appellants Were Not Successful Against CDE

Section 1021.5 is designed to encourage private enforcement of important public rights. (*Connerly, supra*, 37 Cal.4th at p. 1182.) Section 1021.5 provides: “Upon motion, a court may award attorneys’ fees to a *successful* party against one or more *opposing* parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the

necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. . . .” (Italics added.)

Each of the statutory criteria must be met before fees are awarded. (*County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 648.) Thus, it does not suffice that the litigation resulted in enforcement of an important right affected the public interest. Although some courts have stressed active participation in the litigation as grounds for awarding attorney fees, “no court has held that active participation alone, without a direct interest in litigation, can be grounds for awarding section 1021.5 fees.” (*Connerly, supra*, 37 Cal.4th at p.1181 [amici curiae, designated as real parties in interest in order to make the litigation adversarial, were not “opposing parties” liable for attorney fees, despite the fact they bore the laboring oar in opposing the appellant-taxpayer’s challenge to constitutionality of statutory programs].)

Here, the statutory criteria were not all met, because appellants were not successful against opposing party CDE.

A party is successful when he or she obtains the relief sought in the lawsuit, regardless of whether that relief was obtained through a voluntary change in the defendant’s conduct, a settlement, or otherwise. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 567 (*Graham*).) Traditional (non-catalyst) success requires the claimant to prevail by obtaining “a judicially recognized change in the legal relationship between the parties.” (*Id.* at p. 594; *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (*Tipton*).) “ ‘A lawsuit’s ultimate purpose is to achieve actual relief from an opponent. Favorable judgment may be instrumental in gaining that relief. Generally, however “the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant” ’ ” (*Graham, supra*, 34 Cal.4th at p. 571.)

“In order to obtain attorney fees without such a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . , and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.” (*Tipton, supra*, 34 Cal.4th at p. 608.)

Here, however, plaintiffs in their reply brief expressly disclaim any reliance on a “catalyst” theory.

As to a non-catalyst theory, appellants offer no authority that change by AUSD made them successful as against CDE. Appellants obtained no relief from CDE and no judicially-recognized change in the legal relationship between appellants and CDE, and CDE took no action desired by appellants. To the contrary, CDE was the successful party because it prevailed when the trial court ruled the amended pleading failed to allege any failure by CDE to enforce a nondiscretionary ministerial statute, and entered the judgment of dismissal in favor of CDE. Nor did appellants obtain relief as against CDE in the first appeal. Although we held Education Code section 51210 imposed a duty on the school district and noted the pleading implied CDE had an enforcement duty (*Doe I, supra*, 190 Cal.App.4th at p. 674), we were not required to and did not find any statutory basis for liability against CDE. Moreover, in the first appeal, CDE prevailed on its argument that the pleading was defective in failing to allege exhaustion of administrative remedies, and we upheld the trial court’s denial of the preliminary injunction. (*Id.* at pp. 685-686.)

Appellants cite *Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, for the proposition that a court may find an appellant was successful absent a final judgment in his favor, but in order to do so, the court must generally find that the appellant obtained relief in some other way. (*Id.* at p. 1339.) However, *Vargas* held plaintiffs were *not* entitled to section 1021.5 fees, where their complaint alleging misuse of public funds by a

city and city manager was dismissed as a SLAPP suit (§ 425.16), even though the California Supreme Court -- in upholding the dismissal -- accepted part of the plaintiffs' legal analysis regarding the appropriate standard. (*Id.* at pp. 1337, 1339-1340.)

Here, as noted by the trial court (and ignored in appellant's opening brief on appeal), there is some similarity between this case and *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223 (*Rey*). There, voters sued a school district and a county board of education in its capacity as a county committee on school district organization, alleging the school district's "at-large" method of electing members to its governing board caused dilution of the Latino vote. (*Id.* at pp. 1227-1228.) The school district and county committee did not oppose the voters' application for a preliminary injunction, and the school district immediately initiated the process for changing its election method, while the county committee asserted it had no involvement in the election. (*Id.* at pp. 1228-1230.) The court issued the preliminary injunction. The parties later stipulated the school district approved a plan to change the election method, and the county committee -- acting pursuant to its authority under the Education Code -- approved the school district's plan. (*Id.* at p. 1230.) The trial court accepted the stipulation. (*Ibid.*) The voters filed a motion for attorney fees under Election Code section 14030. The county committee filed a demurrer arguing it could not be held liable because the voting rights statutes created no actionable duties for a county committee. (*Ibid.*) The trial court overruled the demurrer. The county committee moved for summary judgment. The voters tried to dismiss the complaint voluntarily while reserving the right to request fees and costs. (*Ibid.*) The county committee objected, and the court denied voluntary dismissal and granted the county committee's summary judgment motion. The court awarded the voters attorney fees, but only as against the school district. (*Id.* at pp. 1228, 1235.) Applying the standards of section 1021.5, the appellate court affirmed the denial of fees as against the county committee. (*Id.* at pp. 1236-1237.)

“Since the County Committee was not responsible for the at-large election method, the trial court properly found that it was not liable for attorney fees.” (*Id.* at p. 1237.)

The voters in *Rey* argued a defendant is liable for attorney fees even if found not liable on the merits because, as stated in *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685, “ ‘[t]he critical fact is the impact of the action, not the manner of its resolution.’ ” (*Rey, supra*, 203 Cal.App.4th at p. 1237.) The *Rey* court explained, however, the *Folsom* analysis pertained to what constitutes a “successful party” under section 1021.5, i.e., if the impact of the action has been the enforcement of an important right affecting the public interest and a consequent conferral of a significant benefit on the general public or a large class of persons, a fee award is not barred simply because the case was won on a preliminary issue or was settled before trial. (*Ibid.*) “Nevertheless, the party liable for the attorney fee award must have been an opposing party, i.e., responsible for initiating and maintaining the actions or policies that gave rise to the litigation. (*Ibid.*)

Rey held: “In sum, appellants did not prevail against the County Committee. The County Committee was not responsible for the at-large election method that appellants successfully challenged. Further, the County Committee did not oppose the granting of the preliminary injunction. Rather, the County Committee’s only interest in the litigation was whether it could be held liable under the [voting rights act]. On this issue, the County Committee prevailed against appellants. Accordingly the trial court correctly concluded that the County Committee was not liable for attorney fees.” (*Rey, supra*, 203 Cal.App.4th at p. 1238.)

Appellants’ opening brief on appeal says nothing about *Rey*, despite the trial court’s discussion of that case. Their reply brief argues *Rey* has no bearing here because, unlike *Rey*, the CDE vigorously opposed preliminary injunction. But we do not see the difference that makes. Although CDE opposed appellant’s application for preliminary injunction, the critical fact is that the application was *denied* by the trial court and we

upheld the denial in *Doe I, supra*, 190 Cal.App.4th at p. 687. Since appellants were not successful on their application for preliminary injunction in the trial court or on appeal in *Doe I*, they cannot recover section 1021.5 fees on that basis.

Moreover, the main reason for denying fees in *Rey* was that the defendant was not responsible for the challenged policy. The same applies here, where appellants failed to achieve any success on a theory that CDE was responsible for AUSD's policy. That CDE put up a vigorous defense after being dragged into the lawsuit, including arguments favorable to AUSD's position, is not enough to make CDE responsible for appellants' attorney fees. That we rejected arguments favorable to AUSD's position in *Doe I* does not make CDE responsible for AUSD's challenged policy. Here, as in *Rey*, appellants were not successful as against CDE which, insofar as this record shows, was not responsible for the AUSD school program successfully challenged by appellants.

“Generally speaking, the opposing party liable for attorney fees under section 1021.5 has been the defendant person or agency sued, 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. [Citations.]” (*Connerly, supra*, 37 Cal.4th at pp. 1176-1177.) Parties such as real parties in interest who have “a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation” are properly held liable for section 1021.5 attorney fees. (*Id.* at p. 1181.)

Appellants do not claim CDE was responsible for initiating or maintaining the AUSD policy that gave rise to the litigation. Instead, they stress *Connerly*'s qualifying words -- “[g]enerally speaking.” However, appellants fail to show how this case justifies a departure from the generalization.

Appellants argue our opinion in *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810 (*Friends*) supports imposing an attorney fee award against CDE on the ground it was not a passive bystander in the litigation limiting itself to defense of its

own position, but rather affirmatively and vigorously opposed the relief appellants sought from both defendants. We disagree. The plaintiff in *Friends* sought to quiet title to a public easement for a recreational trail across private land against both the landowners and the Nevada Irrigation District (NID), which held a utility easement over the land. (*Id.* at p. 819.) The trial court found the public had acquired a public easement, subordinate to NID's easement rights, and entered judgment enjoining the landowners from interfering with or obstructing the easement. (*Id.* at pp. 819-820.) The judgment recited, "No relief is granted in favor of plaintiffs against defendant [NID]." (*Ibid.*) The trial court imposed section 1021.5 attorney fees against both the landowners and NID. (*Ibid.*)

On appeal in *Friends*, NID argued it should not be liable for section 1021.5 fees because the appellant was successful only as against the landowners. (*Friends, supra*, 78 Cal.App.4th at pp. 835-836.) NID argued that to warrant an award against an opposing party the party awarded fees must be a successful party as to that opposing party, and the minimal criterion for success is some change in that opposing defendant's conduct. (*Ibid.*) The plaintiff countered NID was "not a passive bystander in the litigation, limiting itself to defense of its own easement right, but rather affirmatively and vigorously opposed the declaration of a public easement," and, although there was no judicial relief granted against NID, "NID's policy with respect to authorizing gates on the easement road will have to change in view of the judgment." (*Id.* at p. 836.) We upheld the award against NID: "Interpreting 'a successful party against one or more opposing parties' to apply to NID in these circumstances advances th[e] purpose [of section 1021.5 to encourage suits that meet its criteria]. The alternative reading suggested by NID would require a potential plaintiff to face expensive litigation of the merits of the public right claim against an opponent with great resources while having no assurance that the same resources that had to be overcome would be available for recompense. Moreover, it would inequitably saddle other defendants, such as the Landowners, with the sole liability

for the successful plaintiff's attorney's fees even though they were incurred entirely because of litigation tactics and decisions of another 'opposing party.' ” (*Id.* at pp. 836-837.)

Friends does not support an award against CDE in this case. In *Friends*, though the judgment did not expressly state relief against NID, we said “NID’s policy with respect to authorizing gates on the easement road will have to change in view of the judgment.” (*Friends, supra*, 178 Cal.App.4th at p. 835.) Here, in contrast, not only did appellants fail to achieve any change of conduct by CDE, but CDE was affirmatively the successful party by obtaining a judgment of dismissal on the grounds the pleading failed to state any actionable duty against CDE. “[W]e can find no case where the party who actually obtained . . . a dismissal in its favor was held responsible for attorney fees under any theory.” (*Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1842 [that plaintiff’s lawsuit vindicated important constitutional privacy rights did not support imposition of attorney fees against defendants who prevailed on summary judgment affirmed on appeal].) In the absence of obtaining some success against CDE, appellants who drew CDE into the lawsuit cannot complain that CDE mounted a zealous defense.

Appellants also cite *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493 (*Bolsa Chica*), where a Land Trust challenged some aspects of a Local Coastal Program approved by the California Coastal Commission and obtained a judicial determination that some of the Commission’s findings were inadequate. (*Id.* at pp. 498, 501.) The trial court imposed section 1021.5 attorneys fees against both the Commission and two private landowners who actively participated in the litigation as real parties in interest. (*Id.* at p. 501.) The appellate court held it was proper to order the landowners to pay attorney fees because they “vigorously defended Commission’s findings both in the trial court and do so again on appeal. Indeed, the vigor of their defense of Commission’s findings was so great that they *opposed* Commission’s efforts to have the matter remanded so that it could make new findings. It suffices to say the

vigor of [the landowners’] defense no doubt compelled the trust to incur substantial attorney fees and accordingly make it fair under the equitable principles embodied in Code of Civil Procedure section 1021.5 to impose some of those costs on [the landowners].” (*Id.* at pp. 517-518, orig. italics.)

Unlike *Bolsa Chica*, plaintiffs here do not show that CDE interfered with any attempt by AUSD to resolve the matter. Plus, the landowners in *Bolsa Chica* lost on the merits when the trial court found defects in the local coastal program. Here, CDE was successful on its demurrer that the complaint failed to allege CDE violated any ministerial statutory duty making it subject to mandamus relief.

Since CDE was not an “opposing party” against whom appellants were “successful,” the denial of attorney fees was proper.

DISPOSITION

The order denying attorney fees is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278.)

_____ HULL _____, Acting P. J.

We concur:

_____ ROBIE _____, J.

_____ MURRAY _____, J.