No. 70606-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,

Appellant,

v.

SAN JUAN COUNTY and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE,

Respondents.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION and WASHINGTON COALITION FOR OPEN GOVERNMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

OTHER AUTHORITY

I. INTRODUCTION

This case will determine when a committee "acts on behalf of" another governing body for purposes of triggering RCW 42.30.030, which requires governing body committees to meet openly. The answer must serve the intent of the Open Public Meetings Act (OPMA) to conduct the people's business transparently so that the people may maintain control of government. This Court should hold that a committee "acts on behalf of" a county or city council when it takes "action" (as defined by the OPMA) that is subject to the council's control. For example, when a committee gathers information or makes recommendations (both OPMA "actions") for the council's consideration, it is acting on the council's behalf. Openness must be required for any committee involved in policymaking, even if it is only advisory.

The trial court's interpretation would allow county and city councils to use private committees to hash out policies, as long as the councils do not formally cede their power to committees. This approach elevates form over substance and provides an easy escape from public scrutiny. If the term "acts on behalf of" applies only when a council says it does, committees with real influence can operate in the dark at the whim

of elected council members, and the true reasons for decisions affecting the public may be hidden. The OPMA is not so weak.

In addition to construing open committee requirements liberally, as required by the OPMA, this Court also should hold that RCW 42.30.030 applies to meetings of a "negative quorum." That is, when a meeting includes enough council members to *block* a proposal from passing, it must be open. Also, this Court should clarify that an OPMA plaintiff is not required to prove that a violation was willful in order to obtain attorney fees or other remedies besides civil penalties against violators.

II. IDENTITY AND INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. Washington Newspaper Publishers Association (WNPA) is a trade association representing 120 weekly community newspapers throughout Washington. Washington Coalition for Open Government (WCOG) is a statewide nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. These organizations ("Amici") regularly advocate for public access to government records and proceedings in order to inform the public about matters of public concern. Their members

frequently attend government meetings to learn about policy decisions and the considerations behind those decisions. Newspapers routinely report on council, board and committee meetings of public interest, and WCOG members attend meetings so as to participate in democracy.

Amici are interested in this case because it will affect the public's right to know how, why and when governments make decisions affecting the daily lives of citizens. Amici are interested in preserving the vitality of the OPMA so that newspaper readers, WCOG members and other members of the public can play a meaningful role in shaping public policies. Amici are concerned that if the trial court's narrow interpretation of the OPMA is upheld, county and city councils, school boards and other governing bodies will use private committees to avoid scrutiny of the policymaking process, increasing the influence of special interests and diminishing public trust. Amici want to protect the public's ability to observe all policy deliberations as envisioned by the OPMA, so that final decisions are not merely rubber-stamping decisions made in secret.

III. DISCUSSION

A. The OPMA Declares That All Committees Must Be Open.

The OPMA says:

> The legislature finds and declares that *all* public commissions, boards, councils, *committees, subcommittees*,

> departments, divisions, offices, and all other public agencies of this state and subdivisions thereof *exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.*
>
> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010 (italics added). The legislative declaration expressly states that "deliberations," not just final decisions, must "be conducted openly." *Id.* By listing committees and subcommittees along with commissions, boards and councils, the OPMA evinces the Legislature's intention to require openness at every level of policymaking activity. *Id.*

B. A Committee "Acts on Behalf Of" a Council When It Takes "Action" Subject to the Council's Control.

The overarching requirement for open meetings is stated in RCW 42.30.030 as follows:

> All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

By its plain terms, this core requirement for openness applies to *all* governing body meetings regardless of whether any final decisions are made. RCW 42.30.030.[1]

A key issue here is whether the Critical Areas Ordinance/Shoreline Master Program Implementation Team ("Ordinance Team"), which included half of the members of the County Council, was a "governing body" subject to the OPMA requirement to meet openly. The answer lies in RCW 42.30.020(2), which defines "governing body" as:

> the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, *or any committee thereof when the committee acts on behalf of the governing body*, conducts hearings, or takes testimony or public comment.

(italics added). The Ordinance Team never held hearings or took testimony, so the trial court focused on "whether it acted 'on behalf of' the [county] council." CP 823. The court erroneously concluded that the Ordinance Team did not act on the council's behalf, and therefore could meet privately, for two flawed reasons: 1) "the council had no authority under the county charter to delegate its authority to a committee, so as a

[1] RCW 42.30.110 lists 15 exceptions to the open meeting requirement, not relevant here. In addition to requiring all non-excepted meetings to be open to public observation, the OPMA requires advance public notice of meetings. RCW 42.30.060(1); RCW 42.30.070; RCW 42.30.080. Under the notice provisions, a governing body can adopt policies and rules only in regularly scheduled meetings or in special meetings announced at least 24 hours in advance. *Id.* Any action taken in violation of *either* the openness requirement *or* the notice requirement is "null and void." RCW 42.30.060(1).

matter of law it could not have directed the committee or team to act on its behalf"; and 2) the Ordinance Team itself did not have "policy-making or rule-making authority." *Id.*

1. **A committee need not have policymaking authority of its own for the OPMA to apply.**

RCW 42.30.020(2) does not say that a committee must have any particular authority of its own to constitute a "governing body" for open meeting purposes, and the trial court was incorrect to read such a requirement into the OPMA. On the contrary, the statute defines a governing body as a "policy or rule-making body...*or* any committee thereof..." RCW 42.30.020(2) (emphasis added). Thus, only the parent governing body need have policymaking or rulemaking authority for the Ordinance Team to fall under the OPMA. *Id.*

In holding otherwise, the trial court relied on outdated interpretations of an older version of the statute. CP 823. Prior to July 1983, the "governing body" definition was limited to a "board, commission, committee, council, or other policy or rule-making body of a public agency." *Refai v. Central Washington University*, 49 Wn.App. 1, 11, 742 P.2d 137 (Div. 3 1987), citing Laws of 1982, 1st Ex. Sess., ch. 43, §10, p. 1307. The old definition "was not designed to cover groups which meet to collect information and make recommendations, but have no

authority to make final decisions." *Refai*, 49 Wn.App. at 14. After the definition expanded to include any committee which acts on behalf of a governing body, a "stronger case" could be made that advisory groups must meet openly. *Id. See* also *Clark v. City of Lakewood*, 259 F.3d 996, 1013 (9th Circ. 2001) (the definition of "governing body" is no longer limited to groups that make policy or rules). Thus, a committee can act on behalf of a governing body without possessing the authority to adopt policies for the public agency.

2. **Delegation of authority is not a condition of making committees open.**

The trial court suggested that a committee "acts on behalf of" a governing body only when the latter body lawfully delegates its policymaking power to the committee. CP 823. But nothing in the OPMA requires a formal delegation of power in order for the openness mandate to apply to committee meetings. On the contrary, the OPMA states an intention that *all* government committees conduct business openly. RCW 42.30.010. Moreover, RCW 42.30.910 requires liberal construction to promote the remedial purpose of the OPMA. Therefore, it is error to read into the statute a strict limitation which is nowhere in the language of the OPMA. The trial court effectively replaced the statutory

words "acts on behalf of" with an implied term, "acts with delegated power," although that is not the same thing.

Courts do not interpret statutes so as to achieve absurd results. *City of Auburn v. Gauntt*, 174 Wn.2d 321, 330 (2012). If this Court accepted the trial court's interpretation, no council committee would ever be required to meet openly, because county and city councils always retain the ultimate authority to decide policies for counties and cities. There would be no limit to private discussions by committees, as long as the larger governing bodies avoid passing a resolution stating "we empower you to act on our behalf." For example, the trial court's interpretation could permit Seattle City Council committees, which routinely meet openly to develop proposals for the full council, to close meetings in which the reasoning and details of proposals are fleshed out.[2] In essence, elected officials would have discretion to decide when committees are open and when they are not, which flips the OPMA legislative declaration on its head.

3. The proper interpretation, under the statute and common law, is that a committee acts "on behalf of" its governing council when it takes "action" that is subject to the council's control.

[2] *See* http://www.seattle.gov/council/com_assign.htm for a description of the substantive policymaking roles of council committees.

Although the OPMA does not define the term "acts on behalf of," it does define "action." RCW 42.30.020(3) says:

> 'Action' means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations and final actions.

Applying this definition to the term "acts on behalf of," a committee "acts" when it takes any "action" that would constitute transaction of official business by a governing body. Thus, when the committee deliberates, discusses (even preliminarily) or considers official matters of the public agency, it "acts" for purposes of RCW 42.30.020(3). This interpretation harmonizes RCW 42.30.020(2), the definition of governing body, with RCW 42.30.020(3), the definition of action. It also is consistent with the stated purpose of the OPMA to permit observation of the entire decision-making process, including "deliberations" of "committees" as well as councils. RCW 42.30.010.

That still leaves the question of what "on behalf of" means. In the common law context of agency, the term "on behalf of" is used to refer to one party agreeing to act under another party's control. The Restatement (Third) of Agency §1.01 (2006), says:

> Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Comment g to Section 1.01 explains that the term "acting on behalf of" includes representing the principal in transactions with third parties and consenting to "do the work that the employer directs and to do it subject to the employer's instructions."

Although amici do not suggest that a committee must be a common law "agent" of a governing body in order to fall under the OPMA (which would be contrary to the statute), the point is that under the common law the term "acts on behalf of" generally connotes that the actor is subject to the other's control. An action is not "on behalf of" a principal unless that principal expressly or implicitly permits it to be so.

Applying that common-law concept to this case, the Ordinance Team acted "on behalf of" the County Council. The Ordinance Team could not have performed its work without the consent of the County Council which had final authority over the ordinance in question. Indeed, three County Council members participated in the Ordinance Team, and its "purpose was to facilitate and coordinate the County's efforts in amending the County's critical areas ordinances." Brief of Resp. p. 1.

Amendment of ordinances is a policymaking function under the council's control, not an executive function. RCW 36.32.120(7) (county councils hold the power to regulate development by ordinance).

The inquiry is not whether the governing body created the committee or what language was used in creating it. Rather, the relevant question is what role the committee actually plays, and whether it is taking "actions" with respect to matters within the governing body's purview. If the governing body can control the matters discussed, reviewed, considered or proposed in a committee, then the committee "acts on behalf of" the governing body. Practically speaking, any time a committee is asked to deal with a county ordinance, the committee is necessarily acting with the consent of, and subject to control by, the county governing body. RCW 36.01.030 (a county's "powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law").

In sum, "acts on behalf of" means conducting the people's business subject to the governing body's control. No other interpretation is consistent with the intent of the OPMA to require openness throughout the policymaking process.

C. A Negative Quorum Triggers Open Meeting Requirements.

Amici agree with the appellants and with San Juan County Prosecutor Randall Gaylord's opinion that the reasoning of *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 398 N.W.2d 154 (1987), is sound and should be adopted here. In *Showers*, the Wisconsin Supreme Court held that Wisconsin's similar open meetings law applies any time there "is the potential of a group to determine the outcome of a proposal, whether that potential be the affirmative power to pass, or the negative power to defeat." 135 Wis.2d at 101-02. It is illogical to require public oversight only when a council majority meets, if a meeting of less than a majority is equally capable of determining a proposal's outcome, as in this case where three of the six council members privately discussed land use policies which they could have controlled as a negative bloc. As San Juan County's own attorney explained in a memo to the County Council:

> San Juan County has a unique charter with an even number of Council members and a voting requirement for four affirmative votes to take action. This two-thirds voting requirement means that three members can block any proposal before the Council. Due to the unique circumstance of the San Juan County Home Rule Charter, when three members assemble they have the potential to exercise "negative" decision-making by forming a block and if they do so outside of a public meeting, it is done in a way that is not obvious and not known to the public. Whether intentional or just a normal part of the decision

> making process, when this occurs, the committee may exercise de facto decision making authority.

CP 455.

Construing Washington's law liberally as required, the RCW 42.30.030 requirement to meet openly applies to meetings of a negative quorum. In fact, the OPMA does not explicitly state that RCW 42.30.030 applies only if a majority of members are present. RCW 42.30.020 (defining "meeting" as "meetings at which 'action' is taken" and "action" as "the transaction of the official business of a public agency by a governing body including...deliberations, discussions, considerations, reviews, evaluations and final actions"). Because a negative quorum is just as capable of "action" as a positive quorum, this Court should adopt the *Showers* rule.

Even if this Court does not embrace *Showers*, it should hold that the presence of three of the six Council members at the Ordinance Team meetings was sufficient to make the Ordinance Team a "committee" of the governing body for purposes of RCW 42.30.020(2). A "committee thereof" encompasses not just groups which consist partly or wholly of the parent body's members, but also committees appointed by the parent body to discuss, review, evaluate, consider, or take public comments on official business of the public agency.

D. Attorney Fees Must Be Awarded to Citizen Enforcers For *Any* Proven Violation, Regardless of Willfulness.

It is important to clarify the legal standard applicable to the present case because the trial court stated the wrong standard, and the same erroneous standard has appeared in Division 3 cases discussed below, and should be corrected. This Court should hold that an OPMA plaintiff's burden of proof depends on the remedy sought, that it is not necessary to prove that a knowing violation of the OPMA except to impose civil penalties, and that attorney fees should be awarded when *any* OPMA violation is proven regardless of whether additional remedies are available.

1. **The OPMA offers four distinct remedies.**

There are four distinct remedies available to citizens under the OPMA: 1) nullification of actions taken in illegal meetings (RCW 42.30.060(1)); 2) injunctions to prevent threatened OPMA violations (RCW 42.30.130); 3) civil penalties of $100 per person for knowing violations of the OPMA (RCW 42.30.120(1)); and 4) an award of costs and reasonable attorney fees for any person prevailing in an action alleging an OPMA violation (RCW 42.30.120(2)). *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (CLEAN)*, 119 Wn.App. 665, 702-03, 82 P.3d 1199 (2004) (listing the four possible consequences of

OPMA violations). Nothing in the OPMA suggests that a citizen must meet the test for multiple remedies in order to obtain any single remedy.

2. **Only civil penalties hinge on proving that participants in an illegal meeting knew of its illegality.**

Here, the citizens who challenged San Juan County's closed committee meetings dropped their requests for an injunction and civil penalties against individual County Council members. CP 44-46, 828; Brief of App., p. 23. Thus, only two remedies were at issue: nullification of action pursuant to RCW 42.30.060(1) and fee-shifting pursuant to RCW 42.30.120(2). In granting summary judgment to San Juan County, the trial court erroneously stated as follows:

> In order to overcome summary dismissal of an OPMA claim, the plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) where that body took action in violation of the OPMA, and (4) the members of that body had knowledge that the meeting violated the statute. Eugster v. City of Spokane, 118 Wn.App. 383, 424, 76 P.3d 741 (2003) (Eugster 2), wherein the court cited to Eugster v. City of Spokane, 110 Wn.App. 22, 39 P.3d 380 (2002) (Eugster 1).

CP 819. San Juan County asserts a similar erroneous standard on appeal, contending that all four cited elements must be proven to avoid summary dismissal of "an OPMA claim," but only the first three must be proven "to prevail" on a claim. Brief of Resp., pp. 11-12.

It is not true that a citizen must prove a willful, knowing violation of the OPMA by closed-meeting participants – a practically impossible burden – in order to survive summary judgment on *any* OPMA claim. Rather, knowledge of illegality must be proven only for relief under RCW 42.30.120(1), which says:

> Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person....

The operative term, "knowledge of the fact that the meeting is in violation," is not present anywhere else in the OPMA.

By contrast, RCW 42.30.060(1), the nullification provision, says, "Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void." It does not say the failure must be knowing or willful in order to nullify an action. RCW 42.30.120(2), the fee-shifting provision, requires a fee award to "any person who prevails against a public agency in any action in the courts for a violation of this chapter." It says "a violation," not a *knowing* violation. If legislators

wanted to make fee-shifting or nullification contingent on proving knowledge of illegality, they would have said so.

In asserting an overly demanding standard of proof, the county and trial court relied on *Eugster 2*, failing to recognize that the opinion misquoted the test announced in *Wood v. Battle Ground School District*, 107 Wn.App. 550, 27 P.3d 1208 (Div. 2 2001), in which a citizen sought civil penalties against School Board members who "met" by email. What *Wood* actually said was that an unlawful closed meeting "subjects members to civil penalties" under RCW 42.30.120(1) and that "*to enforce this provision*, the party bringing the action must show (1) that a 'member' of a governing body (2) attended a 'meeting' of that body (3) where 'action' was taken in violation of the OPMA, and (4) that the member had 'knowledge' that the meeting violated the OPMA." *Wood*, 107 Wn.App. at 558 (italics added). Thus, the four-part test stated in *Wood* applied solely to enforcement of the *penalty* provision ("this provision"), not to any and all OPMA claims.

Both *Eugster 2* and its predecessor, *Eugster 1*, misquoted *Wood* by characterizing the 4-part test as necessary "to defeat summary dismissal of an OPMA claim," as opposed to penalty claims specifically. *Eugster 1*,

110 Wn.App. at 222; *Eugster 2*, 118 Wn.App. at 424.[3] The earlier case, when read carefully in its entirety, actually is consistent with *Wood*, explaining that knowledge is "an element in an OPMA penalties claim" and that "the knowledge element...is not a necessary element of recovering attorney fees." *Eugster 1*, 110 Wn.App. at 226 (emphasis adde). Unfortunately, *Eugster 2* omitted that explanation and incorrectly applied the four-part *Wood* test to nullification and fee claims. 118 Wn.App. at 423-24. *Eugster 2* was decided by Division 3, is not binding on this Court (RAP 13.4(b)(2)), and should not cloud the law here.

Applying the knowledge test to all OPMA claims, not just penalty claims, would make the statute virtually unenforceable. In fact, in the 43-year history of the OPMA, there has never been a published appellate opinion finding that a governing body member knowingly violated the statute. It is too easy for accused violators to say that they relied on faulty legal advice or simply were ignorant of the law. Therefore, this Court should refrain from repeating the standard stated by the trial court and San Juan County, and clarify that knowledge of illegality is an element of proof only for the penalty remedy under RCW 42.30.120(1) and not for avoiding

[3] *Eugster 3*, 128 Wn.App. 1, 114 P.3d 1200 (Div. 3 2005), is even more confused than its predecessors, incorrectly stating that RCW 42.30.060(1) allows "some actions without a public meeting" and again misstating the *Wood* test. Amici urge this Court to view the *Eugster* line of cases with extreme caution.

summary dismissal of any and all OPMA claims.[4] To protect citizens' ability to enforce the OPMA, this Court also should clarify that if *any* OPMA violation is proven, attorney fees must be awarded. RCW 42.30.120(2); *Eugster 1*, 110 Wn.App. at 226-27.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and remand the matter for application of the proper legal standards explained herein.

Dated this 17th day of March, 2014.

Respectfully submitted,

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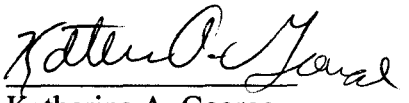
By: 

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[4] As explained above, the misstated standard was just one of the trial court's legal errors; it is not clear whether correcting this particular error would have changed the decision.