

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 26 AM 10:07
STATE OF WASHINGTON
BY  DEPUTY

Court of Appeals Case No. 48185-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JOHN LEY, an individual, JOHN HALLINEN, an individual, GERALD R. HALLE, an individual, MICHAEL & CAROLE KELLEY, husband and wife, MICHAEL CONNER, an individual, LISA ROSS, an individual DEBORAH WARD, an individual PAT ANDERSON, an individual, BRIAN J. ROHAN, an individual, ROBERT NICHOLS, an individual, JOHN BURKE, an individual, ROBERT RAY LARIMER, JR., an individual, MARK HEAGY, an individual,

Appellants,

v.

CLARK COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, dba C-TRAN, a Washington Public Transportation Benefit Area, C-TRAN BOARD COMPOSITION REVIEW COMMITTEE, a statutorily-created special committee, C-TRAN BOARD OF DIRECTORS, GREG ANDERSON, C-TRAN Board of Directors Member, JACK BURKMAN, C-TRAN Board of Directors Member, BART HANSEN, C-TRAN Board of Directors Member, JIM IRISH, C-TRAN Board of Directors Chair, LYLE LAMB, C-TRAN Board of Directors Member, DAVID MADORE, C-TRAN Board of Directors Member, JENNIFER MCDANIEL, C-TRAN Board of Directors Member, ANNE MCENERNY-OGLE, C-TRAN Board of Directors Vice-Chair, JOHN SHREVES, C-TRAN Board of Directors Member, JEANNE STEWART, C-TRAN Board of Directors Member, TOM MIELKE, C-TRAN Board of Directors Member, CONNIE JO FREEMAN, C-TRAN Board of

Directors Member, JEFF HAMM, chief administrative
officer of the Clark County Public Transportation Benefit
Area,

Respondents.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

Damien R. Hall, WSBA No. 47688
Email: dhall@balljanik.com
Adele J. Ridenour, WSBA No. 35939
Email: aridenour@balljanik.com
BALL JANIK, LLP
101 SW Main Street, Suite 1100
Portland, OR 97204
Telephone: 503.228.2525
Facsimile: 503.226.3910
Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STANDARD OF REVIEW1

III. ARGUMENT IN REPLY.....2

**A. Plaintiffs have preserved the argument that the claims
 against the Individual Defendants raise issues of first
 impression.....2**

**B. C-TRAN fails to identify authority that is controlling in
 this case.2**

IV. CONCLUSION4

TABLE OF AUTHORITIES

CASES

Cary v. Allstate Insurance Co., 78 Wn.App. 434, 897 P.2d 409
(1995)..... 1, 2

Clark v. City of Lakewood, 259 F.3d 996 (9th Cir, 2001) 3, 4

Wash. State Physicians Ins. Ex. & Assoc. v. Fisions Corp., 122
Wn.2d 299, 858 P.2d 1054 (1993)..... 1, 2

STATUTORY AUTHORITIES

RCW 36.57 4

RULES AND REGULATIONS

CR 11 1, 5

I. INTRODUCTION

Appellants' claims against the individual defendants are issues of first impression that present debatable issues of public importance, and as such, should not be subject to attorney's fees under CR 11. *See Cary v. Allstate Ins. Co.* 78 Wn.App. 434, 440-41, 897 P.2d 409 (1995).

Respondents do not argue the existence of issues of public importance, but instead focus their briefing on identifying controlling authority in an effort to prove that the claims against the individual defendants are not issues of first impression. However, the cases identified by Respondents are factually and legally dissimilar to the current situation, and therefore are not controlling. Thus, the claims against the individual defendants do raise issues of first impression, and the trial court abused its discretion in finding a violation of CR 11. Appellants ask for the relief designated in Part 2 below.

II. STANDARD OF REVIEW

This Court reviews the trial court's grant of attorneys' fees pursuant to CR 11 for abuse of discretion. *Wash. State Physicians Ins. Ex. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). An abuse of discretion occurs when the trial court's order is manifestly unreasonable or based upon untenable grounds. *Id.* at 339.

Claims that raise issues of first impression are not frivolous and not subject to attorneys' fees if they present debatable issues of public importance. *Cary v. Allstate Ins. Co.*, 78 Wn.App. at 440-441.

III. ARGUMENT IN REPLY

A. Plaintiffs have preserved the argument that the claims against the Individual Defendants raise issues of first impression.

Appellants have repeatedly noted that this case, specifically the claims against the Individual Defendants, raise issues of first impression. Respondents' assertions to the contrary are baseless. The first impression argument was made to the trial court in both Plaintiffs' Response to Certain Defendant's Motion for Reasonable Attorney's Fees and Costs Under Civil Rule 11 for Claims Against the Individual Defendants (CP 576, 577, 579, 584, 586) and Plaintiffs' Response to Certain Defendant's Supplemental Motion for Reasonable Attorney's Fees and Costs Under Civil Rule 11 (CP 696). Respondents even mention the argument in their own briefing to the lower court. CP 712.

B. C-TRAN fails to identify authority that is controlling in this case.

Respondents argue that there are no issues of first impression but rely on authority that is not controlling under the facts of this case.

Respondents have not identified any case where the OPMA is applied to the binding action of one governing body of a public agency to change the composition of the governing body of a separate public agency, as would be factually “on all fours” with the case at hand, and thus provide controlling precedent for this Court’s analysis of the actions taken by the BCRC, the C-TRAN Board of Directors, and the reconstituted C-TRAN Board of Directors.

No such case has been presented to the court, and Respondents’ assertions that cases are controlling are unpersuasive. Nonetheless, Respondents characterize *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir, 2001) as “controlling case law” standing for the concept that “[o]nly actions taken in closed meetings violates the OPMA,” and that there is no “fruit of the poisonous tree” analogue in the OPMA. Supplemental Brief of Respondents, p. 8.

In contrast to these assertions, *Clark* only states in the positive that “action taken in closed meetings is null and void,” and does not foreclose the validity of the ratification rule. *Clark v. City of Lakewood*, 259 F.3d at 1014. In fact, the City Council in *Clark* actually ratified the decision made in a closed meeting prior to taking further action on the decision. *Id.* Here, the BCRC took action in a closed meeting to change the

composition of the C-TRAN Board. That decision was never ratified in an open meeting, either by the BCRC or the C-TRAN Board, and is null and void. Thus, the actions of the C-TRAN Board that was reconstituted based on the null BCRC decision, are likewise null and void.

Finally, Respondents fail to identify controlling authority as to Mr. Hamm's notice obligations. Respondents acknowledge that Mr. Hamm is responsible for compliance with the notice requirements of RCW 36.57.A.55. *Supplemental Brief of Respondents* at 13. However, the OPMA is silent as to the party responsible for providing OPMA compliant notice. Respondents urge the court to find that there is no overlap between these two statutory notice obligations, even though both are applicable to the very same meetings of the BCRC. But again, no authority is presented that is determinative of the issue. As such, the interplay of these two statutory notice requirements presents an issue of first impression.

IV. CONCLUSION

The claims against the Individual Defendants present multiple issues of first impression and therefore should not be subject to CR 11 sanctions. None of the cases relied on by Respondents presents controlling authority to the contrary. Based on the above, Appellants request that this Court reverse the trial court's Order Granting Certain

Defendants' Motion for Reasonable Attorneys' fees and Costs under Civil
Rule 11.

DATED: September 21, 2016.

Respectfully submitted,

BALL JANIK, LLP

/s/ Damien R. Hall

Damien R. Hall, WSBA #47688

Adele J. Ridenour, WSBA #35939

Attorneys for Appellants

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 21, 2016 I filed the foregoing
APPELLANTS' SUPPLEMENTAL REPLY BRIEF by e-mailing a copy to:

Washington Appellate Court Clerk
Court of Appeals Division II
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402-4454

I further certify that on September 21, 2016, I served a copy of the
foregoing *APPELLANTS' SUPPLEMENTAL REPLY BRIEF* by e-service,
per agreement of the parties, to the following party:

Thomas H. Wolfendale
thomas.wolfendale@klgates.com
Aaron E. Millstein
aaron.millstein@klgates.com
Robert B. Mitchell
Rob.mitchell@klgates.com
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

Attorneys for Defendant C-TRAN

Chris Horne
chris.horne@clark.wa.gov
Chief Civil Deputy Prosecuting
Attorney for Clark County
PO Box 5000
Vancouver, WA 98666-5000

*Attorneys for Defendant Tom
Mielke*

FILED
COURT OF APPEALS
DIVISION II
2016 SEP 26 AM 10:07
STATE OF WASHINGTON
BY _____
DEPUTY

David Madore
17401 NE Stoney Meadows Drive
Vancouver, WA 98682-5614

By US Mail only

DATED: September 21, 2016.

BALL JANIK, LLP

/s/ Damien R. Hall

Damien R. Hall, WSBA #47688
Adele J. Ridenour, WSBA #35939
Attorneys for Appellants