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COURT OF APPEALS
DIVISION II

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Court of Appeals Case No. 48185-5-II

STATE OF WASHINGTON
BY 
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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.

SUPPLEMENTAL APPELLANTS' BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	2
	A. First Assignment of Error	2
	1. Sub-Assignment of Error No. 1	2
	2. Sub-Assignment of Error No. 2	2
	B. Issues Pertaining to Assignment of Error No. 1	3
III.	STATEMENT OF THE CASE.....	3
IV.	STANDARD OF REVIEW	6
V.	SUMMARY OF ARGUMENT	7
VI.	ARGUMENT	8
	A. Assignment of Error 1.....	8
	1. Sub-Assignment of Error 1	9
	2. Sub-Assignment of Error 2	10
VII.	CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

Cary v. Allstate Ins. Co.,
78 Wn.App. 434, 897 P.2d 409 (1995)..... 6, 10

In re Cooke,
93 Wn.App. 526, 969 P.2d 127 (1999)..... 15

Skimming v. Boxer,
119 Wn.App. 748, 82 P.3d 707 (2004)..... 15

Wash. State Physicians Ins. Ex. & Assoc. v. Fisions Corp.,
122 Wn.2d 299, 858 P.2d 1054 (1993)..... 6

STATUTES

RCW 36.57A.055..... passim

RCW 42.30.120. 5

RCW 42.30.910. 15

RCW 42.30.010.....13

RULES

CR 11 passim

I. INTRODUCTION

Plaintiffs submit this supplemental appeal of the trial court's Order Granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants. The individual defendants' in question are the C-TRAN Board members and the C-TRAN administrator Mr. Hamm.

At the outset, if the Court reverses the trial court's decision in the underlying action, it should also vacate this award of attorneys' fees.

This Court's review of this supplemental appeal turns on two issues: (i) whether any facts were disputed or misrepresented to the trial court as would provide tenable grounds for the trial court's finding that the claims were not well based in fact, and (ii) whether the claims against the individual defendants were issues of first impression, and thus not frivolous. Appellants also contend that even if the claims against the individual defendants are not found to be issue of first impression, that a good faith argument exists that such claims are based on reasonable extensions of existing law.

For these and all the reasons set forth below, Appellants request that the Order Granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants be reversed, and no attorneys' fees be granted to C-TRAN.

II. ASSIGNMENT OF ERROR

A. First Assignment of Error

The trial court erred in granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against the individual defendants.

1. Sub-Assignment of Error No. 1

The trial court erred in determining that the claims against the individual defendants were not well grounded in fact.

2. Sub-Assignment of Error No. 2

The trial court erred in determining that the claims against the individual defendants were not warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law or the establishment of new law.

B. Issues Pertaining to Assignment of Error No. 1

i) Were any facts disputed or misrepresented before the trial court?

ii) Are the claims against the individual defendants issues of first impression?

iii) Did defendants identify to the trial court any applicable authority precluding all possibility of success for the claims against the individual defendants?

iv) Will affirming the trial court's grant of attorney fees under CR 11 have a chilling effect on enforcement of the Washington Open Public Meetings Act ("OPMA")?

III. STATEMENT OF THE CASE

The C-TRAN Board Composition Review Committee ("BCRC") reviews the composition of the C-TRAN Board of Directors ("C-TRAN

Board”) and has the sole authority to change the composition of the C-TRAN Board. RCW 36.57A.055. At the BCRC meeting on November 18, 2014 (“BCRC Meeting”), a majority of the BCRC voted to change the composition of the C-TRAN Board. CP 601. Lack of notice for the BCRC Meeting gave rise to the OPMA-based claims in this case. CP 2. The BCRC has not met subsequent to the BCRC Meeting and has not appeared in this case.

Following the BCRC Meeting, the C-TRAN Board next met on January 13, 2015. CP 591. At that meeting, the C-TRAN Board was informed by C-TRAN Board members that: (1) the notice of the BCRC Meeting was inconsistent with Open Public Meetings Act (“OPMA”) requirements; (2) the action of the BCRC to change the C-TRAN Board composition was null and void; and (3) the C-TRAN Board should continue to meet as previously constituted until the BCRC met and took action in a meeting that complies with the OPMA. CP 592-94.

Complaint, ¶ 24.

Upon being informed that the BCRC Meeting was held in violation of the OPMA, the C-TRAN Board declined to reconvene the BCRC to ratify its decision in a properly noticed, open meeting. By declining to

ratify the action of the BCRC, the C-TRAN Board accepted the risk of implementing the actions taken at the improperly noticed BCRC meeting. The reconstituted C-TRAN Board has been meeting since.

Pertinent to the individual defendants, the Complaint alleges the following:

“3. Entry of a Judgment declaring the actions of the C-TRAN Board of Directors knowingly violated Washington’s OPMA and therefore should be issued a civil penalty in the amount of \$100.00 each pursuant to RCW 42.30.120.

4. Entry of a Judgment declaring that Hamm violated Washington’s OPMA in failing to provide proper notice of the November 2014 Meeting of the C-TRAN BCRC.”

CP 10.

Subsequent to the trial court granting the Moving Defendants’ Motion to Dismiss all claims, the same defendants filed the Certain Defendants’ Motion for Reasonable Attorneys’ Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants. CP 516. In supplemental briefing, C-TRAN requested payment of \$32,249.95 in attorney fees for defending the claims against the individual defendants

and bringing the Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants. CP 675.

On March 4, 2106, the trial court entered the Order Granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants ("Order"), and awarded C-TRAN attorneys' fees of \$15,000. CP 744. Plaintiffs timely filed a Notice of Appeal on April 4, 2016.

IV. 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. Fisions 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 issue 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. 434, 440-441, 897 P.2d 409 (1995).

V. SUMMARY OF ARGUMENT

The trial court erred in granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants. First, the trial court abused its discretion by finding that the claims against the individual defendants were not well grounded in fact. This ruling is manifestly unreasonable because the parties are in agreement on all of the facts in the case.

Second, the trial court again abused its discretion by finding that the claims against the individual defendants were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. This ruling is manifestly unreasonable because the claims against the individual defendants were issues of first impression, as is the entire action.

Finally, even if this Court does not find that the claims against the individual defendants are issues of first impression, the trial court still abused its discretion in finding that the claims against the individual defendants were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the

establishment of new law. This ruling is based on untenable grounds because the defendants have identified no controlling legal precedent that forecloses the possibility of success of the claims against the individual defendants

VI. ARGUMENT

A. Assignment of Error 1

The trial court erred in granting Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against the Individual Opponents. Generally, CR 11 allows for sanctions in three situations: (1) the assertion of a factually frivolous claim or defense, (2) the assertion of a legally frivolous claim or defense, and (3) the assertion of a claim or defense for the purpose of harassment or delay. None of these situations is present in this case.

First, the parties agree on all of the facts identified in the Complaint, and the trial court erred in finding that any claims were factually frivolous. Second, the claims against the individual defendants were all issues of first impression. By definition, cases of first impression are not legally frivolous, and defendants have identified no controlling

legal precedent that forecloses the possibility of success of the claims against the individual defendants. Third, the defendants did not argue and the trial court did not rule that any claims were brought for the purpose of harassment or delay. Thus, none of the situations that give rise to CR 11 exist in this case and the trial court abused its discretion in finding to the contrary.

1. Sub-Assignment of Error 1

The trial court erred in determining that the claims against the individual defendants were not well grounded in fact. The Certain Defendants' Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against Individual Defendants, does not dispute any of the facts presented in the Complaint, and at no time did any defendant assert that the plaintiffs misrepresented any facts at any point in the proceedings before the trial court. CP 522-23.

In the absence of any disputed facts it is manifestly unreasonable for the trial court to have found that the claims against the individual defendants were factually frivolous. The Order does not specify the grounds upon which the trial court relied in making its finding that the

claims were not well based in fact, but in the absence of a factual dispute or misrepresentation, such grounds are inherently untenable. Thus, the trial court abused its discretion in finding that the claims against the individual defendants were not well grounded in fact.

2. Sub-Assignment of Error 2

The trial court erred in determining that the claims against the individual defendants were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

- a. The claims against the individual defendants are issues of first impression.

The trial court abused its discretion in finding that CR 11 was violated because the claims against the individual defendants are legal issues of first impression. Claims that raise issue 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. 434, 440-441, 897 P.2d 409 (1995).

The claims against the individual defendants are based on the

applicability of the OPMA to the meetings of the BCRC, and the applicability of the OPMA to the C-TRAN Board's implementation of actions taken by the BCRC. The parties agree that there is no appellate precedent on this matter.

Specifically, no case has been identified which addresses the fundamental legal issues of whether the OPMA applies to the BCRC or the subsidiary legal issues which apply to the claims against the Individual Defendants, such as:

- When the BCRC takes action in a meeting that does not comply with OPMA notice requirements, is such an action binding on the C-TRAN Board?
- Can the C-TRAN Board reconvene the BCRC to ratify its action in a meeting that complies with OPMA notice requirements?
- In the absence of such ratification, is the C-TRAN Board free to knowingly implement the actions of the BCRC taken in a meeting that does not comply with OPMA notice requirements?
- If the C-TRAN Board does knowingly implement actions taken outside of an open meeting, what are the remedies?

Neither side identified or presented the trial court with any appellate precedent addressing these specific factual and legal issues, or even interprets the OPMA in the context of RCW 36.57A.055 generally.

Further, there is no controlling precedent determining the extent of Mr. Hamm's notice obligation under RCW 36.57A.055. Clearly, he has a statutory obligation to provide notice of BCRC meetings, but does that obligation incorporate and extend to compliance with OPMA notice requirements? Or is his statutory notice obligation completely separate from and additional to the notice requirements of the OPMA? Again, there is no controlling authority interpreting and applying the pertinent law or any appellate cases involving Public Transportation Benefit Area Board Composition Committee.

In the absence of any controlling authority, the claims against the individual defendants are cases of first impression (A case of first impression is one that "presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction." Black's Law Dictionary, p. 228 (8th ed. 2004). These issue of first impression address issues of public importance. The claims against the individual defendants seek to clarify the legal standards applicable to ensuring that local government decisions are made in open

meetings. There are few issues of greater public importance.¹

Because the claims against the individual defendants are issues of first impression, the trial court abused its discretion in finding that the claims were frivolous and awarding attorneys' fees.

- b. The claims against the individual defendants are based on good faith argument for the extension and modification of existing law.

The claims against the C-TRAN Board members were based on a good faith argument for extension of existing law, the ratification rule. This claim is discussed in detail at section VI.A.4 of the Appellants' Opening Brief. In the absence of ratification by the BCRC, and with

¹ RCW 42.30.010:

“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.”

unrefuted evidence that the C-TRAN Board had been informed of an OPMA violation, it is clear that plaintiffs had an adequate basis in law and fact to levy claims against individual C-TRAN Board members. The trial court abused its discretion in finding that the claims against the C-TRAN Board members were not based on good faith argument for the extension and modification of existing law.

Appellants also had a good faith basis to allege a violation of Washington's OPMA against Mr. Hamm based on Mr. Hamm's statutory obligation to provide notice of the BCRC meeting under RCW 36.57A.055. Respondents argued to the trial court that Hamm's responsibility to effectuate notice of the BCRC meeting is entirely separate from any requirements of the OPMA. However, the statutory notice requirements of RCW 36.57A.055 and the OPMA should be read to be consistent if possible. Under such an interpretation, RCW 36.57A.055 would obligate Mr. Hamm to provide all required notice of the BCRC meeting, as opposed to distinguishing between Hamm's required notice and OPMA notice for which he is not responsible.

Of course, there is no authority which has interpreted the interrelationship between RCW 36.57A.055 required notice and OPMA

required notice. In the absence of controlling authority to the contrary, it is clear that the interpretation that RCW 36.57A.055 obligates Hamm to provide all notice of the BCRC meeting, including OPMA required notice, is consistent with a good faith interpretation of the applicable statutes. Further, it is worth noting that with respect to Hamm, Appellants' only requested a declaration of violation of the OPMA, with no accompanying personal liability or other express remedy. CP 10.

Because the claims against the C-TRAN Board members and Mr. Hamm are based on good faith extensions and interpretations of existing law, the trial court abused its discretion in finding that these claims were in violation of CR 11.

c. The CR 11 Sanctions Have a Chilling Effect on OPMA Enforcement.

As a matter of public policy, defendants' motion should be denied. Washington's legislature has directed that the OPMA be liberally construed. RCW 42.30.910. Whether meetings of the BCRC are subject to the OPMA was a matter of first impression, as was the liability of the individual defendants based on their respective roles in either providing notice of the BCRC meeting and/or conducting the business of C-TRAN

Page 15

under the newly constituted board of directors. Plaintiffs made a good faith argument for extension of the OPMA to these parties and any award of fees would have a chilling effect on future members of the public claiming a violation of the OPMA. The Washington Court of Appeals has specifically noted that because CR 11 sanctions have a potential chilling effect, trial courts should impose such sanctions “only when it is patently clear that a claim has absolutely no chance of success.” *Building Ass’n of Wash. v. McCarthy*, 152 Wn.App. 720,745, 218 P.3d 196 (2009) citing *Skimming v. Boxer*, 119 Wn.App. 748, 754, 82 P.3d 707 (2004) and *In re Cooke*, 93 Wn.App. 526, 529, 969 P.2d 127 (1999)). Here that was just not the case. The issues in this matter were extensively briefed and nothing about the trial court’s decision indicates plaintiffs’ claims were frivolous or without merit in fact or law.

It is unlikely that the BCRC is the only statutorily-created public body about which the applicability of the OPMA can be questioned. Upholding the Order of the trial court would chill not only enforcement of the OPMA in similar settings involving Public Transportation Benefit Areas and Board Composition Review Committees throughout the state,

but would extend to other meetings of public bodies for which there is no well-established body of case law.

VII. CONCLUSION

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 or Claims Against the Individual Defendants.

DATED: June 24, 2016.

Respectfully submitted,

BALL JANIK, LLP

/s/ Damien R. Hall

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 24, 2016 I filed the foregoing
SUPPLEMENTAL APPELLANTS' BRIEF by mailing a copy to:

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I further certify that on June 24, 2016, I served a copy of the
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