

No. 481855-II

COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

JOHN LEY, et al.,

Appellants,

v.

CLARK COUNTY PUBLIC TRANSPORTATION
BENEFIT AREA, a Washington Public Transportation
Benefit Area, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellants challenge the imposition against them of Civil Rule 11 sanctions for the facially unsustainable claims they brought against individual C-TRAN Board members and Jeff Hamm (collectively, the “individual defendants”¹) under the Open Public Meetings Act (“OPMA”). Much as they did below, appellants attempt to avoid CR 11 sanctions by creating and attacking legal straw men. Appellants fail to identify a single fact that supported their claims against the individual defendants. The conclusory allegations in their complaint neither raised issues of first impression nor constituted good-faith arguments for the extension of existing law.² The trial court’s award of CR 11 sanctions should be affirmed.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether appellants’ claims against the individual C-TRAN Board members violated Civil Rule 11 when appellants failed to identify a single

¹ The individual defendants are Greg Anderson, Jack Burkman, Bart Hansen, Jim Irish, Lyle Lamb, David Madore, Jennifer McDaniel, Anne McEnery-Ogle, John Shreves, Jeanne Stewart, Connie Joe Freeman, and Jeff Hamm.

² On appeal, appellants do not challenge the trial court’s determination that they failed to conduct a reasonable inquiry or that \$15,000 in attorneys’ fees was a proper sanction. Any challenge to these determinations has been waived. *See* RAP 10.3(a) (“A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failing to assign error to a finding waives any potential claim of error on appeal).

fact to support their claims, no legal authority supported their claims, and their claims against the individual Board members were inconsistent with appellants' larger claims against the Board Composition Review Committee ("BCRC") and C-TRAN.

2. Whether appellants' claim against Mr. Hamm violated Civil Rule 11 when the OPMA does not allow for individual liability against non-members of governing bodies.

2. Whether allowing Civil Rule 11 sanctions here will have a chilling effect on legitimate OPMA claims or will merely deter baseless claims as CR 11 intended.

3. Whether this Court should grant respondents attorneys' fees for defending against this supplemental appeal under RAP 18.1 and 18.9.

III. COUNTERSTATEMENT OF THE CASE³

After the trial court granted the motion to dismiss, respondents filed a Motion for Reasonable Attorneys' Fees and Costs Under Civil Rule 11 for Claims Against the Individual Defendants. Clerk's Papers ("CP") 516. The motion was brought by C-TRAN, certain individual Board

³ Respondents incorporate the statement of the case set forth in their previously filed Brief of Respondent and will only set forth additional relevant factual history as needed.

members⁴, and Mr. Hamm, seeking attorneys' fees and costs under CR 11 for the claims brought against the individual defendants. *See* CP 516.

The motion was based on appellants' claims that the individual Board members violated the OPMA by attending a C-TRAN board meeting in January 2015 and that Mr. Hamm violated the OPMA when he provided notice of the November 2014 BCRC meeting. CP 516-17. Long before the motion to dismiss was granted, respondents warned appellants that they were courting CR 11 sanctions by making these claims. Respondents' counsel specifically informed appellants that their claims against the individual defendants were baseless and gave appellants an opportunity to voluntarily dismiss those claims to avoid Civil Rule 11 sanctions. CP 533 ("I reiterate our position that your claims against the individual defendants are inconsistent with, and in violation of, Civil Rule 11. . . . [I]f you are willing to dismiss the individual defendants, with prejudice, my clients may be willing to forego their right to seek the recovery of costs and fees from your firm or your clients."). Appellants ignored that request.

On December 11, 2015, after extensive argument, the trial court concluded that the OPMA claims against the individual defendants

⁴ The motion was not brought on behalf of respondents Freeman, Stewart, or Madore, even though it did seek recovery of legal fees that C-TRAN expended in defending the claims on their behalf. CP 516.

violated Rule 11. Verbatim Report of Proceedings (“VRP”) 20. The court reserved the determination on the appropriate sanction for a subsequent hearing. VRP 20.

The parties submitted supplemental materials to the trial court. Respondents requested \$32,249.95 in attorneys’ fees and \$117.94 in costs for defending the claims brought against the individual defendants. CP 675. After hearing additional argument on January 29, 2016, the trial court determined that \$15,000 in attorneys’ fees was the proper sanction. CP 744.

The trial court specifically found that the OPMA claims brought 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, and thus were not grounded in law or fact.” CP 743. The court further found that the appellants could have discovered the frivolous nature of their claims against the individual defendants through a reasonable inquiry. CP 743.

IV. SUMMARY OF ARGUMENT

The trial court properly awarded sanctions under CR 11. The claims against the individual Board members lacked any basis in fact or law. Appellants never alleged that the Board members attended an improperly noticed C-TRAN Board meeting. Rather, appellants’ theory

was that the C-TRAN Board members should be held liable for an alleged OPMA violation by a separate entity, the BCRC, which had occurred two months earlier. Appellants' argument was also inconsistent with their claim that the C-TRAN Board was not properly constituted, which (if true) meant there was no governing body as of January 2015, when the Board members allegedly violated the OPMA.

The OPMA claims against Mr. Hamm were equally frivolous. The OPMA allows claims against the members of a governing body, not employees of the public agency. The OPMA does not provide any basis for holding staff of a public agency liable. Appellants were fully aware at the time they made their claims that Mr. Hamm was the CEO of C-TRAN and not a member of a governing body.

Appellants do not contest the trial court's finding that they "failed to conduct a reasonable inquiry into the law or the facts." CP at 744. Nor do they contest the monetary value of the sanctions awarded.

V. ARGUMENT

A. Standard of Review.

Appellate courts review the imposition of CR 11 sanctions for abuse of discretion. *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009). "An abuse of discretion occurs only when no reasonable person would take the view that the trial court

adopted.” Where a party challenges a specific finding of fact by the trial court, an appellate court’s review is limited to determining whether the trial court’s findings of fact are supported by substantial evidence. *Wixom v. Wixom*, 190 Wn. App. 719, 726, 360 P.3d 960 (2015).

Rule 11 sanctions are appropriate where a claim is (1) not well grounded in fact, (2) 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, or (3) brought for an improper purpose, such as harassment. CR 11; *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). “The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system.” *Building Indus. Ass’n of Wash.*, 152 Wn. App. at 746. A filing is baseless when it is “not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law.” *Id.*

B. Appellants’ claims against the individual defendants were not well grounded in fact or law.

Rule 11 sanctions were proper in this case because the appellants’ claims against the individual defendants lacked an adequate basis in either law or fact. Appellants’ appeal arguments create straw men that should not divert this Court from the reasons for the trial court’s decision.

1. Appellants had no factual or legal basis for their claims against the C-TRAN Board members.

Appellants alleged no facts to support their claim that the C-TRAN Board members were subject to civil penalty under the OPMA. The trial court held in its dismissal order that the claims against the individual Board members lacked any factual or legal basis. *See* CP 501. To enforce the civil penalty provision of the OPMA, appellants had to 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) the member had knowledge that the meeting violated the OPMA. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001).

Appellants never identified any facts or law to support liability under this standard for the C-TRAN Board members. Appellants did allege that the BCRC meeting violated the OPMA because it was insufficiently noticed. CP 5-6. But they alleged no similar defects in notice with respect to any C-TRAN Board meetings. *See* CP 7-8. Instead, they alleged that the C-TRAN Board was notified the BCRC meeting violated the OPMA and held a meeting anyway. CP 7-8. Nowhere does the OPMA say that it is a violation to conduct a meeting after being informed that a previous meeting of the same governing body, let alone a

completely different group (as here), violated the OPMA. *See* ch. 42.30 RCW.

Appellants' position appeared to be that, because the BCRC meeting allegedly violated the OPMA, all subsequent C-TRAN Board meetings also violated the OPMA. *See* CP 7-8. This position is unequivocally foreclosed by controlling case law and the plain language of the OPMA, which also forecloses appellants' argument on appeal that they had a good-faith argument for modification, extension, or reversal of existing law.

In *Clark v. City of Lakewood*, the Ninth Circuit held that only "action taken in closed meetings" violates the OPMA. 259 F.3d 996, 1014 (9th Cir. 2001). Relying on the Washington Supreme Court's decision in *Organization to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996), the Ninth Circuit held that the OPMA "does not require that subsequent actions taken in compliance with the Act also be held null and void." 259 F.3d at 1014. As the Ninth Circuit recognized, there is no "fruit of the poisonous tree" analogue in the OPMA context. *Id.* When action taken at a closed meeting results in a related action being taken at an open meeting, only the actions at the closed meeting violate the OPMA—not the action at the open meeting. *Id.* This authority forecloses plaintiffs' already tenuous position that C-TRAN

Board members violated the OPMA either at a meeting they did not attend or at a meeting that, by all accounts, fully complied with the requirements of the OPMA.

Despite confronting this controlling authority in the Motion to Dismiss, appellants ignored it and pursued their unsupported theory of liability. They conflated the remedy of nullification with the elements of an OPMA violation. *See* CP 365-67. These are two different concepts. *City of Lakewood*, 259 F.3d at 1014 (“Under these provisions, any action taken in closed meetings is null and void. ***The statute, however, does not require that subsequent actions taken in compliance with the Act also be held null and void.***”) (discussing *OPAL*, 128 Wn.2d 869) (emphasis added). The case appellants relied upon at the trial court, *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003), fails to support their theory. The court held there that a settlement agreement reached in violation of the OPMA could not be relied upon unless it was properly ratified by retracing steps to remedy the defect. *Id.* at 1091. Nothing in that opinion even remotely supports the theory that subsequent, properly noted meetings after an initial OPMA violation also constitute a violation of the OPMA. *See id.*

Thus, appellants’ claims were not a based on a good-faith argument for the extension, modification, or reversal of existing law. The

mere fact that they alleged liability is not enough. "A conclusory allegation contrary to current jurisprudence that is made without any support whatsoever does not represent a good faith argument to modify existing law." *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 346 (5th Cir. 1990).

Even if appellants' theory of the case were correct and a continuing violation of the OPMA somehow existed, the individual Board members could not be held liable under the OPMA. Under appellants' theory, C-TRAN's Board is not properly constituted and does not currently exist. The absence of a C-TRAN Board means there is no current "governing body" as that term is defined under the OPMA.⁵ If no "governing body" existed, then no "meeting" under the OPMA could occur.⁶ If no "meeting" could occur under the OPMA, then there could be no "action."⁷ If all of this were true, no violation of the OPMA could occur. The contradiction inherent in appellants' legal theory underscores why their OPMA claims against the individual Board members were

⁵ The OPMA defines a "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." RCW 42.30.020(2).

⁶ The OPMA defines a "meeting" as "meetings at which action is taken." RCW 42.30.020(4).

⁷ The OPMA defines "action" as "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." RCW 42.30.020(3).

baseless, both legally and factually, and could not be construed as a good-faith argument for extending, modifying, or reversing existing law.

Appellants do not address either the inherent contradiction in their claims or the case law foreclosing those claims. Simply put, no facts supported their legal claims against the individual Board members. Instead of addressing the lack of facts, appellants focus on the lack of disputed facts. *See* Suppl. Appellants' Br. at 9-10 ("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.")⁸ But the utter lack of factual support for the claims against the individual defendants supports the trial court's ruling that the claims were not well grounded in fact, and appellants have identified no authority to the contrary.

On appeal, appellants argue for the first time that they are raising an issue of first impression of public importance, which should not be the basis for CR 11 sanctions. But the issues of public importance identified in appellants' brief do not rely on their claims against the individual Board members. Appellants generally claim that the issue of first impression was the "applicability of the OPMA to the meetings of the BCRC, and the

⁸ The trial court's order dismissing the case specifically found as follows: "Plaintiffs do not allege any facts or legal theory that any C-TRAN Board meeting which occurred in calendar year 2015 failed to comply with the notice provisions of the OPMA" CP 501.

applicability of the OPMA to the C-TRAN Board's implementation of actions taken by the BCRC." Suppl. Appellants' Br. at 10-11. These issues relate to the claims against the BCRC and C-TRAN as separate entities, not the individual Board members. Respondents did not seek sanctions for the claims brought against the BCRC or C-TRAN.⁹ Accordingly, these fundamental issues, as identified by appellants, were resolved by the decision as to C-TRAN and the BCRC as separate legal entities—a wholly separate claim.

Consequently, appellants' claims against the individual Board members lacked any basis in fact or law.

2. Appellants had no factual or legal basis for their claims against Mr. Hamm.

Appellants' OPMA claims against Mr. Hamm also lack any basis in fact or law. He is not a member of a governing body, which is a fundamental element for any claim of individual liability under the OPMA. *See Wood*, 107 Wn. App. at 558. Appellants failed to identify any facts to support the theory that a judgment should be entered declaring that Mr. Hamm "violated Washington's OPMA in failing to provide

⁹ Further, the claims against the BCRC and C-TRAN relied on allegations that the November 2014 BCRC meeting violated the OPMA. In contrast, the claims against the individual defendants relied on allegations that C-TRAN violated the OPMA beginning in January 2015. Plaintiffs failed to raise any allegation that C-TRAN improperly noticed the 2015 meetings or otherwise took action in violation of the OPMA during those meetings.

proper notice of the November 2014 Meeting of the C-TRAN BCRC.”
CP 10.

Mr. Hamm is C-TRAN’s Executive Director/CEO. In that role, he has no authority to vote, take testimony, or control any meeting in any way. Because he is not a “member” of any “governing body,” he could not possibly take any “action” as the OPMA defines that term. Appellants never alleged otherwise. Nor did they identify a single authority for holding a non-board member liable under the OPMA. Thus, no factual or legal basis existed to bring the OPMA claim against Mr. Hamm.

Appellants argue that their OPMA claim against Mr. Hamm did not seek a monetary penalty and thus should not be subject to sanctions. But appellants sought a declaration that Mr. Hamm violated the OPMA. Appellants obfuscate the analysis by arguing that no court has ever addressed how RCW 36.57A.055—which requires Mr. Hamm to notice the BCRC meeting—interacts with the OPMA. However, this argument fails because appellants also brought a separate claim that Mr. Hamm violated RCW 36.57A.055. CP 9 (“Plaintiffs are further entitled to a declaration that Hamm’s actions in failing to provide proper and timely notice of the November 2014 Meeting of the BCRC constitute a violation of Washington’s OPMA”). Accordingly, appellants had no need, let alone any basis, for also alleging that Mr. Hamm violated the OPMA.

The issue of whether Mr. Hamm complied with RCW 36.57A.055 is separate from, and could be resolved without, the OPMA claim. Bringing an OPMA claim against Mr. Hamm is akin to bringing an OPMA claim against an administrative assistant for failing to publish a public agency's meeting notice properly. Nothing in the OPMA or case law supports holding such an administrative assistant liable. Doing so unnecessarily castigates a public servant for a purely administrative function.

C. Allowing sanctions against the appellants will not have any chilling effect on legitimate OPMA claims.

Affirming the trial court's order will not chill citizens from filing complaints under the OPMA where a non-frivolous reason exists for such a complaint. Appellants tacitly concede that the goal of their lawsuit (namely, contesting the legality of the BCRC proceeding) could have been fully adjudicated without the individual defendants. The addition of individual defendants was legally superfluous, which leaves only non-legal motivations as an explanation for that action. The only necessary parties to an OPMA action in this case were BCRC and C-TRAN. Suppl. Appellants' Br. at 16 (quoting *Building Ass'n of Wash*, 152 Wn. App. at 745). As demonstrated in this brief and the papers filed with the trial court, the claims against the individual defendants had "absolutely no

chance of success.”

Further, the only conduct that granting sanctions will deter is the filing of baseless lawsuits against individuals who cannot be held liable and whose presence in the case is unnecessary. Respondents requested sanctions only after expressly warning appellants that their claims against the individuals were frivolous and sanctionable under Rule 11. *See* CP 533 (Counsel warned appellants, “I reiterate our position that your claims against the individual defendants are inconsistent with, and in violation of, Civil Rule 11.”). Appellants’ brief fails to acknowledge that they were explicitly informed after receiving the Motion to Dismiss that these claims were frivolous. Certainly, appellants were free to ignore opposing counsel’s statements, but they did so with clear notice and at their own peril. Thus, no chilling effect will occur if this Court upholds the sanctions.

D. Respondents are entitled to attorneys’ fees under RAP 18.1 and 18.9

Respondents request attorneys’ fees under RAP 18.1 and 18.9. Under RAP 18.9(a), an appellate court may impose sanctions for filing a frivolous appeal. “An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal.” *Dave Johnson Ins., Inc.*

v. Wright, 167 Wn. App. 758, 787, 275 P.3d 339 (2012). For the reasons articulated in the preceding sections, the arguments put forward by appellants do not create a reasonable possibility of reversal. On the contrary, appellants fail to address the critical flaws in the claims they brought against the individual defendants. Appellants' argument on appeal is frivolous, making an award of attorneys' fees appropriate.

VI. CONCLUSION

Appellants fail to show that the trial court abused its discretion in imposing CR 11 sanctions. They do not and cannot show a single fact that supports their claims against the individual defendants. Neither the OPMA nor case law supports the claims here. While no court may have specifically addressed how the OPMA interacts with Chapter 36.57A RCW, this interaction is relevant only to resolving the claims against the BCRC and C-TRAN, not the individual defendants. Thus, appellants fail to raise legal issues of first impression. In short, the record amply supports the trial court's imposition of CR 11 sanctions. The trial court should be affirmed.

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Respectfully submitted this 22nd day of August, 2016.

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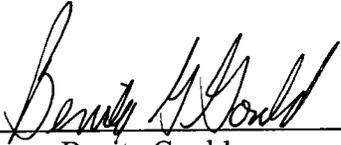
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Signed this 22nd day of August, 2016, at Seattle, King County, Washington.



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