NO. 98728-9

**SUPREME COURT OF THE
STATE OF WASHINGTON**

KIMBERLYN DOTSON, Appellant,

v.

PIERCE COUNTY, Respondent.

PIERCE COUNTY'S ANSWERING BRIEF TO DOTSON'S PETITION FOR REVIEW

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I. INTRODUCTION

In *Belenski v. Jefferson County*[1], this Court held that an agency's final, definitive response to a PRA request triggered the one year statute of limitations, regardless of whether the agency's response was truthful or correct, unless a requestor could establish equitable tolling. The Court of Appeals adhered to that decision in its analysis of Dotson's appeal. The Court of Appeals strictly applied *Belenski*, and held that the County's closing letter to Dotson was a final, definitive response that triggered the statute of limitations notwithstanding the County's discovery and release of records to Dotson four months after its closing letter. Pierce County also asserted exemption claims that independently triggered the action.

The Court of Appeals properly applied settled invited error law, holding Dotson waived equitable tolling when she told the trial court "we don't even need to get to that in this case" in response to the trial court's inquiry on that issue. Dotson's characterization of the Court of Appeals decision as conflicting with multiple decisions on a variety of claims is not supported by examination of the narrow issue considered in that decision. Further, Dotson's claim that this case presents an issue of public interest is lacking, as it is based on nothing other than the Court of Appeals decision

[1] *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016).

to publish its opinion. This Court should deny review.

II. COUNTER STATEMENT OF ISSUES

Did the Court of Appeals properly affirm the trial court's dismissal of Dotson's PRA action in conformity with this Court's decision in *Belenski v. Jefferson County* where Dotson filed suit sixteen months after the County issued a closing letter in response to her PRA request, thereby triggering accrual of the action, and where the County subsequently discovered and immediately produced additional records four months after the closing letter, and where Dotson waived equitable tolling by neither briefing nor raising the issue before the trial court, and when she affirmatively told the trial court it need not reach equitable tolling?

III. COUNTER STATEMENT OF CASE

In 2015, Pierce County Planning and Land Services (PALS) received a State Department of Ecology complaint alleging Dotson built a paddock over a stream and shoveled dirt into a creek. CP 618. Pierce County biologist Mary Van Haren viewed Dotson's property, and then retrieved a single document from PALS archived file number 553137, which concerned a 2006 residential construction application for a parcel adjacent ("Hansen/Pecheos" parcel) to Dotson's parcel. CP 663. The document Van Haren retrieved form file 553137 was dated August 27, 2007, and titled Critical Area Notice Fish and Wildlife Habitat Conservation Area/And Or

Stream Buffer Notice (hereinafter "final approval document") and constituted the final approved and recorded (title notification) document for that construction application. CP 664, 674. The 553137 "final approval document" identified the existence of an "F1" type stream on the Hansen/Pecheos parcel.[2] CP 664, 674. After reviewing it, Van Haren placed a copy of that 553137 final approval document into Dotson's investigative file. CP 666. Van Haren used no other records from the 553137 file. CP 663.

On November 25, 2015, Van Haren sent Dotson a letter informing her of the complaint concerning a potential "critical area violation" based on the presence of a paddock, stall, and horse within 100 feet of an F1 stream on Dotson's parcel." CP 678-80. Van Haren's letter recommended Dotson relocate the paddock, stall, and horse, and advised her to apply for a Fish and Wildlife Habitat Water Type Verification and Farm Management Plan. CP 679. On March 17, 2016, Dotson submitted an application to PALS as recommended by Van Haren. CP 664.

On May 4, 2016, Van Haren sent Dotson a letter of approval for her application. CP 682. The letter enclosed a document titled Regulated Fish and Wildlife Species and Habitat Conservation Area Approval that read in

[2] An F1 stream type includes water courses providing habitats for critical fish species.

part, "[b]ased on our research and site visit, a stream was identified within your parcel. This drainage course was typed as an F1 through application 553137 in the upstream parcel 0417044004." CP 685.

On May 18, 2016, Dotson made a PRA request to PALS for:

> A copy of any and all records, correspondence, and documentation including Emails related to Kim Dotson, Parcel number 14-17-06-2-101, Site address: 5523 296th St. E. Graham, WA concerning: applications, permits, enforcement, cease and desist, orders, complaints, communications with other agencies, communications with other departments, and or site visitations.
> Please search dates: January 2014 to the present.

CP 793, 830, 846.

On May 20, 2016, Predoehl sent a 5-day letter to Dotson that acknowledged her request, provided an estimate of "3-4 weeks" to complete the request, and listed an internet address Dotson could access to obtain a first installment of records. CP 796, 848.

Predoehl discovered the parcel number attorney Lake provided for Dotson's property was incorrect after searching the PALS and Assessor databases. CP 794. She located the correct number and found active files. CP 798.

Predoehl tasked County IT to search email records using terms from the record request as well as the correct parcel number. CP 831. Predoehl forwarded the request to PALS supervisor Kathleen

Larrabee, who determined employees Dominique Senzig and Van Haren might have records. CP 833.

Van Haren searched her own records according to a PALS search protocol. CP 664-45. Van Haren understood the request as seeking any records she used or prepared for purposes of the application and enforcement actions concerning Dotson's property. CP 665. Because Van Haren had not used any other records from file 553137 for her enforcement and application actions related to Dotson's property, she never considered other records from 553137 to be responsive. CP 666. Van Haren and Senzig provided responsive records to Predoehl including phone logs and duplicates of application records Van Haren knew Predoehl would separately search and produce. CP 800.

On June 23, 2016, Predoehl emailed Dotson to inform her records were available and could be accessed at the PALS website under application numbers 832074 and 832073. CP 802. She also advised that she would be providing three files via Filelocker, an electronic file transfer protocol. CP 804.

Exemptions Claimed By County:

On June 23, 2016, Predoehl produced four partially redacted records via a Filelocker production that exempted identifying

information of a citizen who reported the alleged violation to the State Dept. of Ecology. CP 804, 617-24. Predoehl provided an explanation that the redacted text was "confidential complainant information." CP 617-624. Predoehl's exemption explanation to Dotson stated, "complainant requested nondisclosure" and cited to RCW 42.56.240(2), which exempts the identity of a witness who files a complaint with an investigative agency. CP 617-24.

That installment also included numerous emails, and the letters Van Haren sent Dotson with enclosures, including the final approval notice from file 553137 used by Van Haren. CP 395-398, 416-417, 427-431, 804. On June 28, 2016, Predoehl received "read receipt" emails confirming Dotson's attorney had downloaded the records from Filelocker. CP 804.

County Closes PRA Response to Record Request:

On June 29, 2016, Predoehl sent a closing letter to Dotson that summarized the county's installment productions to Dotson and stated in part, "As you have received responsive documents, I am closing your request If you have any questions regarding this request, please contact me at (253) 798-3724." CP 805.

Later Discovered Records:

On October 25, 2016, PALS employee Cory Ragan, prompted by

a subpoena from Dotson to appear at her administrative hearing the next day, found a "lobby visit" report while attempting to recall any prior conversation he had with Dotson. CP 806. Ragan provided the report to Predoehl, which identified three visits by Dotson between 2012 and 2016, including two that occurred in the requested date range. CP 806. Predoehl emailed that record to Dotson on October 26th. CP 635-636. Prior to October 26, 2016, Predoehl was unaware PALS maintained lobby visit records. CP 806.

At Dotson's administrative appeal hearing held October 26, 2016, Van Haren testified about her investigation of the complaint regarding the paddock, stall, and horse located within a stream buffer on Dotson's property. CP 688. She was the only witness for the county. Van Haren testified that she determined that the stream was an F1 type based on her review of the final approval document she retrieved from the file 553137. CP 304-305.

On October 25, 2017, Dotson filed a PRA action based on her 2016 request. CP 1-6. On November 6, 2016, during a review of her records, Predoehl discovered two pages of phone logs she had received from Van Haren and Larrabee prior during their original search, but had somehow inadvertently overlooked in her rush to produce records to Dotson. CP 807. While reading Dotson's PRA complaint, Predoehl

noticed Dotson wanted a July 10, 2007 Habitat Assessment Report that pertained to the adjacent parcel. CP 807. On November 7, Predoehl sent Dotson copies of the phone logs and the 2007 Habitat Assessment Report. CP 807.

On March 2, 2018, Predoehl reviewed a copy of Dotson's summary judgment motion. CP 807. Dotson's motion repeatedly referred to the adjacent parcel and application file 553137. CP 807. Predoehl was unable to consult Van Haren to determine if any other 553137 records were responsive because Van Haren was on an extended vacation. CP 808. In an abundance of caution, Predoehl scanned the entire 55337 file and also took screen shots of every permit and violation report associated with the adjacent parcel. CP 808. On March 2, 2018, out of an abundance of caution, Predoehl hand delivered those records on a CD to Dotson.. CP 808. After Van Haren returned, she informed Predoehl that other than the final approval document from 553137, she had not used any of the records Predoehl provided to Dotson on March 2, 2018. CP 809.

Procedural History:

On October 25, 2017, Dotson filed a PRA complaint that alleged PALS/Pierce County did not perform an adequate search, did not disclose all responsive records, did not identify exempt records with

particularity, and failed in its five day letter to identify a specific calendar date for production of records. CP 1-6.

Both parties filed for summary judgment. CP 11-658, 902-915. Dotson's motion sought summary judgment on all of her claims. *Id*. Pierce County sought dismissal of all claims, contending the action was barred by the statute of limitations. *Id*.

At the hearing scheduled to hear both motions, the trial court requested to treat the hearing as a decision on the merits rather than under a summary judgment standard, and the parties agreed to that request. VRP at 4. The trial court advised it would bifurcate the arguments and decide the statute of limitations issue separately before hearing argument on the merit issues:

> **COURT**: [S]o . . . I would like to bifurcate this argument, and then we will hear argument solely on the statute of limitations issue, which is interesting and unique in these circumstances, at least from this Court's perspective, and warrants individualized attention in terms of back-and-forth in that sense. And then I will rule on that, and then contingent upon that ruling, we will then get to the merits that remain other than the statute of limitations.

VRP at 16.

At the hearing, the County argued it had claimed exemptions and withheld identifying information of the citizen complainant, and pointed out that those partially exempt records were produced on June

23, 2016. VRP at 8-9. The County argued the statute of limitations was triggered both by its claims of exemptions and its closing letter issued on June 29, 2016. VRP at 8-9.

During argument, the trial court asked Dotson's counsel to identify when the action had accrued:

> **COURT**: So if the year didn't start until this later production, could Ms. Dotson have brought suit between the closing letter and this thing that you didn't know was going to happen yet? And if you could bring suit, doesn't that expand beyond the one year?
>
> **DOTSON**: The statute - - if nothing else had happened, we could have brought a lawsuit between June 23rd, but the County opened the door by providing additional installment of records.
>
> **COURT**: So the County actions can create a longer statute of limitations period than the legislature had enacted by statute?
>
> **DOTSON**: Not at all your Honor.

VRP at 17. The Court addressed the issue again shortly thereafter:

> **COURT:** When could you have brought this lawsuit in the first instance? When was it ripe for you to bring?
>
> **DOTSON**: It could have been brought under June 23rd - - a year from June 23rd, but when the County issued its next installment, it's clearly an installment that was responsive to this request. That extended - - that brought the - - that made a new bright line under the statutory prong of 556(2).

VRP at 18-19.

The trial court ruled Dotson's claims were barred by the statute

of limitations. VRP at 5 (Ruling). The trial did not hear argument or enter an order on Dotson's summary judgment motion.

The Court of Appeals held Dotson's claims accrued when the county issued its closing letter in June of 2016, and that her action was barred by the statute of limitations. The Court of Appeals further held that Dotson had waived equitable tolling..

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A. The Court of Appeals Decision Is Consistent With This Court's Previous Decision in *Neighborhood Alliance*

This Court may accept review of a Court of Appeals decision if it the decision is in conflict with a decision of the Supreme Court. RAP 13.4(b)(1). Contrary to Dotson's argument, Court of Appeals decision is entirely consistent with this court's prior ruling in *Belenski.*

Dotson contends that the Court of Appeals decision conflicts with *Neighborhood Alliance of Spokane v. Spokane County*, which held agency searches for records must be reasonably calculated to uncover all relevant documents and that a search outside that standard violates the PRA.[3] Pet.

[3] Dotson cites two separate decisions for her "Neighborhood Alliance" claim, including *Neighborhood Alliance at American Civil Liberties Union of Washington v. City of Seattle*, 121 Wn.App. 544, 548, 89 P38 295 (2004) (see Pet. At 1, n.1, and Pet. At 9, n.3) and also cites to "*Neighborhood Alliance*, 172 Wn.2d at 720" and 172 Wn.2d at 724" (See Pet. At 9, n. 34 and n. 35). The County assumes Dotson intends *Neighborhood Alliance of Spokane v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).

at 9. Dotson also claims a conflict with Federal FOIA search decisions (Id.), which does not justify RAP 13.4(b)(1) review.

Neighborhood Alliance requires that agencies conduct a reasonably calculated adequate search for records, that a reasonable search is not the same as a "perfect" search, and that a determination of reasonableness is separate from whether additional responsive documents exist but are not found. *Neighborhood Alliance*, 172 Wn.2d at 720. The Court of Appeals decision did not rule otherwise. Indeed, the Court of Appeals did not reach Dotson's search claims because it held the action was barred by the statute of limitations. Dotson has not shown a RAP 13.4(b)(1) conflict with neighborhood Alliance.

B. The Court of Appeals Decision Does Not Conflict With This Court's Decision on Silent Withholding

Dotson next claims that the Court of Appeals decision conflicts with this Court's decision in *Progressive Animal Welfare Society v. Univ. of Washington,*[4] where this Court held the PRA "does not allow silent withholding" of documents." Pet. at 11. Dotson asserts, but does not otherwise explain how the Court of Appeals decision conflicts with this Court's *PAWS* decision. Pet. at 11. This Court's decision in *Belenski v. Jefferson County* refutes Dotson's argument. It should be remembered that

[4] *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994).

Belenski asserted Jefferson County had "silently withheld records," but this Court nonetheless held that a one year statute of limitations applies to all PRA actions, and that "this statute normally begins to run on an agency's definitive, final response to a PRA request[.]" *Belenski,* 186 Wn.2d at 457. This Court held that a county's response that it had no records was a final, definitive response and that [r]egardless of whether this answer was truthful or correct" it "was sufficient to put him on notice" and "trigger" remanded the statute of limitations. *Id*. at 458-461. Thus, this Court addressed "silent withholding" in *Belenski,* and held that a definitive final agency response triggers the statute of limitations on such claims unless a plaintiff satisfies equitable tolling.

The Court of Appeals decision in Dotson's case is consistent with the *Belenski* decision's treatment of "silent withholding" where an action is not timely filed. The Court of Appeals held that the county's June 29, 2016 closing letter constituted a final definitive response that triggered the statute of limitations under *Belenski*. Dotson has not shown a conflict.

Dotson argues the Court of Appeals "erred" in determining that file 553137 was not responsive to her request, which amounts to no more than a claim of ordinary appellate error insufficient to justify review under RAP 13.4(b). The Supreme Court is not a court of ordinary error, as reflected by the criteria of RAP 13.4(b).

Dotson's attempt to dispute the Court of Appeals is premised upon her assertion that the administrative hearing examiner referred to file 553137 "seven times." Pet. at 11-12. Dotson's petition does not identify with any particularity where the hearing examiner referred to information from the 553137 records that was inconsistent with Van Haren's testimony. Pet. at 47. Dotson was the lone witness at the administrative hearing. CP 269-381. She stated in her declaration to the trial court that she had retrieved and used only the final approval document from file 553137, and that her testimony at the administrative hearing was also based on just that one document. Van Haren testified at the administrative hearing that the final approval document was based on a Habitat Assessment Report ("report") dated July 10, 2007, which was referenced by the hearing examiner in his decision, but her statement concerning that report came directly from within the final approval document, (CP 676), not any separate use of report by Van Haren. CP 669. Van Haren reviewed the report after the PRA action was filed, and noted that it was not a stream typing determination relevant to Dotson, but was instead a report specific to the adjacent Hansen/Pecheos parcel concerning landscaping recommendations by an outside vendor that the county required the owner to implement as a condition of final approval. CP 668-69. Further, the Court of Appeals conclusively held that Van Haren's hearing testimony and her declaration stating she used only the

single final approval document were consistent. *See* Ruling Denying RAP 9.11 Motion, *Dotson v. Pierce County*, No. 50860-5-II, *review denied*, 193 Wn.2d 1014 (2019). Dotson's attempt to obtain discretionary review on this matter is thwarted by issue preclusion..

C. The Court of Appeals Decision Is Consistent With This Court's Decision In *Belenski v. Jefferson County*

Dotson contends the Court of Appeals decision "conflicts with *Belenski* by not finding that the facts of her case support equitable tolling." Pet. at 13. The argument misconstrues *Belenski* and the decision of the Court of Appeals, and fails to demonstrate any actual conflict..

No conflict can be demonstrated between these decision because neither court actually ruled on the merits of an equitable tolling claim. *Belenski* made allowance for equitable tolling to be addressed by the trial court after remand, but did not rule on whether it was established by the facts. The Court of Appeals decision did not hold that equitable tolling was never available as a defense to a statute of limitations bar, but rather held Dotson waived the issue when she told the court "we don't even need to get to that in this case" in response to the court's inquiry. VRP at 16. The Court of Appeals decision merely applied clearly established precedent. The invited error doctrine prohibits a party from setting up an error in the trial court and then complaining about it on appeal. *In re Pers. Restraint of*

Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *Davis v. Globe Mach. Mfg. Co*., 102 Wash. 2d 68, 77, 684 P.2d 692, 698 (1984); *Shavlik v. Dawson Place*, 11 Wn. App 2d. 250, 270, 452 P.3d 1241 (2019) (invited error doctrine precluded requester in PRA action from assigning error to trial court denial of continuance where during hearing requester asked court to deny continuance in favor of alternative course of action), *review denied*, 195 Wn.2d 1019 (2020). The court will deem an error waived where a party asserting the error materially contributed to it. *In Re Dependency of K.R.,* 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Dotson's next contends she was somehow prevented by the trial court from raising equitable tolling, which again constitutes no more than a claim of ordinary error. Dotson relies, mistakenly, on this exchange:

> **THE COURT**: Anything else?
>
> **MS. LAKE**: No, Your Honor.
>
> **THE COURT**: Thank you. Rebuttal argument.
>
> **MS. LAKE**: Oh, I will add one thing because the County kind of mixed in a little bit of substantive argument. The claim that we were put on notice of the fact that records were missing by the one record of the adjacent parcel, but that's not true. Your Honor. As you know - -
>
> **THE COURT**: I will indicate you don't need to get into that because that is not going to have any material impact on my ruling whatsoever.
>
> **MS. LAKE**: Okay. I appreciate that. Thank you, Your

Honor.

VRP at 25-26.

Dotson's assertion that she was "cut off" by the court while trying to raise equitable tolling is in error. Recall that the trial court had bifurcated the arguments (VRP at 4) on the separate motions, advising it would separately hear Dotson's summary judgment arguments *after* it ruled on the statute of limitations. In response to Dotson's comments, the court attempted to assuage her concerns by stating she need not "get into **that...**" where the court's use of the term "that" – a pronoun referring to a thing previously mentioned - referred back to Dotson's identified subject matter, namely a concern for "mixed in" "substantive argument" by the county during its statute of limitations argument. The court's response effectively informed Dotson that its statute of limitations ruling would not be prejudiced by mixed in substantive argument from the county. Dotson never uttered the words "equitable tolling" or "tolling." Just moments prior to this exchange, when the court invited Dotson to address equitable tolling (VRP at 16), Dotson responded by dismissing the issue, telling the court "we don't even need to get to that in this case ..." VRP at 16. Dotson was equally dismissive of the issue in her briefing, which nowhere address equitable tolling. (CP 737-749). If Dotson had intended to raise equitable tolling to the court after the conclusion of her argument, thereby reversing

her prior stated position to the court, it was incumbent on her to do so clearly and to make her record. Instead, Dotson thanked the court in apparent satisfaction, without taking the opportunity to clearly mention "equitable tolling" and make her record despite the opportunity to do so. The Court of Appeals correctly concluded she waived the issue.

Dotson also asserts that the Court of Appeals decision conflicts with *Belenski* "by applying the Belenski standard even where the second prong of RCW 42.56.550(6) clearly applies." Pet. at 15. Dotson is mistaken.

The Court of Appeals addressed a very narrow issue, namely whether the County's June 29, 2016 letter stating, "As you have received responsive documents, I am closing your request," comprises such a final, definitive response" in accordance with this Court's holding in *Belenski* that the one year statute of limitations "usually begins to run on an agency's 'final, definitive response' toa PRA request." *Dotson v. Pierce County*, 464 P.3d 678 (2020) (citing *Belenski*, 186 Wn.2d at 460).

In *Belenski,* this Court held that Jefferson County's response informing Belenski that there were "no responsive records," despite the fact such responsive records did indeed exist, was sufficient to trigger the one-year statute of limitations. *Id*. 459. This Court noted that such a definitive response triggers the statute of limitation regardless of whether the response

is truthful or correct." *Id* at 461. The decision of the Court of Appeals is consistent with this Court's decision in *Belenski*.

Dotson strains to artificially narrow and distinguish *Belenski* to its particular facts, implying its holding that a final definitive response triggers the one year statute applies only "where a claim of exemption was not exerted nor any installment had issued." Pet. at 15. Yet, the County asserted exemptions in his case in addition to issuing a closing letter. Those claims of exemption were independently sufficient to trigger the one year statute of limitations pursuant to RCW 42.56.550(6). While the Court of Appeals did not address the County's exemptions in its decision, it is nonetheless an alternate basis to deny review.

D. The Court of Appeals Decision Does Not Create An Issue Of Substantial Public Interest

Dotson contends that this case involves issues of substantial public interest that should be determined by this Court. Her argument in support is a generic one divorced from any discussion of the issues and facts of the case. Her sole argument concerning a "public interest" consists of pointing out that the Court of Appeals published its decision, and that the criteria to publish under RAP 12.3(d) has some commonality with the criteria for discretionary review under RAP 13.4. Dotson's argument amounts to an appeal for discretionary review to be granted whenever a Court of Appeals decision is published, yet that is not grounds for review under RAP 13.4.

The Court of Appeals decision is a restrained application of *Belenski,* and traditional application of invited error. These are not issues of substantial public interest and this Court should deny review.

V. CONCLUSION

The Court of Appeals properly applied the analysis reached by this court in *Belenski v. Jefferson County* when it held that Dotson's action was triggered by the county's closing letter, which was a definitive final response as defined by this Court in *Belenski*. The Court of Appeals applied settled invited error and waiver principles in holding that Dotson had waived equitable tolling before the trial court. Accordingly, discretionary review is not justified.

DATED this 3rd day of August, 2020.

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CERTIFICATE OF SERVICE

On August 3, 2020, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S ANSWERING BRIEF TO DOTSON'S PETITION FOR REVIEW with the Clerk of the Court, which will transmit electronically to Appellant, and I delivered a true and accurate copy via email pursuant to agreement to the following:

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Dated this 3rd day of August, 2020.

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