NO. 47359-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NORBERT SCHLECHT,

Pro Se Appellant,

v.

CLARK COUNTY, WASHINGTON,

Respondent.

CLARK COUNTY'S RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In this appeal, which follows his unsuccessful Motion for Summary Judgment and Motion for Reconsideration and, most recently, his inability to provide material evidence sufficient to overcome Defendant Clark County's Motion for Summary Judgment, Norbert Schlecht (hereinafter "Schlecht") continues his efforts to obtain records that are not, and never have been, in the possession of Clark County. Schlecht refuses to accept that Clark County simply does not have the records he requests and continues to assert various conspiracy theories, including record tampering, and further, demands the County create new records to satisfy his request. The material evidence on record, however, illustrates that on the contrary, Clark County made a comprehensive and good faith effort to locate responsive records, but that it simply does not have any.

In his ongoing attempt to use the Public Records Act to acquire records that do not exist, Schlecht alleges that the trial court erred in concluding that the evidence shows beyond a material doubt that Clark County made a good faith and reasonable effort to locate responsive documents. The record does not support Schlecht's characterization of the trial court's findings, nor does applicable law support his claim that Clark County must produce requested records when it does not have them. For

the reasons that follow, the trial court's order dismissing Schlecht's suit should be affirmed.

II. RESPONSE TO ASSIGNMENT OF ERRORS

A. The Trial Court Correctly Granted Defendant's Motion for Summary Judgment Pursuant to CR 56.

B. Appellant is Not Entitled to Recover Attorney Fees in This Action.

III. STATEMENT OF THE CASE

This appeal stems from a public records request by Schlecht dated November 8, 2013 to the Clark County Sheriff's Office seeking 1) "[a]ny/all records identifying vehicle owners" for specific license plates Schlecht listed on his request; and 2) "any/all records identifying subjects initially described as WM 30 S carrying gas can signaling a WF curly HR M 20 S Bro shirt BJ as follows: a) PER completed at 5/9/13 7:37:07; and b) PER search completed 7:50:30."[1]

Petitioner's request for a PER, or person, search was received by the Sheriff's Office on November 20, 2013.[2] Upon receipt, its Records Unit

[1] CP 79, lines 20-28; CP 83.

[2] CP 79, lines 26-28. Defendant notes that Plaintiff contends this record was 'backdated." There is absolutely no evidence supporting this contention, which is consistent with Schlecht's other unsubstantiated theories he has expounded to the trial court and in this appeal. Further, although Schlecht asserts that the received date was "backdated," he has not argued as a basis for appeal that the County's response was untimely. Indeed, the

Footnotes continued on the next page.

reviewed the Clark Regional Emergency Services Agency (hereinafter "CRESA 911") transcript attached to Schlecht's request and identified the responding officers to the May 9, 2013, 911 call as Deputy O'Dell and Deputy Smyth.[3] The Sheriff's Office Records Department then checked both officers' logs, which showed that neither had filed a report.[4] They also confirmed that the name of "WM carrying gas can" or "WF curly HR" were never obtained by either Deputy.[5] The Sheriff's Office also ran the name of the person who called 911 to report the May 9, 2013 incident to make sure the neither officer had filed a report on the May 9, 2013 call under the name of the caller, rather than the suspects.[6] None of these searches turned up any responsive documents.[7] The Sheriff's Office then took the further step of calling CRESA 911, which is a regional public safety agency independent of Clark County, and verified that the PER search done by the 911 operator on the "WF curly HR" and "WM carrying gas can" was done on those identical search parameters and not by name,

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material evidence shows that the Sheriff's Office Records Unit received the request on November 20, 2013, and responded within the five-day window, as required by the Public Records Act. See *RCW 42.56.520.*

[3] CP 80, lines 1-3.
[4] CP 80, lines 3-4.
[5] CP 80, lines 4-5.
[6] CP 80, lines 6-8.
[7] CP 80, lines 8-9.

and that CRESA records, in fact, do not contain the actual names of these individuals.[8]

On November 22, 2013, the Sheriff's Office responded to Schlecht's public records request by informing him it had no responsive records.[9] Schlecht then wrote to the Sheriff's Office on November 27, 2013 demanding, "[i]f your position is that records do not exist under your jurisdiction then please advise which agency holds requested records."[10]

On December 18, 2013, MaryAnn Gentry, the Sheriff's Office Public Records Unit supervisor, wrote to Schlecht, confirming that Clark County had no responsive records but, to the extent Schlecht was seeking vehicle owner identity, he could obtain that information from the Washington State Department of Licensing.[11] Nine days later, Schlecht filed a lawsuit in Clark County Superior Court alleging Clark County violated the Public Records Act by not producing records identifying the names of the individuals that were the subject of the May 9, 2013 911 call.[12] On March 12, 2014, Schlecht filed a Summary Judgment Motion,

[8] CP 80, lines 11-16.
[9] CP 80, lines 17-19; CP 85.
[10] CP 80, lines 19-21; CP 88.
[11] CP 80, lines 23-26; CP 90.
[12] CP 3-27.

which was heard and argued on April 11, 2014.[13] In its Response to Schlecht's Summary Judgment Motion, Clark County submitted a declaration from MaryAnn Gentry which outlined the comprehensive steps her office had taken to locate records responsive to Schlecht's public records request.[14] In what he described as a "smoking gun" in his response brief and at oral argument, Schlecht cited an email from Deputy O'Dell that the deputy sheriff sent in response to the inquiry from Schlecht.[15] In his email, Deputy O'Dell confirmed that in responding to the May 13, 2013, 911 call, he spoke with a woman at the scene but did not file a report.[16]

In both his briefing and at oral argument, Schlecht posed several theories of what he assumed "probably" happened at the scene.[17] Finding his theories were suppositions, rather than facts, and were not in the record before her nor supported by any document he submitted, the trial court denied Schlecht's Motion for Summary Judgment.[18] On May 2, 2014 Schlecht filed a Motion for Reconsideration, which was also denied by the

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[13] CP 38-64
[14] CP 79-90; see also County's Response Brief CP 68-78.
[15] CP 94 lines 5-7; CP 110, lines 19-22; CP 113, lines 18-25; CP 114, lines 1-2.
[16] CP 100; CP 110, lines 19-21.
[17] CP 115 line 4-9.
[18] CP 115, lines 2-25; CP 116, lines 1-10; CP 119.

trial court.[19] Clark County then filed a Motion for Summary Judgment on June 13, 2014, which Schlecht responded to on July 3, 2014.[20] The hearing, which Schlecht failed to appear for, was held on July 18, 2014, at which time the trial court granted Clark County's Motion for Summary Judgment.[21] Schlecht now appeals the trial court's dismissal of this lawsuit.

IV. ARGUMENT

A. Standard of Review.

1. Standard of Review for Summary Judgment.

The standard of review of an order of summary judgment is de novo and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). See also, *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c).

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[19] CP 121-132; CP 133-134; CP 167.
[20] CP 142-163; CP 168-198.
[21] CP 203; CP 204.

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Prods., Inc. v. Lloyd,* 93 Wn.2d 596, 602, 611 P.2d 737 (1980). On review of a summary judgment, this Court must decide whether the affidavits, facts, and record have created an issue of fact and, if so, whether such issue of fact is material to the cause of action. *Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Therefore, the adverse party must set forth specific facts showing there is a genuine issue for trial or the summary judgment, if appropriate, will be entered against them. CR 56(e); see also, *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

The appellate court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.,* 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Keck v. Collins,* 181 Wn. App. 67, 325 P.3d 306 (2014). But the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value;" instead, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a

material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

2. Standard of Review for Actions Brought under the Public Records Act.

The Court interprets the disclosure provisions of the Public Records Act liberally and exemptions narrowly. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d. 243, 251, 884 P.2d 592 (1994) (PAWS II). The agency claiming the exemption bears the burden of proving that the documents requested fall within the scope of the exemption. RCW 42.56.550(1) ("The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records"); *Cowles Publ'g Co. v. Spokane Police Dep't,* 139 Wn.2d 472, 476, 987 P.2d 620 (1999).

Judicial review of an agency's denial is governed by statute:

> Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.56.550(1). The court's review is de novo and any hearing may be conducted solely upon affidavits. RCW 42.56.550(3).

Once documents are determined to be within the scope of the Public Records Act, disclosure is required. *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995, 1000 (1993). Responses to requests for public records are required to be made within five business days of receiving a public record request, by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested; (3) acknowledging that the agency has received the request and providing a reasonable estimate of the time the agency will require to respond to the request; or (4) denying the request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. See *RCW 42.56.520.*

B. Schlecht Failed to Perfect the Record for Review.

As Appellant, Schlecht has the burden of perfecting the record on appeal so that this Court has before it the information and evidence relevant to the issues that are presented for consideration. Schlecht's brief omits any mention of the Motion for Summary Judgment he filed on

March 12, 2014, four months before Clark County moved for Summary Judgment, as well his Motion for Reconsideration of the denial of his summary judgment motion, which he filed on May 2, 2014.[22] These motions resulted in extensive briefing by both sides. By omitting any mention of these proceedings in his appeal, Schlecht has failed to disclose the entire evidentiary record the trial court reviewed prior to dismissing his lawsuit.

Appellate courts have refused to consider issues where the appellant fails to perfect the record on appeal. Wash. RAP 9.2; see also, *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827, 838-39, 234 P.3d 299 (2010) (court held appellant bears the burden of perfecting the record so that the reviewing court has before it all the evidence relevant to the issue and matters and matters not in the record will not be considered). In the present matter, the trial court considered evidence that was not disclosed by Schlecht to this Court. His failure to disclose all the evidence considered by the trial court should result in dismissal of his appeal.

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[22] The remaining record has now been designated by Clark County. Because these records were filed before most of the records designated by Plaintiff, the County anticipates the Clerk will count the entire record sequentially. Accordingly, the county has numbered all of its citations to the record sequentially by sub number; if however the Clerk's numbering differs, Clark County requests that it be permitted to file a brief that conforms with the Clerk's numerical designations.

C. The Trial Court Correctly Granted Defendant's Motion for Summary Judgment Pursuant to CR 56.

1. Clark County met its burden of showing that the search it conducted was reasonable and in good faith, but yielded no responsive records.

First, as will be discussed in further detail, infra, Schlecht appears to argue that because Clark County submitted a declaration from MaryAnn Gentry, the Sheriff's Office Records Unit supervisor, which outlined the search her department had conducted in order to locate responsive records, Clark County was required to obtain a declaration from the deputy who responded to the 911 call. Gentry's declaration, however, was not created to comply with the public records search, but rather, to document how that search had been conducted. In Public Records Act cases, the agency's burden is to establish beyond material doubt the reasonableness of its search for documents, and to do so it may rely on reasonably detailed affidavits submitted in good faith. See *Neighborhood Alliance of Spokane Clark County v. Spokane Clark County,* 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011).

In the present case, Clark County presented to the trial court the declaration of MaryAnn Gentry, which detailed the extensive search her office undertook to locate records responsive to Schlecht's request. These steps included: 1) reviewing the CRESA 911 transcript attached to

Schlecht's request; 2) identifying and contacting the responding officers to the May 9, 2013, 911 call; 3) checking both officer's logs, which showed that neither had filed a report; 4) confirming that the names of "WM carrying gas can" or "WF curly HR" were never obtained by either deputy; 5) running the name of the person who called 911 to report the May 9, 2013 incident to make sure that neither officer had filed a report on the May 9, 2013 call under the name of the caller, rather than the suspects; and 6) calling CRESA 911 and verifying that the person search done by the 911 operator on the "WF curly HR" and "WM carrying gas can" were done on those identical search parameters, not by name, and that CRESA records, in fact, do not contain the actual names of these individuals.[23] Only after the County completed the above-described search did it conclude it had no responsive records.

The trial court reviewed this procedure three separate times, during Schlecht's Motion for Summary Judgment, his Motion for Reconsideration and County's Motion for Summary Judgment and determined each time that the search satisfied the requirements of the Public Records Act and applicable case law.

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[23] CP 79-81.

Finally, Clark County notes that in his Motion for Summary Judgment, Schlecht attached a public records response he received from Clark County regarding a subsequent public records request he made in January of 2014, on a different matter in which a police report was made and filed. Since a report had been made and, therefore, could be produced, it was provided by Clark County to Schlecht. The material evidence in the record, therefore, shows that when Clark County has records responsive to Schlecht's public records requests, they are produced. In the present case however, the investigating officers never obtained the actual names of "WM carrying gas can" or "WF curly HR", they never filed a report and even CRESA 911 does not have the names of the aforementioned individuals; thus, Clark County has no records to produce.

2. Washington law provides that Clark County has no duty to provide records that do not exist.

In his Response in Opposition to Clark County's Motion for Summary Judgment, Schlecht requested that the trial court order Clark County to create a new record; specifically demanding that it procure a written statement from the officer about his response to the 911 call in order to "challenge Clark County to back up its statement."[24] In this

[24] CP 174 lines 20-21.

appeal, Schlecht cites as evidence of an inadequate search "the county's refusal to pursue a lead vis a vis Deputy O'Dell."[25] While Schlecht asserts Clark County "falsely interprets such challenge as a request to create a new public records," there is nothing "false" about this interpretation.[26] By asking the County to have Deputy O'Dell create a new document explaining his actions on the date in question, that is exactly what Schlecht is requesting and is contrary to the requirements of the Public Records Act.[27] The trial court did not err in so ruling.

First, County notes that while Schlecht continues to attempt to force Clark County to create new records in response to his public records request, and that the County's refusal to do so is "bad faith," Schlecht fails to cite any legal authority as the basis for this request.[28] "Where no authorities are cited, the court may assume that counsel, after diligent search, has found none." *Grant County v Bohne*, 89 Wn.3d 953, 95, 577 P.2d 138 (1978).

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[25] See Appellant's Opening Brief, page 15, paragraph 3.
[26] See Appellant's Opening Brief, page 14, paragraph 2.
[27] Further, asking Clark County to create new evidence so that he can continue to pursue his claim does not meet Schlecht's burden of raising a material issue of fact sufficient to defeat a CR 56 motion. Moreover, to the extent Schlecht believed the officer had material evidence sufficient to defeat the county's motion, it was his burden to obtain it, not the County's.
[28] See Appellant's Opening Brief, page 16, paragraph 2.

Indeed, it is well settled in Washington that, on the contrary, "an agency has no duty to create or produce a record that is nonexistent." *Bldg. Indus. Ass'n of Wash. v. McCarthy (BIAW)*, 152 Wn. App. 720, 734, 218 P.3d 196 (2009) (quoting, *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 969 P.3d 1012 (2004)). Further, "purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." *Forbes v City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384, 389 (2012) (quoting, *Trentadue v. FBI,* 572 F.3d 794, 808 (10th Cir. 2009)) *review denied,* 177 Wn.2d 1002 (2013).

In *Smith v. Okanogan Clark County*, 100 Wn. App. 7, 994 P.2d 857 (2000), the Court addressed the same situation as in the present case. In *Smith*, the petitioner submitted a public records request to various departments of Okanogan County. After conducting a search, Okanogan County produced some records and responded that the rest of the requested records did not exist. Petitioner filed a complaint and respondent moved for dismissal on the grounds that it could not produce records it did not have. The trial court dismissed the lawsuit and Court of Appeals affirmed the dismissal, finding,

> The County argues that several of Smith's requests were for records that did not exist. No Washington case has decided whether a duty to create an otherwise nonexistent document exists under RCW 42.17. But there is federal law on the issue. The Washington Public Disclosure Act closely parallels the federal Freedom of Information Act and judicial interpretations of that Act are, therefore, particularly helpful in construing our own. *Hearst Corp.*, 90 Wn.2d at 128, 580 P.2d 246; see also, *Dawson v Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). Under the Freedom of Information Act, an agency is not required to create a record which is otherwise nonexistent. See *National Labor Relations Bd. V Sears, Roebuck & Co.,* 421 U.S. 132, 161-62, 95 S. Ct. 1504 (1975). We agree and determine there is no such duty under the State Act.

Smith at 13-14.

In *Smith,* the petitioner requested indexes and charts that did not exist, but which could have been prepared from existing data. Even though Okanogan County had the information from which the requested documents could have been created, the Court held that the county had no duty to prepare something it didn't already have. In the present case, Clark County doesn't even have underlying data that could have been the basis of the requested records, let alone any responsive documents. Clark County made a reasonable search but found no information regarding the identity of "WM carrying gas can" or "WF curly HR" information, even after it searched outside Clark County by contacting CRESA 911.

D. Schlecht is Not Entitled to Recover Attorney Fees in This Action.

Apparently anticipating that the Court will order the production of nonexistent records after Clark County has expended significant time and resources complying with his records requests and responding to his frivolous lawsuit, Schlecht, who has appeared pro se throughout the entire proceeding, requests an award of attorney fees. This Court has already addressed the issue of whether pro se litigants may recover attorney fees, however, and has held that they cannot. Specifically, in *In re marriage of Brown*, 159 Wn.App. 931, 247 P.3d 466 (2011), the court addressed the issue of whether a pro se litigant could be awarded attorney fees post-trial. In denying this request, the *Brown* court held, "[w]e previously explained that lawyers who incur fees representing themselves should be awarded attorney fees where fees are otherwise justified because they must take time from their practices to prepare and appear as any other lawyer would. *Leen v. Demopolis*, 62 Wn.App. 473, 486–87, 815 P.2d 269 (1991). But no Washington case extends this reasoning to a nonlawyer pro se litigant." *Brown* at 938.

E. Defendant Should be Awarded Reasonable Attorney Fees for Having to Defend This Frivolous Action.

This appeal does not present an arguable basis for relief from judgment. The trial court has already reviewed the evidence in the record on three separate occasions and determined each time that the County's record search was reasonable and done in good faith. Schlecht's continued allegations that Clark County's search somehow was not reasonable are based on unsubstantiated allegations. This Court should award attorney fees as a sanction for Schlecht's actions. An action or motion is frivolous "if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of success." *Miller Cas. Ins. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). This case appears to more than meet that standard.[29]

[29] Clark County notes that other alternatives were suggested by it to Petitioner regarding his apparent concern with neighborhood nuisances, which triggered his public records request. For example, in its Reply Brief in Support of Summary Judgment, Clark County stated, "regarding Petitioner's apparent complaint that his neighbor's conduct constitutes a public nuisance, the County notes there are procedures and ordinances which regulate and enforce these issues. Petitioner has these remedies available to address his concerns independent of attempting to use the Public Records Act to obtain records which simply don't exist." CP 201,lines 17-21. Notwithstanding this reminder and the trial court's repeated affirmation of the reasonableness of the search the County made for responsive records, Schlecht persists in using a process which he knows will not help him in this matter, thus entitling Clark County to an award of attorney fees.

V. CONCLUSION

There was no basis for the underlying lawsuit and there is no basis for this appeal. Clark County has presented material evidence submitted in good faith which shows that the public records search it conducted pursuant to Schlecht's request was reasonable beyond a material doubt, but yielded no responsive records. Clark County has, at all times in this litigation, specifically outlined the steps it took to locate any responsive documents, including contacting outside agencies and conducting a comprehensive internal search. In contrast, Schlecht has provided no evidence beyond unfounded allegations that Clark County has documents responsive to his request regarding the identity of two unknown people discussed on a 911 tape and, in fact, produced an email from one of the officers who responded to the 911 call which states no report was ever made. The material evidence shows that Clark County does not have any records identifying the names of the individuals described in the May 13, 2013, 911 call as "WM carrying gas can" and "WF curly HR." Because

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no genuine issues of material fact exist in this case, Respondent Clark County respectfully requests this Court affirm the trial court's granting of Clark County's Motion for Summary Judgment.

DATED this _____ day of February, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I, Mindy Lamberton, hereby certify and state as follows: I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 17th day of February, 2015, I caused service of the *Clark County's Supplemental Designation of Clerk's Papers, Motion on the Merits and Response to Appellant's Opening Brief* to be made on the Appellant, Pro Se, at his last known address in the manner that follows:

Norbert Schlecht 7704 NW Anderson Avenue Vancouver WA 98665	☒ ☐ ☐ ☐ ☐	U.S. Mail Facsimile Federal Express Hand Delivered Email at:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this _____ day of February, 2015.

_____

CLARK COUNTY PROSECUTOR

February 17, 2015 - 2:46 PM

Transmittal Letter

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