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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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BRIAN CORTLAND,

*Appellant/Cross-Respondent*

v.

LEWIS COUNTY,

*Respondent/Cross-Appellant.*

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RESPONSE/REPLY BRIEF OF APPELLANT/CROSS-  
RESPONDENT

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## I. ARGUMENT

### A. Response Cross-Appeal: Lewis County violated the Public Records Act

The trial court did not err and correctly found that Lewis County violated the Public Records Act for the reasons listed below. The burden is on Lewis County, as the cross-appellant, to prove that these documents are not subject to the Public Records Act and Lewis County fails to meet that burden. *Guillen v. Pierce County*, 31 P. 3d 628, 638 (Wash. 2001) (stating “the government bears the burden 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”) (internal quotations marks omitted). Lewis County is unable to meet its burden to establish that its refusal to permit public inspection is in accordance with the Public Records Act.

#### 1. Lewis County waived any argument in its cross-appeal that the records at issue in this lawsuit are not subject to the Public Records Act

Lewis County waived the argument that the records at issue in this lawsuit are not subject to the Public Records Act because they are records of the Lewis County Law Library Board. *See* Lewis County’s Br. of Resp./Cross-Appellant at 8-37. Lewis County argues the records at issue in this lawsuit are not subject to the Public Records Act because: 1. They

are records of a non-existent agency; 2. Law Library Boards are judicial agencies; 3. The records are judicial records.

Through Lewis County's prior inconsistent acts of affirmatively stating to the trial court that Lewis County would fully comply with the Public Records Act when responding to Public Records Act requests regarding the Lewis County Law Library Board, Lewis County has waived its argument that the records at issue in this lawsuit are not subject to the Public Records Act because they are records of the Lewis County Law Library Board.

Washington Court recognize the doctrine of waiver judicial review of arguments that are waived. "We have held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense." *King v. Snohomish County*, 47 P. 3d 563, 565 (Wash. 2002) (citing *Lybbert v. Grant County*, 1 P.3d 1124, 1130 (2000)). It is "appropriate for this court to apply the doctrine of waiver to the undisputed material facts." *Lybbert v. Grant County, State of Wash.*, 1 P. 3d 1124, 1130 (Wash. 2000).

The trial court stated in its Order on Penalty, Attorney's Fees, and Costs that Lewis County affirmatively represented to the trial court that it would comply with the Public Records Act for all Public Records Act

requests directed to the Lewis County Law Library Board. “As to the need to deter future misconduct of Defendants, counsel for the Defendants has represented to the Court at oral argument in this case that following the Court’s ruling on the merits the Defendants would be complying with the Public Records Act in a manner consistent with this Court’s ruling on the merits in this case.” CP 825-26.

The trial court made this ruling because Lewis County’s attorney of record, Mr. Carter, adamantly gave the court assurances, that starting a year prior, Lewis County started processing Public Records Act requests regarding the Lewis County Law Library Board in full compliance with the Public Records Act. Mr. Carter told the trial court on November 03, 2017 “[w]hat we did with respect to the subsequent [Law Library Board Public Records Act] requests that were made by Mr. Cortland in September of 2016 and October is that we went ahead and provided the documents.” VRP 2 at 26-27. The Court responded “And that was my understanding, but for the purpose of making sure that this record is clear here, at this point, unless and until that order is reversed or somehow mooted, you are responding to public records requests as they would come in.” VRP 2 at 26. Mr. Carter responds with “Your Honor, that’s correct.” VRP 2 at 26.

In other words, to mitigate the penalty the trial court relied upon Lewis County's assurances made at the Penalty Hearing that it is complying with the Public Records Act for requests made concerning the Lewis County Law Library Board. The trial court was concerned with whether Lewis County needed to be deterred from future violations of the Public Records Act regarding Public Records Act requests made to the Lewis County Law Library Board. The trial court took Lewis County's word at face value, when ruling on the deterrence aggravating factor, that Lewis County would be in full compliance with Public Records Act requests concerning the Lewis County Law Library Board in the future.

Mr. Cortland argued to the trial court that Lewis County needed to be deterred in the form of a statutory penalty in this lawsuit because there are many other requests made to Lewis County concerning the Lewis County Law Library Board. CP 408-09. Afraid that Lewis County would repeatedly violate the Public Records Act concerning the Lewis County Law Library Board, Mr. Cortland asked the trial court to impose a penalty to deter Lewis County from future misconduct.

It is clear from the record, the trial court order and the transcript, that Lewis County made representations to the trial court that it is and would be in compliance with responding to Public Records Act requests regarding the Lewis County Law Library Board. Only now that Lewis

County has mitigated the penalty in the trial court is it changing its stance to an irreconcilable position that the records at issue in this lawsuit are not subject to the Public Records Act.

To Mr. Cortland's detriment, in order to mitigate the statutory penalty, the trial court believed Lewis County's assurances that Public Records Act requests concerning Lewis County Law Library Board would be processed in compliance with the Public Records Act. *See* CP 825-26.

**2. Lewis County's is inviting error by making an irreconcilable statement as to the nature of the records at issue in this lawsuit to this Court of Appeals**

The doctrine of invited error precludes Lewis County from making voluntary representations to the trial court that it will fully comply with the Public Records Act concerning requests about the Lewis County Law Library Board, benefit from it when the trial court relied upon Lewis County's assertion of compliance to mitigate the statutory penalty, and then claim error on appeal that these records are not subject to the Public Records Act. Under the doctrine of invited error, Lewis County's cross-appeal is precluded.

"Under the doctrine of invited error, a party cannot set up an error and then complain about it on appeal." *State v. Schaler*, 236 P. 3d 858, 872 (Wash. 2010) (Johnson, J., dissenting); (citing *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009)). "The doctrine was designed in part to prevent

parties from misleading trial courts and receiving a windfall by doing so.” *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009); *State v. Henderson*, 114 Wash.2d 867, 868 (1990). The test used to “determine whether the invited error doctrine is applicable to a case, [is] whether the petitioner ‘affirmatively assented to the error, materially contributed to it, or benefited from it.’” *In re Copland*, 309 P. 3d 626, 636 (Wash. Ct. App. 2013) (citing *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009)).

Lewis County set up the error complained about on appeal at the trial court. On August 03, 2017, the Court issued its amended order on the merits, finding Lewis County in violation of the Public Records Act for failing to respond and to produce documents responsive to Mr. Cortland’s Public Records Act requests. CP 380-87. Then on November 03, 2017, during the oral argument for the Penalty Hearing, Lewis County’s attorney of record Mr. Carter, stated affirmatively stated to the court that for requests regarding Lewis County Law Library Board documents, Lewis County has complied with the Public Records Act by providing the documents. Mr. Carter stated to the trial court “[w]hat we did with respect to the subsequent [Law Library Board Public Records Act] requests that were made by Mr. Cortland in September of 2016 and October is that we went ahead and provided the documents.” VRP 2 at 26-27. The Court responded “And that was my understanding, but for the purpose of making

sure that this record is clear here, at this point, unless and until that order is reversed or somehow mooted, you are responding to public records requests as they would come in.” VRP 2 at 26. Mr. Carter responds with “Your Honor, that’s correct.” VRP 2 at 26. Lewis County assented to producing the records concerning the Lewis County Law Library Board under the Public Records Act. The Court went so far as to even clarify and ensure there was a clear record for appeal, if Lewis County assented to provide Lewis County Law Library Board documents under the Public Records Act. Lewis County once again affirmatively assented.

Lewis County is claiming as error on appeal that the trial court erred in determining these records are subject to the Public Records act. *See e.g.* Lewis County’s Br. of Resp./Cross-Appellant at 8 (stating “Lewis County did not violate the PRA”). First, to support its claim of error on appeal, Lewis County argues in its appellate brief, that it “did not have a duty to respond to a PRA request to a non-existent agency.” *Id.* Second, to support its claim of error on appeal, Lewis County argues “the requested records were outside the PRA because law library boards are judicial agencies.” *Id.* at 14. Third, to support its claim of error on appeal, Lewis County argues “the records here were judicial records.” *Id.* at 32. Fourth, in summation of its claim of error on appeal, Lewis County argues “the Court should reverse the decision below because Lewis county did

not violate the PRA” by not responding, pursuant to RCW 42.56.520. *Id.* at 36.

Lewis County benefited from setting up this claimed error by affirmatively stating at the November 03, 2017 Penalty Hearing that it had and would continue to produce Lewis County Law Library Board documents in compliance with the Public Records Act. Lewis County benefited when the trial court did not apply the *Yousoufian* aggravating factor of deterrence. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 745 (Wash. 2010) (stating “the purpose of the PRA's penalty provision is to deter improper denials of access to public records” and “[t]he penalty must be an adequate incentive to induce future compliance”). The issue of deterrence is the ninth enumerated aggravating factor in the *Yousoufian* multifactor framework. *Id.* at 748. It is beyond dispute the trial court did not apply the *Yousoufian* aggravating factor of deterrence because Lewis County affirmatively stated to the Court that it had been complying and would comply with the Public Records Act for Public Records Act requests concerning the Lewis County Law Library Board. Therefore, the trial court did not aggravate the statutory penalty because it relied upon Lewis County’s affirmative statements “that benefitted Defendants [Lewis County] and was accepted by the Court.” CP 825-26.

### **3. Lewis County had a statutory duty respond**

Lewis County's argument that it does not have a duty to respond to a Public Records Act requests to a non-existent agency fails because: 1. It is undisputed that Lewis County responded to Mr. Cortland's Public Records Act to a non-existent agency, the Lewis County Law Library Board; and 2. Lewis County had a mandatory statutory duty to respond to Public Records Act requests pursuant to RCW 42.56.520.

**a. It is a verity on appeal that in this above entitled lawsuit Lewis County responded to Mr. Cortland's Public Records Act requests to a non-existent agency, the Lewis County Law Library Board**

Lewis County's argument fails because it is an unchallenged fact that in this above entitled lawsuit, Lewis County responded to Mr. Cortland's Public Records Act requests to a non-existent agency, the Lewis County Law Library Board.

“[U]nchallenged findings of fact are verities on appeal.” *State v. Levy*, 132 P. 3d 1076, 1087-88 (Wash. 2006); *In re Estate of Jones*, 93 P. 3d 147, 151 (Wash. 2003); *Robel v. Roundup Corp.*, 59 P. 3d 611, 615 (Wash. 2002).

The trial court found as a matter of fact in the Amended Order on the Merits that “[o]n December 11, 2015, Lewis County Chief Civil Deputy Prosecuting Attorney Glenn Carter responded to Mr. Cortland's public records requests by letter.” CP 383 at ¶ 7 (Amended Order on the Merits); *c.f.* CP 825 (Order on Penalty Attorney's Fees, and Costs stating

“[t]here is no evidence in the record in this case that the Defendants failed to comply with PRA procedural requirements”). Reaffirming the finding of fact, the trial court concluded as a matter of law in the Amended Order on the Merits that Lewis County violated the Public Records Act by “Lewis County’s response that Mr. Cortland was not entitled to any records he requested because the judiciary is not subject to the Public Records Act.” CP 387.

Lewis County does not challenge the trial court’s finding of fact that it was Lewis County who responded to Mr. Cortland’s Public Records Act requests at the trial court in either a motion for reconsideration or through an objection.

Lewis County does not challenge this finding of fact on appeal. In its argument in the Brief of Respondent/Cross-Appellant, Lewis County claims the trial court erred as a matter of law in ruling Lewis County had a duty to respond to a PRA request to a non-existent agency. *See* Lewis County’s Br. of Resp./Cross-Appellant at 9 (stating “[t]he trial court erred on this question of law, which is reviewed de novo”).

Because Lewis County did not object to or challenge the finding of fact the trial court made in the Amended Order on the Merits. that a Lewis County employee responded to Mr. Cortland’s Public Records Act requests at issue in this lawsuit, Lewis County waived this argument. This

court is bound by verities on appeal and does not have the discretion to revisit the issue and Lewis County's argument fails.

**b. Lewis County had a statutory duty to respond to Mr. Cortland's Public Records Act requests**

The trial court was correct in finding as a matter of law that Lewis County had a statutory duty under the Public Records Act to respond to Mr. Cortland's Public Records Act requests directed to the Lewis County Law Library Board.

Lewis County argues that it did not have a duty to respond to a Public Records Act request to a non-existent agency.

As a matter of law, an agency has a mandatory statutory duty to respond to each of the Public Records Act requests it receives, regardless of the subject matter. The plain language of RCW 42.56.520(1) states that "[r]esponses to requests for public records shall be made promptly by agencies." Washington courts construe shall as "presumptively imperative" creating a "mandatory duty." *Goldmark v. McKenna*, 259 P. 3d 1095, 1099 (Wash. 2011); *Phil. II v. Gregoire*, 128 Wash.2d 707, 713 (1996). Lewis County had a mandatory duty to respond pursuant to RCW 42.56.520, no matter circumstances. For it to argue otherwise, in this appeal, is to not only ignore the plain language of the statute, but it is to also construe the Public Records Act narrowly instead of liberally. RCW

42.56.030. This Court of Appeals is bound to construe the Public Records Act liberally in favor of disclosure pursuant to the plain language of RCW 42.56.030.

Because Lewis County did have a mandatory statutory duty to respond to Mr. Cortland's Public Records Act requests, its argument fails.

**4. County law library boards are not judicial agencies, county law library boards are county agencies**

In no way, shape or form are county law libraries are county law library boards judicial agencies. County law library boards are county functions. This court does not need to look past the plain and unambiguous language of Chapter 27.24 RCW to determine that county law libraries and county law library boards are county functions, not judicial function. Lewis County's argument fails because nothing in the plain language of the statute suggests county law library boards are a function of the judiciary.

**a. The plain language of RCW 27.24 identifies the legislative intent of county law library boards to be county functions**

Washington courts have the duty when interpreting a statute to discern and implement the legislature's intent. *Jametsky v. Olsen*, 317 P. 3d 1003, 1006 (Wash. 2014); *Lowy v. PeaceHealth*, 280 P. 3d 1078, 1083 (Wash. 2012); *State v. Ervin*, 239 P. 3d 354, 356 (Wash. 2010). To determine the Legislature's intent Washington courts, look to see if the

“plain language of a statute is unambiguous and legislative intent is apparent,” if it is then Washington courts “will not construe the statute otherwise.” *Lowy*, 280 P. 3d at 1083.

First, in the plain language of the statute there is the title of the chapter. Chapter 27.24 RCW is entitled “County Law Libraries.” This is not to be confused with Chapter 27.20 RCW entitled “State Law Library.” RCW 27.24.010 mandates that “[e]ach county with a population of eight thousand or more shall have a county law library.” RCW 27.24.040 mandates that annually the county law library board shall “make a report to the county legislative authority” concerning a full statement of property and expenditures. County law library boards can demand upon “county legislative authority of each county that is required to maintain a county law library” a room for the law library pursuant to RCW 27.24.066. The “county treasurer shall deposit in the county” law library fund a portion of the court filing fees pursuant to RCW 27.24.070.

Chapter 27.24.RCW only mentions the duties and responsibilities of counties. Pursuant to the plain language of RCW 27.24.010 counties with a certain population, including Lewis County, are mandated to have a county law library and therefore a county law library board. There is no mention of the state, anywhere, in the entire Chapter 27.24 RCW. The reason for this is as stated above, there is another chapter in the Revised

Code of Washington that deals solely with the State Law Library, Chapter 27.20 RCW.

Lewis County skipped long-standing rules on statutory interpretation and impermissibly went into a statutory construction argument, while working under the assumption that the judiciary was in charge of the Lewis County Law Library Board. This is a violation of well-established rules for statutory interpretation. This Court needs to interpret the statute as the Legislature intended.

**b. A Washington Attorney General Opinion identifies county law library boards**

The Washington State Attorney General has written an informal opinion to the Pierce County Prosecuting Attorney advising the office that the county law libraries, pursuant to RCW 27.24.010, et. seq., “are best understood as a component of county government and not a separate legal entity.” 2016 Op. Att’y Gen. Nov. 30, at 5 (unpublished). *See* CP 191. ““The question of whether county law libraries are county functions or independent entities, however, depends on state law, not the county charter.” CP 191.

The analysis is crystal clear that the Washington State Attorney General’s Office considers county law libraries to be a function of the county. It should be noted that nowhere in the Attorney General Opinion does it mention the judiciary. CP 187-92.

### **5. Lewis County Law Library Board records are not judicial records**

Lewis County's argument that the Lewis County Law Library Board records are judicial records based off the "membership and function" test in *West v. Wash. State Dist. And Muncip. Court Judges Ass'n* fails. 361 P. 3d 210, 214 (Wash. Ct. App. 2015).

Lewis County first proposed the trial court use the "membership and function" test in its Reply Brief for the Merits Hearing. CP 212. The membership and function was developed to determine if entities are within the "judicial branch for the purposes of the Public Records Act." *West v. Wash. State Dist. And Muncip. Court Judges Ass'n* fails. 361 P. 3d 210, 214 (Wash. Ct. App. 2015). Lewis County never proposed before the in the Reply Brief, the last filing it made before the Merits Hearing, that the court should supplement the "membership and function" test with a "practical analysis" test. *See generally* CP 212-13. This is a new argument that was disregarded by the trial court because it was untimely and trial court ruled on Lewis County's Motion for Reconsideration that "even if the Court were to consider those arguments, they fail on their merits." CP 379.

First, the trial court correctly analyzed the "membership and function" test. For the membership part of the test, the trial court used RCW 27.24.020(2) to determine the membership of county law library

boards. CP 386 at ¶ 6. Pursuant to the plain language of the statute, only one member of a county law library board as described in RCW 27.24.020(2) is a member of the judiciary, the others are part of the county legislative branch or are private attorneys. Therefore, only twenty percent (20%) of the membership is comprised by the judiciary. For the function part of the test, the court stated “[p]roviding the public with access to materials to research legal issues is not the type of work that judges traditionally engage in.” CP 386 at ¶ 7.

Lewis County does not explain how a practical analysis would change the analysis. Even if a practical analysis is still used, it is uncontested by Lewis County that the function of county law libraries and county law library boards would stay the same -- “[p]roviding the public with access to materials to research legal issues is not the type of work that judges traditionally engage in.” CP 386 at ¶ 7.

Moreover, these are not judicial records because Washington courts have repeatedly held that records that are subject to the Public Records Act cannot be transformed into documents exempt from production. *Gendler v. Batiste*, 274 P. 3d 346, 354 (Wash. 2012) (stating “[n]or does the type of form utilized by the WSP transform collection of the information into a joint WSP-DOT § 152 purpose.” The Court looked to the statutory purpose of the form.); *Lindeman v. Kelso School Dist. No.*

458, 172 P. 3d 329, 331 (Wash. 2007) (stating placing video from a surveillance camera into a student's file "does not transform the videotape into a record maintained for students"); *Amren v. City of Kalama*, 929 P. 2d 389, 394 (Wash. 1997) (determining government cannot "transform a city police officer into a state employee" to gain an exemption under the Public Records Act). Pursuant to this well-established case law, Lewis County's practical analysis fails because it cannot transform the purpose of the documents.

Because the Public Records Act must be construed liberally pursuant to RCW 42.56.030 by Washington courts to promote the production of documents and the function part of the analysis stays the same, regardless if a practical analysis is used or not, these records are still subject to the Public Records Act.

**6. The trial court used the correct legal standard in rejecting Lewis County's motion for reconsideration**

After the trial court found a violation of the Public Records Act, Lewis County impermissibly, tried to finesse a new defense into the case through a motion for reconsideration. The trial court correctly denied Lewis County's motion for reconsideration because: 1. "the motion impermissibly raises several new arguments for the first time"; and 2. "and even if the court were to consider those arguments, they still fail on their merits." CP 378-79.

The Merits Hearing was originally scheduled as a summary judgment hearing. In the briefing for the Merits Hearing, both parties treated it as a summary judgment proceeding. CP 20-93 (Lewis County's Motion for Summary Judgment); CP 151-207 (Mr. Cortland's Response to Motion for Summary Judgment); CP 208-223 (Lewis County's Reply to Motion for Summary Judgment); CP 224-234 (Mr. Cortland's Surreply to Motion for Summary Judgment).

As explained in the previous argument, Lewis County first introduced the legal defense of the "membership and function" test in its Reply Brief for the Merits Hearing. CP 212-13. If Lewis County was going to propose the practical analysis test, it should have proposed it before the Merits Hearing and not after a violation of the Public Records Act had been found. It is uncontested that Lewis County first introduced the "practical analysis" test argument after a violation of the Public Records Act had been found in the motion for reconsideration. CP 378-79; Lewis County's Br. of Resp./Cross-Appellant at 34-36.

Case law makes it clear that is an ambush for Lewis County to introduce a new legal defense in after there has been found to be a violation of the Public Records Act. CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry

of an adverse decision. *Wilcox v. Lexington Eye Institute*, 122 P. 3d 729, 732 (Wash. Ct. App. 2005) (citing *JDFJ Corp. v. Int'l Raceway, Inc.*, 970 P.2d 343, 347 (1999)); *Vaughn v. Vaughn*, 23 Wn. App. 527, 531 (1979) (holding “the post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment pursuant under CR 59”).

A party who does not plead an affirmative defense cannot later “finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” *Gunn v. Riely*, 344 P. 3d 1225, 1231 (Wash. Ct. App. 2015); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wash.App. 18, 26 (1999).

Lewis County does not cite any case law with the holding supporting its decision. The only case law Lewis County does cite to support its argument is to footnote four (4) in *Reitz v. Knight*, 62 Wn. App. 575, 581 n.4 (1991). This footnote is dicta because it is not central to the holding.

Lewis County has not demonstrated how the trial court’s ruling is untenable. By Lewis County’s own admission, the standard for review of a decision for a motion for reconsideration is abuse of discretion. By citing to a single footnote in a case, Lewis County does not show how the court abused its discretion and the ruling is untenable.

**B. Reply Appeal: It is an abuse of discretion for the trial court to invent unbriefed arguments for Lewis County, sua sponte**

**1. Lewis County failed to brief the issue of attorney's fees in its Brief of Respondent/Cross-Appellant, consequently Mr. Cortland is the prevailing party on the issue of attorney's fees**

Because Lewis County fails to brief the issue of attorney's fees in its Brief of Respondent/Cross-Appellant, as a matter of law, Mr. Cortland is the prevailing party on the issue.

In the Brief of Respondent/Cross-Appellant, Lewis County enumerates and separates out each of its arguments against Mr. Cortland's Opening Brief of Appellant/Cross-Respondent. *See* Lewis County's Br. of Resp./Cross-Appellant at 37-47.<sup>1</sup> Lewis County directly addresses each of Mr. Cortland's arguments in an enumerated and separate argument in its Brief of Respondent/Cross-Appellant, except for Mr. Cortland's argument about the attorney's fees. In Mr. Cortland's Opening Brief of Appellant/Cross-Respondent, he argued that the trial court abused its discretion by inventing arguments to disallow or reduce hours for attorney's fees, sua sponte. *See* Opening Brief of Appellant/Cross-Respondent at 45-48.

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<sup>1</sup> Lewis County's arguments responding to Mr. Cortland's Opening Brief of Appellant/Cross-Respondent consist of: 1. "The trial court applied the correct legal standard; whether Lewis County briefed each factor is irrelevant" on page 38; 2. "The trial court had discretion to apply each of the aggravating factors as it did" on page 38; 3. "the trial court's grouping of the responsive documents into two records was within its discretion" on page 44; 4. "Mr. Cortland's argument about improper service is incorrect" on page 46. *See* Lewis County's Br. of Resp./Cross-Appellant at 37-46.

Lewis County did not argue this point. As stated, all of its other responses to Mr. Cortland's arguments are clearly enumerated and separated out, and an argument against the trial court abusing its discretion concerning the attorney's fees is absent from the record. Lewis County may try to argue that that it did respond to Mr. Cortland argument by somehow lumping the attorney's fees in with some other argument. However, because Lewis County did not address the argument directly, talk about any of the facts from the trial court, or state with specificity why the trial court did not abuse its discretion, its argument would be nothing more than a bald assertion or a conclusory allegation. "Bald assertions and conclusory allegations will not support the holding of a hearing" because Lewis County "must state with particularity facts which, if proven, would entitle [it] to relief." *Matter of Personal Restraint of Rice*, 118 Wn.2d 876, 886 (1992); *accord Rocafort v. IBM Corp.*, 334 F.3d 115, 122 (1<sup>st</sup> Cir. 2003) (stating "a party has a duty to incorporate all relevant arguments in the papers that directly address a pending motion" and this duty "includes explaining arguments squarely and distinctly").

Furthermore, Lewis County still not has addressed Mr. Cortland's argument that it is an abuse of discretion for the trial court, sua sponte, invent unbriefed arguments for Lewis County's benefit. It is a well-established principle of Washington courts and courts in general that the

courts “are not in the business of inventing unbriefed arguments for parties sua sponte.” *State v. Saintcalle*, 309 P. 3d 326, 338 (Wash. 2013); *In re Coats*, 267 P. 3d 324, 332 (Wash. 2011); *State v. Schaler*, 236 P. 3d 858, 867 (Wash. 2010) (stating further “[t]his case should not be decided on the unbriefed invited-error doctrine”); *State v. Studd*, 137 Wash.2d 533, 547 (1999).

As a matter of law, the Court of Appeals must award attorney’s fees for the five hundred and twenty-one hours of uncontested work, in an amount of one hundred and four thousand, two hundred dollars (\$104,200.00) because Washington Courts “are not in the business of inventing unbriefed arguments for parties sua sponte.” *State v. Saintcalle*, 309 P. 3d 326, 338 (Wash. 2013).

**2. The trial court abused its discretion when it made a determination on the number of documents responsive to Mr. Cortland’s requests without examining the documents by affidavit or in camera review**

The trial court erred when it grouped the three thousand six hundred and eighty-two (3,682) responsive documents that Lewis County produced to Mr. Cortland down to two (2), by making a determination on the documents without an in camera review, or without affidavit.

“The PRA allows a trial court to resolve disputes about the nature of a record based solely on affidavits, RCW 42.56.550(3), without an in camera review.” *Nissen v. Pierce County*, 357 P. 3d 45, 57 (Wash. 2015)

(internal quotation marks omitted). This is a binary proposition. It is one or the other. As the *Nissen* court construes RCW 42.56.550(3), there must be either an affidavit with specificity identifying the records for the trial court to rely upon when its determination, or an in camera review must be performed.

In this case, it is undisputed that there was neither an affidavit detailing the responsive records in dispute or an in camera review. Brief of Respondent/Cross-Appellant at 44-45.

Lewis County contends that it was within the discretion of the trial court to base its decision off an exhibit created and written by Lewis County's attorney of record, Mr. Carter. There is no sworn testimony by Mr. Carter that his representation is full, accurate, true and correct. Without an affidavit there is no sworn testimony, and therefore no mechanism to ensure Mr. Carter's assertions to the trial court are fully, accurate, true and correct.

**3. The trial court abused its discretion when it made specific arguments for Lewis County regarding the aggravating and mitigating factors**

Any reasonable person, with a reasonable mind, after looking at Lewis County's Response Penalty Brief for the trial court, would conclude that Lewis County did not apply the facts of the case to seven (7) out of the nine (9) aggravating factors argued by Mr. Cortland at the trial court.

CP 397-411 (stating Mr. Cortland’s arguments regarding the aggravating factors); CP 498-501 (stating Lewis County’s arguments regarding the aggravating factors).

Lewis County claims in its appellate brief to this Court of Appeals that it “cited all the factors and applied them to the facts of the case – it need not use separate bullet points for each one.” Brief of Respondent/Cross-Appellant at 38. This is a misrepresentation of fact to this Court of Appeals. It is telling that Lewis County does not even provide a single example in its appellate brief to this Court of Appeals as evidence that it applied the facts to the aggravating factors to the trial court, like it claims in this appellate brief.

“Bald assertions and conclusory allegations will not support the holding of a hearing” because Lewis County “must state with particularity facts which, if proven, would entitle [it] to relief.” *Matter of Personal Restraint of Rice*, 118 Wn.2d 876, 886 (1992); accord *Rocafort v. IBM Corp.*, 334 F. 3d 115, 122 (1<sup>st</sup> Cir. 2003) (stating “a party has a duty to incorporate all relevant arguments in the papers that directly address a pending motion” and this duty “includes explaining arguments squarely and distinctly”).

Because Lewis County did not make any factually specific arguments regarding the aggravating factors to the trial court, the trial

court abused its discretion by inventing unbriefed arguments for Lewis County concerning the aggravating factors, sua sponte. It is a well-established principle of Washington courts and courts in general that the courts “are not in the business of inventing unbriefed arguments for parties sua sponte.” *State v. Saintcalle*, 309 P. 3d 326, 338 (Wash. 2013); *In re Coats*, 267 P. 3d 324, 332 (Wash. 2011).

**C. Reply Appeal: Lewis County did not argue for and therefore is not entitled to costs and attorney’s fees on this appeal**

Because Lewis County did not argue for costs and attorney’s fees if it is the prevailing party in this appeal, it is not entitled to costs or attorneys fees. RAP 18.1(b) (stating “The party must devote a section of its opening brief to the request for the fees or expenses”).

Respectfully submitted this 04 day of September, 2018.

By: \_\_\_\_\_

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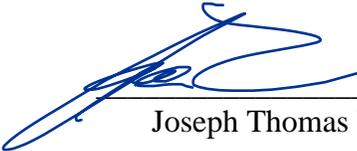
I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Brian Cortland's Response/Reply Brief

To the following:

Mr. Eric Eisenberg  
Lewis County Prosecuting Attorney  
345 W. Main Street  
Chehalis WA 98532

Dated this 04 day of September, 2018.

  
\_\_\_\_\_  
Joseph Thomas WSBA # 49532

**LAW OFFICE OF JOSEPH THOMAS**

**September 04, 2018 - 4:57 PM**

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**Appellate Court Case Number:** 51987-9  
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**Superior Court Case Number:** 16-2-03960-7

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**Comments:**

Response/Reply Brief of Appellant/Cross-Respondent

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