

FILED
Court of Appeals
Division II
State of Washington
5/14/2019 11:10 AM
No. 52739-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

LEWIS COUNTY,

Petitioner,

v.

BRIAN CORTLAND,

Respondent.

RESPONDENT'S RESPONSE BRIEF

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TABLE OF AUTHORITIES

WASHINGTON CASE LAW

<i>American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503</i> , 95 Wn. App 106 (1999)	29
<i>Amren v. City of Kalama</i> , 929 P. 2d 389 (Wash. 1997).....	23, 30
<i>Condon v. Condon</i> , 298 P. 3d 86 (Wash. 2013)	15
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801 (1992)	23-24
<i>Dellen Wood Products Inc. v. State Dept. of Labor & Industries</i> , 319 P. 3d 847 (Wash. Ct. App. 2014)	24
<i>Gendler v. Batiste</i> , 274 P. 3d 346 (Wash. 2012).....	23
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 544 (1978).....	15
<i>In re Copland</i> , 309 P. 3d 626 (Wash. Ct. App. 2013)	17
<i>In re Marriage of Sacco</i> , 114 Wn.2d 1 (1990)	24
<i>In re Estate of Mower</i> , 374 P. 3d 180, 187 (Wash. 2016)	26
<i>King v. Snohomish County</i> , 47 P. 3d 563 (Wash. 2002).....	12
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 544 (1978).....	15
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 243 P. 3d 1283 (Wash. 2010).....	27
<i>Limstrom v. Ladenburg</i> , 136 Wn. 2d. 595 (1998)	30
<i>Lindeman v. Kelso School Dist. No. 458</i> , 172 P. 3d 329 (Wash. 2007)	23
<i>Lybbert v. Grant County</i> , 1 P.3d 1124 (2000)	12, 16
<i>Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane</i> , 261 P. 3d 119 (Wash. 2011).....	25-26

<i>Paich v. N. Pac. Ry. Co.</i> , 88 Wash. 163 (1915).....	9
<i>PAWS v. UW (“Paws I”)</i> , 114 Wn. 2d 677, 687-88 (1990).....	30
<i>PAWS v. UW</i> , 125 Wn.2d 243 (1994).....	19-20
<i>Randy Reynolds & Associates, Inc. v. Harmon</i> , No. 95575-1 (Wash. Sup. Ct. March 28, 2019).....	8-9
<i>Romjue v. Fairchild</i> , 60 Wash. App. 278 (1991).....	13
<i>Sanders v. State</i> , 240 P. 3d 120 (Wash. 2010).....	21
<i>Sheets v. Benevolent & Protective Order of Keglers</i> , 34 Wn.2d 851 (1949).....	8
<i>Spokane Research Fund v. City of Spokane</i> , 117 P. 3d 1117 (Wash. 2005).....	29
<i>State v. Henderson</i> , 114 Wash.2d 867 (1990)	17
<i>State v. Momah</i> , 217 P. 3d 321, 328 (Wash. 2009).....	16-17
<i>State v. Schaler</i> , 236 P. 3d 858, 872 (Wash. 2010).....	16
<i>State v. Taylor</i> , 150 Wn.2d 599 (2003).....	8
<i>Yousoufian v. Office of Ron Sims</i> , 229 P. 3d 735 (Wash. 2010).....	14, 18

FEDERAL CASE LAW

<i>Burwell v. Executive Office for US Attorneys</i> , 210 F. Supp. 3d 33 (D.D.C. 2016).....	25
<i>DeBrew v. Atwood</i> , 792 F. 3d 118 (D.C. Cir. 2015).....	26
<i>Dugan v. Dept. of Justice</i> , 82 F. Supp. 3d 485 (D.D.C. 2015)	25

WASHINGTON STATUTES

RCW 42.56.21020, 21
RCW 42.56.550 14, 18-19, 25-26, 29

WASHINGTON SUPERIOR COURT CIVIL RULES

CR 2A1-3, 6-11, 15-18, 20, 30

WASHINGTON COURT RULES OF GENERAL RULES

GR 31.14-5, 21-22, 26-28

WASHINGTON RULES OF APPELLATE PROCEDURE

RAP 3.13, 8
RAP 18.1 29-30

OTHER AUTHORITY

Rest.2d Torts, § 892A1

TABLE OF CONTENTS

I. INTRODCUTION1

II. COUNTER-STATEMENT OF THE ISSUE3

III. STATEMENT OF THE CASE4

IV. ARGUMENT.....4

1. Appellant does not have standing --- Lewis County is not aggrieved party and pursuant to RAP 3.1 only aggrieved parties may seek an appeal.....8

2. Appellant waived any debatable issues -- By signing the October 30, 2018, CR 2A Stipulated Statutory Penalty agreement Lewis County admits it violated the Public Records Act, and its action waived any argument to the contrary.11

3. Lewis County is inviting error because it affirmatively stipulated to a CR 2A agreement where it admitted to withholding records and benefitted by negotiating a lower statutory penalty.....16

4. Lewis County violated the Public Records Act – By silently withholding eighteen (18) separate documents.19

5. Lewis County violated the Public Records Act – By claiming an invalid exemption to the Public Records Act to withhold documents.21

6. Lewis County violated the Public Records Act – Lewis County never met its burden of proof under of beyond material doubt to establish that it made an adequate search under the Public Records Act.....25

7. Motion for All Costs and Attorney’s Fees – Mr. Cortland is entitled to an award of all costs and reasonable attorney’s fees under the Public Records Act as the prevailing party in this appeal.25

I. INTRODUCTION

This appeal is governed by the legal maxim “volenti non fit injuria” means no wrong is done to one who consents. *See* Rest.2d Torts, § 892A, com. A.

It is unprecedented in the history of the Public Records Act for an agency to enter into a signed CR 2A agreement for the purpose of determining the statutory penalty pursuant to RCW 42.56.550(4), present an agreed Final Order and Judgment in open court based upon the CR 2A agreement, only to then later appeal and claim the agency never violated the Public Records Act.

Lewis County does not present any law or authority which allows an agency to appeal, after admitting liability for a violation of the Public Records Act. And make no mistake, when Lewis County signed the CR 2A agreement it absolutely admitted liability for a violation for wrongfully withholding records under the Public Records Act. It is axiomatic that a statutory penalty is imposed when an agency violates the Public Records Act because the statutory penalty is a mandatory legal operation that arises out of a violation of the statute. When Lewis County signed the CR 2A agreement it ended all controversy because the signature on page identified Lewis County agreed with the trial court’s ruling that it violated the Public Records Act. Otherwise, if Lewis County held a sincere belief

that it did not violate the Public Records Act it would not have voluntarily signed a CR 2A agreement agreeing to a RCW 42.56.550(4) statutory penalty.

Lewis County is not an aggrieved party in this appeal and does not have standing to pursue an appeal. By entering into the CR 2A agreement Lewis County received the result it wanted – a small statutory penalty and reduced attorney’s fees. The trial court had the discretion to award a one-hundred dollar (\$100) per day penalty and Lewis County received the benefit of the bargain by stipulating to only a five dollar (\$5) per day penalty. Also, if the Lewis County litigated the statutory penalty, the attorney’s fees would be much higher. When Lewis County signed the CR 2A agreement it no longer had any pecuniary interest in the litigation because it agreed to the outcome, ending all controversy between the parties.

This Court of Appeals need not go any farther in its analysis then look at the plain language within the four corners of the CR 2A agreement. The CR 2A agreement is final. This Court of Appeals should uphold the CR 2A agreement and the subsequent Final Order and Judgment based upon the CR 2A agreement.

II. COUNTER-STATEMENT OF THE ISSUES

1. Whether Appellant Lewis County is an aggrieved party pursuant to RAP 3.1 after it signed the October 30, 2018, CR 2A Stipulated Statutory Penalty agreement?
2. Whether the October 30, 2018, CR 2A Stipulated Statutory Penalty agreement acts as an admission that Lewis County violated the Public Records Act and waived any argument to the contrary?
3. Whether Lewis County is inviting error by affirmatively stipulating in a CR 2A Agreement that it withheld records and would benefit by paying a lower statutory penalty?
4. Whether Lewis County violated the Public Records Act by wrongfully withholding documents from Mr. Cortland?
5. Whether Lewis County violated the Public Records Act by claiming an invalid exemption to withhold documents?
6. Whether Lewis County violated the Public Records Act when it did not meet its burden of proof of beyond material doubt to establish that it made an adequate search under the Public Records Act?
7. Whether Mr. Cortland is entitled to an award of all costs and reasonable attorney's fees under the Public Records Act as the prevailing party in this appeal?

III. STATEMENT OF THE CASE

The Public Records Act Request and Production

Lewis County stated these following facts about Mr. Cortland's Public Records Act request in its Response Merits Brief to the trial court.

“On November 18, 2016, Mr. Cortland made a public records request to the Lewis County Prosecuting Attorney's Office (LCPAO) for records either created or maintained by then-Chief Civil Deputy Glenn Carter that ‘concern judicial records, either under the common law, *Nast v. Michels*, or Washington State Court Rule GR 31.1.’ CP 205. “LCPAO's Public Records Officer Casey Mauermann acknowledged receipt of the request, sought and received clarification, gave an estimated first installment date of Jan. 4, 2017, and then extended that date into February due to the request taking longer than anticipated.” CP 205.

“Mr. Carter considered these records judicial records subject to GR 31.1, not the PRA. But, not wanting to deny Mr. Cortland access to these records, Mr. Carter and Ms. Mauermann resolved to provide them to him under GR 31.1.” CP 206. “This made sense because Mr. Cortland's request had specifically referred to judicial records outside of the PRA's reach, so it seemed sensible to provide him any responsive judicial records under GR 31.1.” CP 206-07. “Rather than deny Mr. Cortland access,

Lewis County provided the records to him under GR 31.1 in installments.” CP 204.

“When ready on Feb. 3, 2017, Ms. Mauermann sent the first installment to Mr. Cortland with an explanation of how his request had encompassed records which originated with the Superior Court of Washington for Lewis County, and an indication that Lewis County was producing the records to him under GR 31.1.” CP 207 (internal quotation marks omitted).

“On March 7, 2017, she sent Mr. Cortland the second installment of 100 records with the same explanation of how they had come from the court and were being given to him under GR 31.1.” CP 207.

“In June, Ms. Mauermann sent Mr. Cortland the third installment of 106 records with the same explanation of how they had come from the court and were being given to him under GR 31.1.” CP 207.

Trial Court Proceedings

On August 03, 2018, the Honorable Judge John Skinder of the Thurston County Superior Court entered a written order on the merits of the case finding Lewis County in violation of the Public Records Act for wrongful withholding of records. CP 263-69. Judge Skinder ordered a penalty hearing would be scheduled after Lewis County certified it

performed an adequate search pursuant to the adequate search requirements of the Public Records Act. CP 268-69.

On August 13, 2018, Lewis County timely moved the court for reconsideration of the written order on the merits finding Lewis County in violation of the Public Records Act. CP 270-85.

On September 12, 2018, Judge Skinder denied Lewis County's motion for reconsideration and upheld the written order on the merits finding Lewis County violated the Public Records Act. CP 300.

On October 30, 2018, both Plaintiff Brian Cortland and Defendant Lewis County entered into a CR 2A Agreement. CP 317-18. The title of the CR 2A agreement is for a "Stipulated Statutory Penalty Pursuant to RCW 42.56.550(4)." CP 317. The CR 2A Agreement expressly states the "merits order in this matter... presently being binding, both parties stipulate to the following statutory penalty, pursuant to RCW 42.56.550(4)." *Id.* The terms of the CR 2A identifies that both parties stipulated that Lewis County wrongfully withheld eighteen (18) documents from Mr. Cortland for a period of two hundred and thirty-one (231) days. *Id.* Additionally, both parties agreed that Lewis County would pay Mr. Cortland a "per record per day penalty" of five (\$5) dollars amounting to a total of twenty thousand and seven hundred and ninety (\$20,790) dollars. CP 318.

On November 16, 2018, in open court, Judge Skinder signed and entered a Final Order and Judgment. CP 322-23. The Final Order and Judgment was signed by both Lewis County's attorney of record and Mr. Cortland's attorney of record. CP 323; 3 VRP 6. The bottom left-hand corner of the Final Order and Judgment identifies it was presented by Lewis County's attorney of record and agreed to by Mr. Cortland's attorney of record. *Id.* The Final Order and Judgment incorporates the terms from the CR 2A Agreement, including that eighteen (18) records were wrongfully withheld by Lewis County for a period of two hundred and thirty-one (231) days. CP 323. Before signing and entering the Final Order and Judgment the trial court asked the attorneys for both parties in open court "there any reason I shouldn't enter this final order and judgment that you both have signed?" 3 VRP 6. The record is absent of either Lewis County's attorney or Mr. Cortland's attorney objecting to the Final Order and Judgment. 3 VRP 6-7. The Judgment was entered for twenty thousand and seven hundred and ninety (\$20,790) dollars, the same amount as stipulated in the CR 2A Agreement. CP 322; *c.f.* CP 318.

IV. ARGUMENT

1. Appellant does not have standing --- Lewis County is not aggrieved party and pursuant to RAP 3.1 only aggrieved parties may seek an appeal

Lewis County was no longer an aggrieved party when it signed a CR 2A agreement stipulating to the number of records it wrongfully withheld, the number of days it wrongfully withheld the records, and the statutory penalty that Lewis County would pay for the violation of the Public Records Act. CP 318. When the CR 2A agreement was signed Lewis County no longer had a financial interest in the case and was no longer an aggrieved party.

It is well-established under the appellate court rules “[o]nly an aggrieved party may seek review by the appellate court.” RAP 3.1. “While RAP 3.1 does not itself define the term ‘aggrieved,’ Washington courts have long held that ‘[f]or a party to be aggrieved, the decision must adversely affect that party's property or pecuniary rights, or a personal right, or impose on a party a burden or obligation.’” *Randy Reynolds & Associates, Inc. v. Harmon*, No. 95575-1 (Wash. Sup. Ct. March 28, 2019) (published); *State v. Taylor*, 150 Wn.2d 599, 603 (2003) (stating that an aggrieved party is “one whose personal right or pecuniary interests have been affected”); *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949). “A party is not aggrieved by a

favorable decision and cannot properly appeal from such a decision.” *Randy Reynolds & Associates, Inc. v. Harmon*, No. 95575-1 (Wash. Sup. Ct. March 28, 2019) (published); *Paich v. N. Pac. Ry. Co.*, 88 Wash. 163, 165-66 (1915).

Recently, on March 28, 2019 the Washington State Supreme Court reviewed what it means to be an aggrieved party under appellate court rule RAP 3.1. *Randy Reynolds & Associates, Inc. v. Harmon*, No. 95575-1 (Wash. Sup. Ct. March 28, 2019) (published). There *Reynolds* appealed after prevailing on every issue in the trial court. *Id.* Specifically, Reynolds received in the trial court a “default judgment and writ of restitution, obtaining ‘all of the relief it sought.’” *Id.* The Washington State Supreme Court held that Reynolds was not an aggrieved party because “[i]nconvenience alone is not sufficient under RAP 3.1.” *Id.*

Here Lewis County does not dispute there was a CR 2A Stipulated Penalty Agreement, that was the basis for the Final Order and Judgment of the trial court. Furthermore, Lewis County does not dispute the material terms of the CR 2A agreement include: the number of documents Lewis County wrongfully withheld under the Public Records Act, the number of days Lewis County wrongfully withheld those documents, and the statutory penalty for the withholding of those documents. CP 317-18.

The CR 2A agreement ended all controversy between the parties. Lewis County argues it has a right to appeal whether the trial court erred that it wrongfully withheld documents under the Public Records Act from Mr. Cortland. But Lewis County fails to respond to the fact that the plain language within the four corners of the CR 2A agreement identifies a material term that Lewis County by its own stipulated admission wrongfully withheld eighteen (18) records from Mr. Cortland. By Lewis County stipulating that it wrongfully withheld records, the stipulation represents that Lewis County agreed with the trial court's ruling on the Merits that Lewis County violated the Public Records Act by wrongfully withholding documents from Mr. Cortland. Therefore, the CR 2A agreement covers all the issues on appeal and there is nothing left for Lewis County to argue.

By Lewis County's own argument to this Court in the Response to Motion to Modify, Lewis County recognizes "[a] penalties analysis follows necessarily from a finding of a PRA violation." *See* Appellant's Resp. Mot. Modify at 4, April 15, 2019. Under Lewis County's own logic, when Lewis County stipulated to the penalties analysis, Lewis County also admitted that it violated the Public Records Act. Again, by Lewis County stipulating to the penalties analysis, the stipulation represents that Lewis County agreed with the trial court's ruling on the

Merits that Lewis County violated the Public Records Act by wrongfully withholding documents from Mr. Cortland.

Lewis County was no longer an aggrieved party when it signed the CR 2A agreement admitting it wrongfully withheld eighteen (18) records under the Public Records Act from Mr. Cortland because a party cannot be adversely affected by something it agreed to. If this Court does not affirm the CR 2A agreement, it will overturn long-term precedent render CR 2A agreements meaningless because CR 2A agreements will no longer be final when it will be reviewed on the merits by appellate courts. As a matter of law, this Court must rule for Mr. Cortland and affirm the stipulated CR 2A agreement where Lewis County admitted number of records it wrongfully withheld, the number of days it wrongfully withheld the records, and the statutory penalty that Lewis County would pay for the violation of the Public Records Act. CP 318.

2. Appellant waived any debatable issues -- By signing the October 30, 2018, CR 2A Stipulated Statutory Penalty agreement Lewis County admits it violated the Public Records Act, and its action waived any argument to the contrary

Through Appellant's prior inconsistent act of signing the CR 2A Stipulated Statutory Penalty agreement, Lewis County waived the argument that it did not violated the Public Records Act. As a matter of

law this Court of Appeals should not rule on the merits of this appeal because Appellant's inconsistent acts waived its argument.

Washington Court recognize the inconsistent behavior of a party can waive a defense. "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)).

In *King v. Snohomish County*, 146 Wash.2d 420 (2002), the defendant raised a claim-filing defense in its answer but did not clarify the defense in response to an interrogatory, and the parties engaged in 45 months of litigation and discovery, during which time the defendant sought four continuances and filed a motion for summary judgment that did not mention the defense. The court found waiver on the basis that the defendant's assertion of the claim-filing defense, in a motion to dismiss after the case was set for trial, was inconsistent with this prior behavior. Courts also find assertion of a service-related defense inconsistent with a defendant's prior behavior where there are indications the defendant actively sought to conceal the defense until after the expiration of the statute of limitations and 90-day period for service.

In *Romjue v. Fairchild*, 60 Wash. App. 278, 281 (1991), a defendant engaged in discovery unrelated to a service-related defense before moving to dismiss, and waited until three months after the statute of limitations expired to notify plaintiff's counsel of insufficient service, although plaintiff's counsel wrote to defendant's counsel prior to the expiration of the statute of limitations that he understood the defendants had been properly served. The court held the defendant waived the defense by conducting himself in a manner inconsistent with the later assertion of the defense.

Here, at the June 01, 2018 Merits Hearing, Lewis County asserted the defense that it did not violate Public Records Act because it did not wrongfully withhold documents from Mr. Cortland. CP 204-33. On August 03, 2018, the trial court found that Lewis County violated the Public Records Act by wrongfully withholding documents from Mr. Cortland. CP 263-69. On October 30, 2018, Lewis County signed a CR 2A Stipulated Statutory Penalty agreement stating the number of documents Lewis County wrongfully withheld from Mr. Cortland, the number of days the documents were wrongfully withheld, and the statutory penalty Lewis County would pay to Mr. Cortland for the wrongful withholding. CP 317-18. On November 16, 2018, the trial court entered a Final Order and Judgment based upon the stipulated CR 2A

agreement identifying the material terms of Lewis County's wrongful withholding. CP 322-23.

Lewis County acted inconsistently by taking irreconcilable positions in the trial court as to whether it violated the Public Records Act by wrongfully withholding documents from Mr. Cortland. On one hand, Lewis County initially contended to the trial court it did not violate the Public Records Act because it did not wrongfully withhold documents from Mr. Cortland. On the other hand, it is uncontested that Lewis County stipulated to wrongfully withholding eighteen (18) documents from Mr. Cortland under the Public Records Act. This is inconsistent behavior. It makes no sense for a Lewis County to claim there is no violation of the Public Records Act because it acted in compliance with the statute, but four months later stipulate with opposing party that it violated the Public Records Act by wrongfully withholding eighteen (18) documents. Not only did Lewis County stipulate to the number of documents it wrongfully withheld, but it stipulated to the entire *Yousoufian* analysis – the number of documents withheld, the number of days the records were withheld, and the statutory penalty it would pay for the wrongful withholding. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 747-48 (Wash. 2010). The result of the *Yousoufian* analysis is the statutory penalty pursuant to RCW 42.56.550(4) for Lewis County's violation of the Public Records

Act. Therefore, when Lewis County agreed to the *Yousoufian* analysis, it agreed to the statutory penalty for a violation of the Public Records Act.

No reasonable agency would agree to a statutory penalty for a violation of the Public Records Act by stipulating to a CR 2A agreement, only to then maintain on appeal the agency did not violate the Public Records Act. As explained by Lewis County in its Response to the Motion to Modify before this Court of Appeals, “[a] penalties analysis follows necessarily from a finding of a PRA violation.” *See* Appellant’s Resp. Mot. Modify at 4, April 15, 2019. Under Lewis County’s Public Records Act analysis, it recognized that it admitted a violation of the Public Records Act when it stipulated to the penalties analysis in the CR 2A Agreement. It is irreconcilable and disingenuous for Lewis County to admit a violation of the Public Records Act by wrongfully withholding 18 records in the trial court, and then on appeal argue it did not wrongfully withhold documents.

If there is ever a time for this Court to apply the doctrine of waiver it is here. “The purpose of CR 2A is to give certainty and finality to settlements.” *Condon v. Condon*, 298 P. 3d 86, 89 (Wash. 2013); *Haller v. Wallis*, 89 Wn.2d 539, 544 (1978) (stating “[t]he law favors settlements, and consequently it must also favor their finality”). If this Court does not rule that Lewis County waived its argument as to whether it wrongfully

withheld records, the CR 2A agreement entered into in the trial court will not be final.

It will be untenable for this Court of Appeals to rule the CR 2A agreement is not waived, as it will nullify the public policy behind CR 2A agreements. In order to “foster and promote the just, speedy, and inexpensive determination of [this] action” this Court must rule Lewis County waived this appeal with its inconsistent and irreconcilable actions at the trial court. *Lybbert v. Grant County, State of Wash.*, 1 P. 3d 1124, 1129 (Wash. 2000).

3. Lewis County is inviting error because it affirmatively stipulated to a CR 2A agreement where it admitted to withholding records and benefitted by negotiating a lower statutory penalty

Lewis County made a tactical decision to enter into a binding CR 2A Stipulated Statutory Penalty agreement in which it admitted liability by wrongfully withholding records under the Public Records Act. Because Lewis County affirmatively assented to the error when it stipulated to the signed CR 2A agreement, Lewis County is inviting error on appeal, and this Court is barred from hearing this appeal on the merits.

Courts use the doctrine of invited error “to analyze the impact a party's tactical choices have on alleged error.” *State v. Momah*, 217 P. 3d 321, 328 (Wash. 2009). “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)).

In *Momah*, the defendant actively participated in the individual juror questioning that took place in chambers, but he never objected. He benefited from this procedure and exercised a number of challenges for cause based on the information learned. *State v. Momah*, 217 P. 3d 321, 328-29 (Wash. 2009). The court found this conduct comparable to invited error and held *Momah* could not challenge the jury selection process under Washington Constitution article I, section 22.

Here Lewis County made a tactical decision to enter into a binding CR 2A Stipulated Statutory Penalty Agreement. Lewis County’s attorney of record, Chief Civil Deputy Prosecuting Attorney Eric Eisenberg, signed

the CR 2A agreement for Lewis County. CP 318. Mr. Eisenberg's signature on behalf of Lewis County is an affirmative step that was taken to enter into the CR 2A agreement. By affirmatively entering into the CR 2A agreement Lewis County agreed: to the number of records Lewis County wrongfully withheld from Mr. Cortland, the number of days the records were wrongfully withheld from Mr. Cortland, and the statutory penalty that Lewis County would pay to Mr. Cortland for the wrongful withholding. CP 317-18. The CR 2A agreement was all-encompassing because the Final Order and Judgment used the same material terms from the CR 2A agreement. CP 322-23. The CR 2A agreement ended all controversy between the parties.

Lewis County voluntarily made the decision to enter into a CR 2A agreement instead of briefing the issues and letting the trial court make the decision in its discretion. *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 747-48 (Wash. 2010). The result was that Lewis County received a significant benefit from the CR 2A agreement. First, Lewis County received a ninety-five percent (95%) discount on the per-day penalty alone. The negotiated penalty of five dollars (\$5) could have been as high as one hundred dollars (\$100) if the judge decided the issue, pursuant to the plain language of RCW 42.56.550(4). Second, Lewis County saved money on attorney's fees when it bypassed the extensive briefing for the

statutory penalty hearing. Attorney's fees are mandatory when the trial court finds a violation of the Public Records Act and Lewis County would have had to pay attorney's fees for the statutory penalty briefing and hearing, which would have cost two hundred and fifty dollars (\$250) an hour additionally. Appellant's Resp. Mot. Modify at 4, April 15, 2019. Therefore, Lewis County saved thousands of dollars on statutory and attorney's fees by affirmatively entering into the CR 2A agreement.

This Court of Appeals should not permit Lewis County to receive a windfall on appeal by setting up the error at the trial court. The ruling of the trial court must be upheld because Lewis County affirmatively consented to the error by entering into the CR 2A agreement.

4. Lewis County violated the Public Records Act – By silently withholding eighteen (18) separate documents from production

Lewis County violated the Public Records Act when it silently withheld eighteen (18) separate documents from production. As a matter of law, a silent withholding is a violation of the Public Records Act. Because Lewis County violated the Public Records Act by silently withholding documents, this Court of Appeals must uphold the trial court's ruling.

Under the plain language of RCW 42.56.550(1) a violation of the Public Records Act occurs when there is a wrongful withholding. *PAWS*

v. UW, 125 Wn.2d 243, 270 (1994) (stating “[t]he Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request”).

Here Lewis County admitted in the stipulated CR 2A agreement to withholding eighteen separate records from Mr. Cortland under the Public Records Act. CP 317-18. This a silent withholding. The record is absent of Lewis County ever providing Mr. Cortland with an exemption log, identifying the documents it withheld from production, pursuant to RCW 42.56.210(3). Without the exemption log, Mr. Cortland did not know which documents were being withheld from him under the Public Records Act. By definition when documents are not identified that are withheld from production, it is a silent withholding.

Because Lewis County admitted to silently withholding eighteen (18) records from Mr. Cortland in the CR 2A agreement, this Court of Appeals need to go no farther in finding a violation of the Public Records Act. This Court of Appeals should reaffirm the trial court and find Mr. Cortland as the prevailing party.

5. Lewis County violated the Public Records Act – By claiming an invalid exemption to the Public Records Act to withhold documents

It is undisputed that Lewis County claimed an exemption from producing documents under the Public Records Act and this claimed exemption has never been subsequently waived.

It is a violation of the Public Records Act for an agency to claim an invalid exemption because then the requestor is denied the right to accept and copy the requested records without a reason permitted by statute. “An agency withholding a document must claim a ‘specific exemption,’ i.e., which exemption covers the document. RCW 42.56.210(3). The claimed exemption is ‘invalid’ if it does not in fact cover the document.” *Sanders v. State*, 240 P. 3d 120, 125 (Wash. 2010).

In *Sanders v. State* the Washington State Supreme Court considered whether invalid exemptions made the withholding of the records wrongful, and therefore a violation of the Public Records Act. *Sanders v. State*, 240 P. 3d 120, 143 (Wash. 2010). The *Sanders* court held “that the claimed exemptions were invalid and AGO's withholding of the documents was wrongful” and constituted a violation of the Act. *Id.*

Here Lewis County claimed an invalid exemption of GR 31.1 to withhold documents under the Public Records Act. It is uncontested that Lewis County Public Records Officer Casey Mauermann wrote to Mr.

Cortland on August 02, 2017 and stated “our office is not waiving any claim that the documents were exempt from disclosure or were not subject to the PRA at the time of his or any other PRA request.” CP 150 at ¶ 60; CP 43 at ¶ 60. But the Public Records Officer Casey Mauermann stated in the same letter to Mr. Cortland that the Lewis County Prosecuting Attorney’s Office re-evaluated the nature of the requested documents and concluded “the records have become our records, and they are public records of our agency available under the PRA.” CP 150 at ¶ 59; CP 43 at ¶ 59.

It is uncontested that the Public Records Officer claimed an exemption to the Public Records Act request at issue in this lawsuit. The public policy for an exemption is to withhold documents from production under the Public Records Act, usually for privacy reasons. It is also uncontested that Lewis County made the first three of production of documents under GR 31.1 to Mr. Cortland instead of the Public Records Act. CP 264 at ¶ 5; CP 146 at ¶ 32; CP 41 at ¶ 32; CP 265 at ¶ 6; CP 147 at ¶ 40; CP 41 at ¶ 40; CP 265-66 at ¶ 7; CP 149 at ¶ 49; CP 42 at ¶ 49. As identified in the previous paragraph, on August, 02, 2017, Lewis County changed its stance by producing the next installment of documents under the Public Records Act, instead of GR 31.1. CP 150 at ¶ 59; CP 43 at ¶ 59.

Case law is abundantly clear: once a public record subject to the Public Records Act, always a public record within the meaning of the Public Records Act. *Gendler v. Batiste*, 274 P. 3d 346, 354 (Wash. 2012) (stating the type of form the Washington State Patrol used did not “transform collection of the information into a joint WSP DOT § 152 purpose” because “it is nevertheless filled out by law enforcement officers for WSP's own statutory purpose”); *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).

It is uncontested these documents were always used, possessed, or maintained by Lewis County. It is evidence the documents were used, possessed, or maintained by Lewis County or an agency thereof because Lewis County started and continued producing the documents under the Public Records Act to Mr. Cortland on August 02, 2017.

Lewis County did not raise this argument in its opening brief. Washington courts do not consider arguments raised for the first time in reply briefs. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,

809 (1992) (stating “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”); *In re Marriage of Sacco*, 114 Wn.2d 1, 5 (1990) (stating “This court does not consider issues raised for the first time in a reply brief.”); *Dellen Wood Products Inc. v. State Dept. of Labor & Industries*, 319 P. 3d 847, 859 n. 32 (Wash. Ct. App. 2014) (Washington State Court of Appeals Division II) (stating “we do not address Dellen's equity argument, which it improperly raises for the first time in its reply brief.”). This argument was briefed by both parties at the trial court. CP 179-82. It is fundamentally unfair if Lewis County can raise this argument in its reply brief because Mr. Cortland will not have an opportunity to respond. As a matter of law Lewis County has waived this argument.

The waiver of this argument alone by Lewis County, is cause enough for this Court of Appeals to affirm the trial court because claiming an invalid exemption is a violation of the Public Records Act because it is a wrongful withholding denying the requestor the right to copy and inspect records. On this point alone, this Court of Appeals should affirm the trial court.

6. Lewis County violated the Public Records Act – Lewis County never met its burden of proof under of beyond material doubt to establish that it made an adequate search under the Public Records Act

Lewis County violated the Public Records Act it never attempted to prove beyond material doubt at the trial court that it made an adequate search under the Public Records Act. Under the *Neighborhood Alliance* search standard and RCW 42.56.550(1), Lewis County had the mandatory statutory duty at the trial court to prove its search met the strict requirements of the Public Records Act. Since the record is absent that Lewis County never attempted to prove the sufficiency the search at the trial court.

“An inadequate search for records constitutes an improper withholding under the FOIA.” *Burwell v. Executive Office for US Attorneys*, 210 F. Supp. 3d 33, 36 (D.D.C. 2016); *Dugan v. Dept. of Justice*, 82 F. Supp. 3d 485, 494 (D.D.C. 2015). “[A]dequacy of a search for records under the PRA is the same as exists under FOIA.” *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 128 (Wash. 2011). “[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate.” *Id.* at 128.

“[T]he agency bears the burden, beyond material doubt, of showing its search was adequate. To do so, the agency may rely on

reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* “A reasonably detailed affidavit, setting forth the search terms and the type of search performed... is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.” *DeBrew v. Atwood*, 792 F. 3d 118, 122 (D.C. Cir. 2015). This burden of proof in case law to establish an adequate search corresponds with the agency’s mandatory statutory duty in RCW 42.56.550(1) to prove in the trial court that it complied with the Public Records Act.

In the Opening Brief to this Court of Appeals, Lewis County argues that it did not violate the Public Records Act because an agency does not have to prove the adequacy of the search, while the search was on-going. This argument is factually misleading because Lewis County did not respond under the Public Records Act, it responded under GR 31.1. If Lewis County is not forced to respond under the Public Records Act, this Court will render the Public Records Act meaningless. Ignoring the plain language of the Public Records Act violates several well-established rules statutory construction. *In re Estate of Mower*, 374 P. 3d 180, 187 (Wash. 2016) (stating Washington courts “avoid interpretations of a statute that would render superfluous a provision of the statute”); *c.f.*

Lake v. Woodcreek Homeowners Ass'n, 243 P. 3d 1283, 1288 (Wash. 2010) (internal quotation marks omitted) (stating Washington courts “must not add words where the legislature has chosen not to include them, and [] must construe statutes such that all of the language is given effect”).

By Lewis County’s own admission in the trial court, it first responded and produced documents to Mr. Cortland on February 03, 2017 under GR 31.1 and not the Public Records Act. CP 264 at ¶ 5; CP 146 at ¶ 32; CP 41 at ¶ 32. The same is true for the second production of documents on March 02, 2017 where Lewis County produced the documents to Mr. Cortland under GR 31.1 and not the Public Records Act. CP 265 at ¶ 6; CP 147 at ¶ 40; CP 41 at ¶ 40. Again, for the third production on June 27, 2017, Lewis County produced the documents to Mr. Cortland under GR 31.1 and not the Public Records Act. CP 265-66 at ¶ 7; CP 149 at ¶ 49; CP 42 at ¶ 49. Although, Lewis County changed its stance and produced the fourth installment of documents under the Public Records Act there is no evidence in the record that it made a search under the Public Records Act for those documents. CP 150 at ¶ 59; CP 43 at ¶ 59. Lewis County admitted this point to the trial court in its merits briefing stating: “[a]fter performing a search, the only responsive records were judicial records to which a prosecutor had been given access by a

court. . . Lewis County provided the records to him under GR 31.1 installments.” CP 204.

Even the trial court ruled as a matter of fact that Lewis County responded and produced the documents to Mr. Cortland under GR 31.1 and not the Public Records Act. CP 264 at ¶ 5; CP 265 at ¶ 6; CP 265-66 at ¶ 7.

Lewis County has the burden to prove beyond material doubt that it performed an adequate search under the Public Records Act. To meet that burden of proof, agencies are required to submit affidavits/declarations identifying the search terms and locations searched. The record is absent of any affidavits/declarations of Lewis County’s search under the Public Records Act.

It is notable that after Lewis County was found in violation of the Public Records Act, the trial court ordered Lewis County to perform a new search under the Public Records Act and to document the search by “affidavit or declaration.” CP 269 at ¶ 18. The reason why the trial court made Lewis County certify the search after merits hearing was to ensure that Lewis County performed its mandatory duty of an adequate search under the Public Records Act.

This Court must uphold the trial court’s ruling that Lewis County violated the Public Records Act by making an inadequate search and

response. It is axiomatic that an agency must make an adequate search whenever it produces documents to a requestor because a court must be able to verify if the agency complied with the search requirements. There is no proof in the record that Lewis County even made a search under the Public Records Act, let alone an adequate search under the Public Records Act. Consequently, Lewis County did not fulfill its burden of proof.

7. Motion for All Costs and Attorney's Fees – Mr. Cortland is entitled to an award of all costs and reasonable attorney's fees under the Public Records Act as the prevailing party in this appeal

Should Mr. Cortland prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

RCW 42.56.550(4) of the PRA provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

Washington courts recognize that “[s]trict enforcement of this provision discourages improper denial of access to public records.” *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); *see also American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App 106, 115 (1999). The PRA does not allow

for court discretion whether to award attorney fees to a prevailing party. *PAWS v. UW* (“Paws I”), 114 Wn. 2d 677, 687-88 (1990); *Amren v. City of Kalama*, 929 P.2d 389, 394 (1997). The only discretion the court has is in determining the amount of reasonable attorney’s fees. *Id.*

The Washington State Supreme Court in *Limstrom v. Ladenburg*, 136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – “[including] fees on appeal” – to the requestor. Should Mr. Cortland prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

V. REQUEST FOR RELIEF

Mr. Cortland requests this Court of Appeals to uphold the trial court’s finding that Lewis County violated the Public Records Act by denying Mr. Cortland the right to copy and inspect records.

Mr. Cortland requests this Court of Appeals to uphold the Final Order and Judgment which is based upon the CR 2A Stipulated Statutory Penalty agreement that was voluntarily signed by Lewis County’s attorney of record Eric Eisenberg. Since this stipulated CR 2A agreement was entered in open court, it ended all controversy between the parties.

Mr. Cortland request this Court of Appeals to order the Thurston County Superior Court Clerk to immediately release the supersedeas bonds Mr. Cortland and his attorney Joseph Thomas in order to enforce the judgment. If the supersedeas bonds do not satisfy the judgment plus the accrued interest, then for this Court of Appeals to order Lewis County to completely satisfy the judgment, including interest.

Certificate of Service

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 Brief

To the following:

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

Dated this 14 day of May, 2018.



Joseph Thomas WSBA # 49532

LAW OFFICE OF JOSEPH THOMAS

May 14, 2019 - 11:10 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52739-1
Appellate Court Case Title: Lewis County, Appellant v Brian Cortland, Respondent
Superior Court Case Number: 17-2-06152-0

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