NO. 32912-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BENTON COUNTY

v.

DONNA ZINK

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-2-00341-0

BRIEF OF RESPONDENT

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I. INTRODUCTION/RESPONSE TO STATEMENT OF ISSUES

Appellant Donna Zink has made a request for all special sex offender sentencing alternative ("SSOSA") evaluation forms held by respondent Benton County ("County"), regardless of the age of the documents. Ultimately, this is a request for hundreds if not thousands of documents located in criminal files created over multiple decades that will take years to fulfill. After she insisted that the County not only locate all such documents, but that it also create electronic versions of all of them free of charge in lieu of providing paper copies, the County filed a Complaint seeking declaratory relief to resolve the dispute it had with Ms. Zink as to the County's rights and obligations under the Public Records Act ("PRA"). The trial court granted the relief requested by the County, and Ms. Zink has appealed.

Ms. Zink lists dozens of "issues pertaining to assignments of error," but fails to provide argument or authority with respect to a great many of those issues. *See* Brief of Appellant ("Br. Appellant") at 5-10. "It is well settled that a party's failure to . . . provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005), *rev. den.*, 155 Wn.2d 1026 (2005) (quoting *Escude ex rel. Escude v. King Cnty. Pub.*

Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (2003)). Consequently, the County will only respond to the issues raised by Ms. Zink with respect to which she provides argument.

II. STATEMENT OF THE CASE

Washington's Public Records Act requires the County to make available for public inspection and copying all public records that are not otherwise exempt from such disclosure. *See* RCW 42.56.010(1); RCW 42.56.070(1).

History of Ms. Zink's Records Request. Ms. Zink submitted a broad request to the Benton County Prosecutor's Office on or about August 30, 2013, "to review and/or copy all SSOSA forms as well as all victim impact statements filed and maintained anywhere in Benton County." CP 39 (¶7). Ms. Zink subsequently clarified that what she wanted were all victim impact statements and SSOSA evaluations associated with all sex offense convictions ever obtained in Benton County (the County was formed in 1905). CP 3 and 40 (¶¶9); CP 73; CP 75.[1] Over the following 12 months, approximately 561 pages of responsive documents were located, all of which were found within the

[1] Nearly seven months after her initial request and production of numerous victim impact statements, Ms. Zink withdrew the portion of her request for any additional victim impact statements. CP 77; *see also*, CP 91-93.

records held by the Benton County Prosecutor's Office.[2] CP 119 (¶3). The County last estimated that it will take until November 1, 2023, to completely fulfill her request. CP 91.

Ms. Zink initially wanted all responsive documents in electronic format and inquired as to the charge for scanning paper documents to create electronic records. CP 95. She was informed that nearly all responsive documents were held in paper format only, that of the responsive documents the County did have in electronic format, most needed to be redacted, and that the County was not obligated to utilize its resources to create new electronic records for her. CP 97; CP 101. However, the County told Ms. Zink that it would voluntarily accommodate her by sending responsive documents to a local vendor to be scanned to create electronic documents, if she agreed to pay the vendor's charge of 25 cents per page. CP 97; CP 101. She was also notified that she could scan the documents herself if she so desired. CP 97.

Ms. Zink responded that she would accept paper copies for a charge of 15 cents per page, and she picked up the first installment on October 4, 2013. CP 99. Ms. Zink paid the County $1.20 (15 cents per page) and picked up the first installment of responsive documents. CP 4

[2] Duplicate copies of some of the responsive documents are also held by the Benton County Sheriff's Office. CP 120.

and 40 (¶¶13). Ms. Zink was notified on October 17, 2013, that the second installment of responsive records was available and copying costs would be $2.70. CP 4 and 40 (¶¶15). Ms. Zink paid those copying costs and picked up those records. *Id.*

The third installment did not result in any document production, as no additional responsive documents were located by the scheduled date. CP 4 and 40 (¶¶16). The fourth installment of documents was available on November 22, 2013, and Ms. Zink paid the copying costs of $12.45 and picked up those documents. CP 4 and 40 (¶¶17). Thus, between October 3, 2013, and late November, 2013, Ms. Zink paid for and picked up copies of responsive documents produced in four installments, at a combined copying cost of $16.35 (109 pages). CP 120 (¶5).

On November 23, 2013, Ms. Zink notified the County that henceforth she wanted all responsive documents produced in electronic format. CP 4-5 and 41 (¶¶18). Despite the County's prior offer to have all responsive documents scanned to create electronic documents in return for payment of the third party vendor's scanning charge of 25 cents per page, she informed the County that she believed that it had refused to provide her documents in electronic format and had consequently violated the PRA. CP 79. The County responded that while it had located a small portion of responsive records in electronic format, all those located as of

that date (November 25, 2013) needed to be redacted. CP 101. The County once again offered to have a third party vendor scan and create electronic documents from the paper documents and from redacted printouts of electronic documents if she agreed to reimburse the County for the cost. CP 101. The County also indicated that if it located any electronic documents that did not need redaction, it would provide those to her in electronic format. CP 101.

Ms. Zink did not accept the offer to scan, so on December 12, 2013, the County notified Ms. Zink that the fifth installment was ready in paper format and copying costs would be $9.00. CP 5 and 41 (¶¶21). In subsequent e-mails, Ms. Zink again characterized the County's actions as a denial of her request for records. CP 85; CP 87. On December 30, 2013, the County reiterated for a third time that it would have an outside vendor create the responsive documents in electronic format, but Ms. Zink refused that offer and implied that she believed that the PRA did not authorize the County to charge her the cost of the services of the third party vendor. CP 103; CP 105.

The County continued to process her request, and on January 8, 2014, notified her that the sixth installment was available and that copying costs would be $4.50. CP 107. Ms. Zink responded via e-mail that day stating that if the County did not provide all responsive documents in

electronic format, she would sue the County and seek an order requiring it to provide her with all documents in electronic format. CP 6 and 42 (¶¶25); CP 89. On January 28, 2014, the County filed the Complaint in this action in order to address the impasse with Ms. Zink. CP 1.

Since filing the lawsuit, the County has continued to process her records request. CP 120-21. On February 7, 2014, March 13, 2014, April 17, 2014, and May 19, 2014, Ms. Zink was informed that installments seven through ten, respectively, were available and that the copying costs would be $8.40, $10.35, $11.75, and $4.20, respectively.[3] CP 120 (¶7). Ms. Zink did not pay for and pick up installments five through ten. *Id.* However, on June 2, 2014, she notified the County via facsimile that she was now able to receive documents via facsimile. CP 120-21 (¶8). The County acquiesced, and on June 4-5, 2014, all responsive documents from installments five through ten were transmitted to Ms. Zink via facsimile and free of charge. CP 120-21 (¶8). However, Ms. Zink had previously notified the County that even if it ultimately transmitted documents to her via facsimile (which were converted by her device into an electronic

[3] As part of installments seven, eight, and ten, the County e-mailed to Ms. Zink five responsive documents it possessed in electronic format that did not need to be redacted. A sixth responsive document held in electronic format that did not need to be redacted was later located and e-mailed to Ms. Zink on August 21, 2014. CP 120-21 (¶¶6, 7 and 10).

format),[4] a judicial ruling was necessary due to her belief that the County had inappropriately delayed providing her documents in electronic form. CP 111.

On July 11, 2014, installment 11, consisting of another 33 pages of responsive documents, was faxed to Ms. Zink free of charge. CP 121 (¶9). On August 21, 2014, installment 12, consisting of another 52 pages of responsive documents, was faxed to Ms. Zink free of charge. CP 121 (¶10).

Volume and Nature of Responsive Documents Located as of Date of Summary Judgment Hearing. As of the date of the summary judgment hearing in October, 2014, the Prosecutor's Public Records Officer had reviewed that office's files on all felony sex offense convictions obtained in cases filed in 2009 through 2013. CP 121 (¶11). She had located 91 responsive documents totaling approximately 561 pages as of that date. Of those responsive documents, the County had 66 of those documents in paper only format. CP 121 (¶¶11-12). Of the 25 responsive documents that the County possessed in electronic format, 19 of those documents had to be redacted before disclosure. CP 121 (¶12).

[4] Ms. Zink acknowledged to the trial court that her facsimile machine was transforming the County's paper documents into electronic format. Report of Proceedings ("RP") at 17, lines 9-17.

Six responsive documents located in electronic format that did not need redacted were previously e-mailed to her free of charge. CP 120 (¶6). All remaining 85 documents were made available to Ms. Zink initially in hard copy in return for copying costs and/or were faxed to her after she installed a facsimile machine. CP 120-21 (¶¶5-10).

Trial Court Proceedings. In response to the County's motion for summary judgment, Ms. Zink responded with a combined motion to dismiss and memorandum in opposition to the County's motion for summary judgment. CP 130-40. Her motion and response to the County's motion *solely* addressed the County's standing to seek a declaratory judgment. *Id.* It contained no argument or authorities whatsoever regarding the interpretation of the PRA. Only in her subsequent reply brief in support of her motion to dismiss did she provide *any* argument regarding the PRA requirements.[5] *See* CP 163-175. As a result, the County was unable to present a written substantive reply brief regarding the PRA in connection with its motion for summary judgment. CP 141-43.

Oral argument was held before the Honorable Judge Carrie Runge on October 10, 2014, after which Judge Runge granted the County's motion for summary judgment, denied Ms. Zink's motion to dismiss, and

[5] These arguments relied solely on RCW 42.56.100 and .120, and did not mention RCW 42.56.070 or .080. *See* CP 163-175.

entered a declaratory judgment. CP 215-19; 212-14; 220-21. The trial court's declaratory judgment states:

> 1. Washington's Public Records Act (PRA), chapter 42.56 RCW, allows Benton County to hire a third party vendor to create electronic records from records it possesses only in paper form and from electronic records that must be redacted and to charge Ms. Zink twenty-five cents per page[6] or the actual cost, whichever is less, to have such electronic records created if she requests responsive documents be provided in electronic form.
> 2. The PRA does not require that Benton County create or pay someone to create additional records that the County possesses in paper form only; and
> 3. The PRA does not require that Benton County create or pay someone to create additional electronic records from records that the County possesses in electronic form, but that it appropriately redacts under the terms of the PRA.

CP 220-21.

III. STANDARD OF REVIEW

The County concurs that the trial court's legal conclusions reflected in its declaratory judgment are subject to de novo review.

[6] The twenty-five cents per page was based on the undisputed evidence that the County received three quotes for the price to scan and create electronic documents, and the best quoted price was twenty-five cents per page. CP 124-25. The County charges fifteen cents per page for in-house copying of paper copies. CP 117. Consequently, Ms. Zink's unsupported allegation that producing electronic copies costs the County less than producing paper copies is clearly inaccurate. *See* Brief of Appellant, p. 23.

IV. ARGUMENT

A. THE TRIAL COURT HAD AUTHORITY UNDER CHAPTER 7.24 RCW TO ISSUE A DECLARATORY JUDGMENT.

1. The Declaratory Judgments Act Exists for Situations Like The One Before the Court.

When the County offered to have electronic records created to accommodate Ms. Zink, she refused and indicated she would not reimburse the County for the cost to have that done.[7] *See* CP 105; CP 5 and 32 (¶¶20). Ms. Zink then expressly or implicitly threatened on or about six different occasions to sue the County for violating the PRA by not providing her with all requested records in electronic format, despite her refusal to reimburse the County for its actual costs to create those records. *See* CP 5-6 and 33 (¶¶23); CP 81, 83, 85, 87, 89 and 105.

As one prominent authority has stated,

> the declaratory-judgment remedy provides a useful solution. It gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy . . . *in cases in which a party who could sue for coercive relief has not yet done so*. . . . .
>
> The remedy made available by *the Declaratory Judgment Act* and Rule 57 *is intended* to minimize the danger of avoidable loss and the unnecessary accrual of damages and *to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued.*

[7] Responsive documents held in electronic format by the County that do not need to be redacted are e-mailed to Zink in electronic format free of charge. *See* CP 120 (¶6).

10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2751 at 456-57 (3d ed. 1998) (emphasis added) (footnotes omitted). Consequently, courts do not hesitate to issue a declaratory judgment if "one or both parties have taken steps or pursued a course of conduct which will result in 'imminent' and 'inevitable' litigation . . . ." *Id.* §2757 at 486 (quoting *Bruhn v. STP Corp.*, 312 F. Supp. 903, 906 (D. Colo. 1970)). In other words, "a declaratory judgment should be proper if it is reasonably certain that coercive litigation will ultimately take place between the parties unless a declaration is given. This generalization is seldom expressed by the courts, but may be arrived at by a consideration of [Washington] cases . . . ." 15 Orland & Tegland, WASHINGTON PRACTICE, §42:4 at 397 (1996) (footnotes omitted).

The importance of this form of relief is emphasized by the legislature's adoption of RCW 7.24.120, which states, "[t]his chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; *and is to be liberally construed and administered.*" (Emphasis added).

Ms. Zink's position seems to be that the County cannot seek a declaratory judgment because she has not sued the County, so the County

has no rights or interests at stake at this time. *See* Br. Appellant at 36-37; 40-41. Such an argument is completely contrary to and would undermine the very purpose of the Declaratory Judgments Act, which is to allow uncertainties to be resolved and avoid prejudices that frequently accompany an otherwise inherent delay in the adjudication of a party's rights. *See E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854 (8th Cir.), *cert. den.*, 300 U.S. 680 (1987) (intent of federal Declaratory Judgment Act to avoid accrual of actual damages to one not certain of his or her rights by allowing him or her to bring suit before his or her adversary does and therefore avoid damages).

The prejudice to be avoided in this case by a declaratory judgment is obvious. If Ms. Zink waits to file suit until the records request is completed years from now, then the potential penalties accruing under the PRA would be greatly increased given that such penalties are imposed on a per day basis. *See* RCW 42.56.550(6) (action must be filed only within one year of last production); RCW 42.56.550(4) (penalties may not exceed one hundred dollars for each day record denied). Such a situation is exactly type for which the declaratory judgment cause of action exists. The purpose of a declaratory judgment is "to afford one *threatened with liability* an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued." 10B Wright,

Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2751 at 456-57 (3d ed. 1998) (emphasis added) (footnote omitted).

2. Ms. Zink Refuses to Accept that RCW 7.24.010 and .020 Create an Independent Cause of Action.

Ms. Zink repeats the argument she made to the trial court, which is that a declaratory judgment is inappropriate because the County did not identify a statutory cause of action separate and apart from chapter 7.24 RCW. Br. Appellant at 33, 35-36. More precisely, she appears to believe that a declaratory judgment regarding the PRA is inappropriate unless a provision within the PRA itself affords a cause of action. Importantly, she cites no authority to support that belief.

The language of RCW 7.24.020 plainly grant persons whose rights are affected by a statute the right to seek a declaratory judgment, and RCW 7.24.010 plainly authorizes courts to declare rights and legal relations "whether or not further relief is or could be claimed." Furthermore, the Washington Supreme Court expressly rejected Ms. Zink's argument when it held that, "[o]f course, no additional private right of action is necessary for parties to seek declaratory judgment whenever their rights are affected by a statute." *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 187, 157 P.2d 847 (2007) (characterizing as "dubious" an argument that a separate private right of action is necessary); *see also*,

Edelmann, 88 F.2d at 854 (declaratory judgment "statute extended greatly the situations under which relief may be claimed").

Ms. Zink has never presented any authority for her assertion that a separate cause of action is a prerequisite to a declaratory judgment, and her assertion is simply inaccurate.

B. THE COUNTY HAD STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION.

Washington courts require that there be a "justiciable controversy" in order to invoke the court's jurisdiction to issue a declaratory judgment. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), *cert. den.*, 535 U.S. 931 (2002). The four elements of a justiciable controversy are:

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) *which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic*, and (4) a judicial determination of which will be final and conclusive."

To-Ro Trade Shows v. Collins, 144 Wn.2d at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)) (emphasis added). Inherent in these four elements are the notions of standing, mootness and ripeness. *To-Ro*, 144 Wn.2d at 411. The "third

justiciability requirement of a direct, substantial interest in the dispute encompasses the doctrine of standing." *Id.* at 414.

Ms. Zink questions whether the County has standing, but does not argue any other elements of a justiciable controversy are lacking. *See* Br. Appellant at 35, 44. Washington courts have described the concept of standing in varying ways. The case cited by Ms. Zink expresses the test for standing as a requirement that the interests at issue must "arguably [be] within the zone of interests to be protected or regulated by the statute..." and the dispute causing " 'injury in fact,' economic or otherwise, to the party seeking standing." *Grant Cnty. Fire Prot. Dist. No. 3 v. Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (quoting *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). The Court in *To-Ro* used both the "direct, substantial interest" and the "zone of interest" standing tests, indicating they are simply different ways of substantiating that a party should be allowed to bring a lawsuit. *See To-Ro*, 144 Wn.2d at 414. Yet another Washington court has expressed the doctrine of standing simply as requiring "that a claimant must have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002). The County has standing, whichever way the test is articulated.

Direct and Substantial Interest. It is difficult to imagine how one could argue that the County does not have a direct and substantial interest in this dispute with Ms. Zink regarding the interpretation of the PRA and the County's rights and obligations thereunder. If the Court affirms the declaratory judgment issued by the trial court, then the County will not need to expend additional resources, will be deemed to have complied with the PRA, and will not be subject to monetary penalties for refusing to create electronic records for her. If the Court agrees with Ms. Zink's interpretation of the County's rights and obligations under the PRA, then Zink will assert that County has violated the PRA and will request penalties.

In a similar case where a county sought a declaratory judgment asking that its duties under a statute be adjudicated, Whatcom County was held to have standing in *Whatcom Cnty. v. State of Washington*, 99 Wn. App. 237, 993 P.2d 273 (2000). In that case, that county sought a declaration that RCW 4.96.060 and .070 obligated the State and not the county to defend a civil rights action against a deputy prosecuting attorney and to indemnify the deputy for any damages. *Id.* at 240. The State argued that the county did not have standing to bring the action, but the Court disagreed. "[I]f the State [did] not defend and indemnify [the deputy], the County [would] be forced to do so." *Id.* at 241. The county's

financial interest that was contingent upon the interpretation of those statutes was held "sufficient to confer standing." *Id.*

Just as Whatcom County had a direct and substantial interest in the interpretation of the statutes at issue, Benton County has a direct and substantial interest in whether the PRA requires it to expend County resources to create electronic records and whether it may be subject to monetary penalties of potentially thousands or tens of thousands of dollars if it has incorrectly interpreted the PRA as Ms. Zink claims.

The County's Interests are Within the Zone of Interests Regulated by the PRA, and the County Will Likely Face Economic Injury if Its Interpretation is Incorrect. Ms. Zink prefers the standing test articulated in the *Grant County* case. Br. Appellant at 33. She phrases the "zone of interest" prong of that test as requiring that the County's interest be an interest "protected" by the law in question and argues that the County is not within the "zone of interest" of any statute. Br. Appellant at 34-35. She is wrong on both counts.

First, Ms. Zink fails to inform the Court that the County's interest must be one that is "arguably within the zone of interests protected *or regulated*" by a statute. *To-Ro*, 144 Wn.2d at 414 (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)) (emphasis added). Second, the PRA

certainly regulates how the County must expend its resources and respond to requests for records. Consequently, courts do entertain declaratory judgment actions brought by public agencies regarding their obligations under the PRA. *See, e.g.*, *Washington State Dept. of Transp. v. Mendoza de Sugiyama*, 182 Wn. App. 588, 330 P.3d 209 (2014) (declaratory judgment action regarding determination of whether records subject to protective order were exempt from disclosure under the PRA); *cf. United States v. Story Cnty*, 28 F. Supp.3d 861 (S.D. Iowa 2014) (United States obtained order declaring that records at issue were federal records exempted from disclosure requirements of Freedom of Information Act).

Benton County's interest in a declaration that it is not required by the PRA to create additional records, that if it elects to do so the PRA does not require that the County use its own staff and facilities, and that RCW 42.56.120 allows it to recover the actual cost charged by a third party to create the new records, are all interests certainly within the zone of interests regulated by the PRA.

Ms. Zink also argues that the County fails the "injury" component of standing set forth in the *Grant County* case. Br. Appellant at 40-41. She appears to believe that an injury must have already been occurred in order to have standing. *Id.* at 40. However, the sole case upon which her argument is based refutes that premise. In that case, the Court held that

property owners had standing to challenge an annexation because they would face higher tax rates if the annexation were upheld. *Grant Cnty.*, 145 Wn.2d at 714. Under Ms. Zink's reasoning, the property owners would not have had standing unless they had already paid a property tax bill, but there is no mention of that fact by the Court.

The Court in *Grant County* stated it "is axiomatic that parties whose financial interests are affected by an action have suffered injury." *Id.* at 713; *see also*, *Am. States Ins. Co. v. Breesnee*, 49 Wn. App. 642, 645-46, 745 P.2d 518 (1987) (uninsured motorist carrier had standing to challenge trial court declaration that another insurer did not have to provide coverage, despite no apparent payment at time of suit by uninsured carrier). Furthermore, the Washington Supreme Court has held that a *threat* to public safety posed by expanded liquor sales under I-1183 is a sufficient likely injury to confer standing. *City of Burlington v. Liquor Control Bd.*, No. 72438-0, slip. op. at 17 (Wash. Ct. App. May 26, 2015) (citing *Washington Ass'n for Substance Abuse & Violence Prevention v. State of Washington*, 174 Wn.2d 642, 278 P.3d 632 (2012)); *see also*, *Edelmann*, 88 F.2d at 854 (appropriate for alleged infringer of patent to bring declaratory judgment action against patent holder accusing it of patent infringement).

As these cases demonstrate, a party need not have already incurred an injury to have standing. It is sufficient that an adverse interpretation of the statute at issue would likely cause an injury. To require otherwise, as Ms. Zink insists, would mean that potential defendants in a dispute could not seek declaratory judgments until potential plaintiffs filed and successfully litigated the dispute. Such an interpretation would severely undercut the utility of declaratory judgments and is erroneous. *See, e.g.*, 10B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2751 at 457 (3d ed. 1998) (declaratory judgments are "intended . . . to afford one *threatened* with liability an early adjudication"); *Washington State Dept. of Transp.*, 182 Wn. App. 588 (state agency brought declaratory judgment regarding its obligations under the PRA before any penalties were sought).

In this case, Ms. Zink demands that the County utilize its staff and its facilities to create thousands of pages of electronic records for her without charge. Br. Appellant at 22-23. Ms. Zink has clearly stated her intent to seek penalties for the County's alleged violation of the PRA if the Court disagrees with the County's understanding of its rights and obligations under the law. She already attempted to seek penalties in this very action, but withdrew that request for relief when ordered to pay a filing fee in order to assert a counterclaim. CP 37; CP 43-44. Instead, she

stated that she will "just file a motion for penalties if [she] win[s]." CP 162. Thus, the County's financial interests are affected by this dispute. There can be no doubt that absent a favorable declaratory judgment, the County will have to utilize additional resources to respond to the request and will be exposed to a claim for damages. The County has standing to bring this action.

In Accord with *Kleven*, the County Certainly has a Stake in the Outcome of this Action. The simplest yet clearest test for standing is expressed in *Kleven*, which simply asks if the party seeking a declaratory judgment has a personal stake in the outcome. *Kleven*, 111 Wn. App. at 290. The County certainly has a stake in the outcome of this action and has standing under the *Kleven* test.

C. ZINK RAISES TWO ARGUMENTS ON APPEAL REGARDING THE PRA THAT WERE NEVER PRESENTED TO THE TRIAL COURT AND SHOULD NOT BE CONSIDERED ON APPEAL.

1. New Arguments and Theories Should Not Be Considered By the Court of Appeals.

It has long been the rule that an "issue, theory or argument not presented at trial will not be considered on appeal." *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (citing *Boeing v. State*, 89 Wn.2d 443, 450-51, 572 P.2d 8 (1978)); *see also*, *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (refusing to consider argument against

admission of confession based on alleged Fourth Amendment violation, because argument to trial court was based on Fifth Amendment); RAP 2.5; and RAP 9.12. The rationale for refusing to hear arguments not presented to a trial court is that trial courts should have an opportunity to avoid or correct errors and avoid unnecessary appeals. *See, e.g.*, *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5 reflects policy of encouraging efficient use of judicial resources); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

2. Ms. Zink Never Provided Any Argument to the Trial Court, in Any Form, Regarding RCW 42.56.070 or .080.

In response to the County's motion for summary judgment, Ms. Zink moved to dismiss and submitted a memorandum arguing that the County lacked standing to seek a declaratory judgment. CP 130-40. She did not present any written argument regarding the requirements of the PRA. *Id*; *see also* RP at 47 ("I put all my baskets in my standing [argument]"). She did inappropriately present minimal argument citing RCW 42.56.100 and .120 in her reply brief in support of her motion to dismiss for lack of standing. *See* CP 171-73; RP at 28; *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (reply briefs are limited to explaining, disproving or contradicting the non-moving party's evidence or arguments). She also presented limited oral argument

regarding RCW 42.56.100 and .120 at the summary judgment hearing. RP at 19, 39-51. However, no argument whatsoever was ever presented to Judge Runge based on the language of RCW 42.56.070 or .080.

On appeal, however, the entire section D of Ms. Zink's brief is based on a difficult to understand argument regarding the meaning of RCW 42.56.070. *See* Br. Appellant at 24-29. Because Ms. Zink never made any such argument to the trial court, in writing or orally, section D of Ms. Zink's brief should not be considered on appeal.[8]

Similarly, in section C of Ms. Zink's brief, she cites to RCW 42.56.080 in support of her appeal. Br. Appellant at 21-23. Again, she never made any argument whatsoever regarding if or how that provision should cause the trial court to deny the County's motion for summary judgment. Consequently, any argument based on RCW 42.56.080 should also not be considered on appeal.[9]

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[8] Even if the Court were to consider her argument regarding RCW 42.56.070(7), Zink's argument is nonsensical. RCW 42.56.070 simply outlines what costs may be charged when an agency makes copies using its own facilities and staff. It does not expressly prohibit or even imply that an agency cannot have copies made by a third party.

[9] Again, even if the Court were to consider RCW 42.56.080, that provision provides no basis for reversing the trial court decision. Ms. Zink quotes only a portion of one sentence from that section. That entire sentence reads: "Agency facilities shall be made available to any person for the copying of public records *except when and to the extent that this would unreasonably disrupt the operations of the agency*" (emphasis added). First, because Ms. Zink never requested to use County facilities to create electronic records for her, this provision has no relevance. Second, if she had requested to use County facilities to scan and save electronic documents, the County could have and would have denied such request to avoid the disruption of having Ms. Zink using County computers to create new records and adding hundreds or thousands of additional documents to the County's server. CP 121-22; CP 128.

D. THE TRIAL COURT'S RULING AND DECLARATORY JUDGMENT THAT THE PRA ALLOWS THE COUNTY TO HIRE A THIRD PARTY VENDOR TO CREATE ELECTRONIC RECORDS FOR MS. ZINK ARE CONSISTENT WITH RCW 42.56.120 AND THE COUNTY CODE.

Ms. Zink also cites RCW 42.56.120 and argues that because it does not expressly authorize that copies may be made by third parties, all copies must be made by an agency itself. Br. Appellant at 21-22. She made the same argument to the trial court. CP 171-73; RP at 45. She cites no authority in support of her argument that the failure of RCW 42.56.120 to describe or identify who can or must make copies of public records means an agency must use its own staff to create new electronic records.[10]

1. Neither the State nor Local Law Prohibit Public Agencies From Outsourcing the Task of Reproducing or Creating Records and Recouping the Actual Costs thereof.

Ms. Zink does not and cannot cite to any PRA provision stating or even implying that agencies are obligated to copy or scan documents with their own staff and equipment, and the County is not aware of any court that has held that copying or scanning services necessary to provide public records to a requestor must be done by agency personnel or with agency equipment.

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[10] RCW 42.56.120 simply states that a "reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment . . . ."

Furthermore, the PRA not only authorizes but it mandates that public agencies adopt and enforce reasonable rules "consonant with the intent of [the PRA] to provide full public access to public records, to protect public records from damage or disorganization, *and to prevent excessive interference with other essential functions of the agency* . . . ." RCW 42.56.100 (emphasis added).

Therefore, in 2006, Benton County adopted Chapter 5.14 of the Benton County Code ("BCC") in order to satisfy its statutory mandate. It adopted BCC §5.14.120(c), obviously with an eye towards allowing access to records while preventing excessive interference with County operations, which states that "[a]ny request for more than twenty-five (25) pages of documents, . . . may be sent by the County to a private copy shop for copying, in which case the fee shall be the actual charge imposed for copying . . . ." CP 118. Ms. Zink fails to acknowledge this language and makes the unsupported and erroneous argument that the County code allows use of an outside vendor only if copies cannot be made with the County's equipment. Nothing in the language of BCC §5.14.120(c) supports that argument. CP 118.

The legislature also directed the Washington Attorney General to adopt advisory rules to assist agencies with the creation of these local rules. *See* RCW 42.56.570. The County code authorizing the outsourcing

of large copying requests of over 25 pages is consistent with the Attorney General's model rules that states:

> An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. . . . The default rate [of fifteen cents per page] is only for agency-produced copies.

WAC 44-14-07001(5).

Importantly, both the BCC and the Attorney General's advisory model rule are consistent with RCW 42.56.120, which states that a "reasonable charge may be imposed for providing copies of public records . . . , which charges shall not exceed the amount necessary to reimburse the agency . . . for its *actual costs* directly incident to such copying." RCW 42.56.120 (emphasis added). Washington courts have recognized this provision allows an agency to charge requestors in order to be reimbursed for charges the agency pays to third parties to satisfy a request. *See Gronquist v. Dept. of Corrections*, 159 Wn. App. 576, 583-84, 247 P.3d 436, *rev. den.*, 171 Wn.2d 1023 (2011) (when affirming charge to reimburse postage costs when agency refused to allow on-site inspection, the court stated "agency may impose a reasonable charge for providing copies of public records, so long as the charges do not exceed the amount necessary to reimburse the agency for its actual costs incident to such copying. RCW 42.56.120."). Nothing in the PRA requires agencies to

use their own staff to make records available to requestors, and RCW 42.56.120 allows it to recover charges by third parties incurred to satisfy a request.

Ms. Zink has cited to absolutely no authority that expressly prohibits or even implies that the County is prohibited from using outside vendors to create electronic records or copies of records requested by someone. In short, the PRA simply does not require agencies use their own staff. For these reasons, the trial court correctly issued a declaratory judgment that, as a matter of law, the PRA allows the County to have a third party vendor create electronic records from the County's paper records and from its electronic records that must be redacted and to charge Ms. Zink the actual cost of such service.

2. Benton County's Voluntary Offer to Create the Requested Documents in Electronic Format Was Not Required, But It Was a Reasonable Proposal.

It is important to remember that: 1) Ms. Zink's request requires that decades' worth of criminal files in the Prosecutor's Office be searched in order to locate all responsive documents; and 2) the vast majority of the responsive documents are not possessed in electronic format. *See* CP 121. Ms. Zink initially inquired about but did not demand that the County provide all documents in electronic format. After receiving several installments in paper format, she then insisted that she receive all

responsive documents in electronic format. *See* CP 95; CP 5-6 and 41 (¶18).

If required to personally create the electronic records Ms. Zink seeks from the County's paper and electronic records that must be redacted, the Prosecutor's Public Records Officer would have: a) printed all original electronic documents; b) copied all responsive paper documents; c) physically made the necessary redactions; and d) scanned each page and saved the newly created electronic documents on the County's data storage server. CP 121-22 (¶¶13-14); CP 128.

Given the extreme breadth of Ms. Zink's request for thousands and perhaps tens of thousands of pages of documents assembled over the course of several decades, the County declined to expend the additional resources necessary to internally create the new electronic documents demanded by her.[11] Although not legally required to create electronic documents for Ms. Zink, the County attempted to satisfy her desire for electronic documents through the use of a commercial vendor. The County contacted three local vendors to obtain price quotes for this service. CP 124-25. The lowest quote received to scan and provide the County with electronic documents was 25 cents per page. CP 125. This

[11] These resources consist of staff time to perform the scanning as well as space on the County's servers to save the electronic documents. CP 128.

was the price the County offered to charge Ms. Zink if she wanted the County to create electronic documents for her. CP 97.

The County's proposal was consistent with BCC §5.14.120(c) as well as WAC 44-14-07001(5). Although creating electronic records is not required of the County, it is within the County's prerogative and a commendable policy decision, to offer to do more for Ms. Zink than is required by the letter of the PRA. This type of conduct is expressly contemplated by the model rules. *See* WAC 44-14-04001 (agencies are allowed to do more for requestors than required by the letter of the Act). Ms. Zink, however, refused the County's offer and stated she would not reimburse it for the cost of scanning services. CP 105.

E. THE TRIAL COURT CORRECTLY RULED THAT THE PRA DOES NOT REQUIRE THAT THE COUNTY CREATE OR PAY SOMEONE TO CREATE ADDITIONAL ELECTRONIC RECORDS FROM RECORDS IT POSSESSES IN ELECTRONIC FORMAT BUT THAT MUST BE REDACTED.

1. Washington Courts Have Held that Electronic Records that Must be Redacted Need Not be Provided in Electronic Format.

Under BCC §5.14.100, if an electronic record "necessitates redaction due to an exemption [under the PRA], the County is under no obligation to provide the record electronically." *See* CP 115. When previously advised of County regulations regarding public records, Ms.

Zink's response has been that the County code does not trump the PRA. She may be correct.

However, the PRA also does not require that the County provide to Ms. Zink in electronic format electronic documents that it must redact. Ms. Zink cannot point to any statutory provision that contravenes the above quoted County code provision. More importantly, Washington courts have, on more than one occasion, issued holdings identical to BCC §5.14.100.

In *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009), *rev. den.*, 169 Wn.2d 1007 (2010), Division I of the Court of Appeals addressed a request that e-mails of certain city council members be provided in electronic format. The Court of Appeals first noted that no PRA provision expressly requires agencies to provide *any* records in electronic format. *Mechling*, 152 Wn. App. at 849 (emphasis added). The Court then held that "as to properly *redacted* e-mails, we reject Mechling's argument that the City has an obligation to scan e-mails to create PDF or TIFF files."[12] *Id.* at 850 (emphasis added).

[12] With respect to *unredacted* e-mails, the Court remanded the matter back to the trial court to analyze whether it was reasonable and feasible for the city to provide unredacted e-mails in electronic format. *Mechling*, 152 Wn. App. at 850. However, this part of the holding is immaterial with respect to Ms. Zink's request, because the County promptly provides her with electronic copies of responsive electronic records that it has not redacted and will continue to do so when processing this request. CP 120 (¶ 6).

Two years after *Mechling*, the issue of whether redacted electronic documents must be provided in electronic format was before Division II of the Court of Appeals. In *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 277 P.3d 670 (2011), an inmate requested that all data pertaining to him from two electronic databases be provided in electronic format. *Mitchell*, 164 Wn. App. at 600. The Department of Corrections ("DOC") responded that the responsive electronic records had to be redacted and therefore would not be provided in electronic format. *Id.* at 601. The inmate sued, and the Court first noted that the Court in *Mechling* "rejected the contention that an agency could be required to electronically disclose redacted e-mails that would need to be scanned back into electronic format after being redacted." *Id.* at 607. Consistent with *Mechling*, the Court in *Mitchell* held that DOC was not obligated by the PRA to provide in electronic format the responsive electronic documents that must be redacted. *Id.* at 607. The Court reasoned that requiring DOC to provide such documents in electronic format "would force the agency to print the records, redact them, and then scan them back into electronic format. Following *Mechling*, we hold that such duplication of effort is outside of the agency's obligation of 'fullest assistance' under the PRA." *Id.*

Ms. Zink is fully aware of these cases that are directly on point, yet she does not address them in her appeal brief. *See* RP at 43-44; *see*

generally Br. Appellant. And she did not cite any contrary authority to the trial court.[13] Consequently, she has not and cannot avoid the holdings of *Mechling* and *Mitchell.*

2. The Attorney General's Model Rules Are Consistent with These Judicial Rulings.

Ms. Zink tries to create the impression that the Attorney General agrees with her position that the County is obligated to create electronic copies of redacted electronic documents. Br. Appellant at 28-29. The Attorney General's model rules say no such thing, however.

In fact, the Attorney General's model rules are consistent with *Mechling* and *Mitchell.* First, the model rules state that "[a]n agency is not obligated to create a new record to satisfy a records request." *See* WAC 44-14-04003. Just as the agencies would have printed, redacted and scanned in *Mechling* and *Mitchell* in order to create new electronic records for the requestor, the Prosecutor's Public Records Officer would do the same for Ms. Zink if that officer was required to create records in electronic format. CP 121 (¶13).

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[13] She initially intimated to the County prior to this litigation that the case of *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), required the County to create electronic records. *See* CP 73. She was correctly informed by the County, however, that the *Resident Action Council* case only held that a trial court did not abuse its discretion when it ordered an agency that had violated numerous PRA terms to provide records electronically when fashioning a remedy to cure such violations. *See* CP 97. Ms. Zink apparently understands that the *Resident Action Council* case is not on point (it does not even discuss *Mechling* or *Mitchell*), as she elected not to cite the case in support of her argument on this issue to either the trial court or this Court.

Second, Ms. Zink misleadingly quotes WAC 44-14-05001. Br. Appellant at 28. It is true that rule states, "[i]n general, an agency should provide electronic records in an electronic format if requested in that format." The County has complied with this direction with respect to all the responsive electronic records it has located that did not need redacted. CP 120 (¶6). What Ms. Zink fails to point out to the Court is that the Attorney General gives examples of when electronic copies must be created and states, "[t]he following examples *assume no redactions* are necessary." WAC 44-14-05002(2)(c) (emphasis added). That language obviously exists so as to be consistent with WAC 44-14-04003 and with the courts' holdings in *Mechling* and *Mitchell.*

Thus, under the County code, *Mechling*, *Mitchell*, and the Attorney General's model rules, the County is not obligated to duplicate its efforts and create new electronic records for Ms. Zink from electronic records that it must redact, and the trial court correctly issued a declaration so stating.

F. THE TRIAL COURT ALSO CORRECTLY RULED THAT THE PRA DOES NOT REQUIRE THAT THE COUNTY CREATE OR PAY SOMEONE TO CREATE ELECTRONIC RECORDS FROM RECORDS IT POSSESSES IN PAPER ONLY FORMAT.

If ordered to create electronic records from the vast majority of the responsive records held by the County in paper only format, the

Prosecutor's Public Records Officer would scan the documents and save them onto the County's data storage system. CP 128. Just as creating a new version of an electronic record when an electronic record must be redacted is outside of the "fullest assistance" requirement under the PRA, the PRA does not require that paper records be redacted and then electronic records be created from them. This too would be beyond the PRA's call for the "fullest assistance." *Cf. Mitchell*, 164 Wn. App. at 607. This is particularly understandable when viewed in light of very broad records requests like Ms. Zink's. Ms. Zink has asked for thousands and perhaps tens of thousands of pages of documents that the County possesses in paper format only. If required to do as Zink demands, the County would be forced to create hundreds or perhaps thousands of additional public records to be stored by the agency. CP 121-22 (¶¶11-14); CP 128.

Requiring agencies like the County to expend its resources to create thousands of pages of additional records in electronic format for the sake of requestors' convenience could excessively interfere with agencies' operations and would not be good public policy.

That is why no provisions in the PRA state or even imply that an agency has to create a new record to satisfy a records request. Washington courts have repeatedly held that the PRA does not require agencies to

create records in response to requests. *See Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004); *Smith v. Okanogan Cnty.*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000).[14] The Washington Attorney General also advises that agencies are not obligated to create new records to satisfy requests. *See* WAC 44-14-04003(5) (citing *Smith v. Okanogan Cnty.*).

As of the date of the summary judgment hearing in this case, Benton County had located 66 responsive records it had in paper only format. CP 121 (¶12). If required to meet Ms. Zink's demand to create electronic versions of the documents it has located and that it continues to locate as it processes this request, the County would need to create hundreds or perhaps thousands of additional public records that would be distinct and different from the paper copies it already has. The new electronic records would have different creation dates than the original paper versions, would contain metadata that currently does not exist, would be subject to future records requests, and would utilize storage space on the County's server. *See* CP 128.

[14] In *Smith*, the court noted that under the federal Freedom of Information Act, "an agency is not required to create a record . . . . We agree and determine there is also no such duty under the State Act." *Smith*, 100 Wn. App. at 13-14 (citation omitted). In that case, the requestor was seeking a list of all employees of a prosecutor's office with job titles and descriptions, rates of pay, etc. The court held that the agency did not have to create that record for the requestor.

Ms. Zink's demand that the County create electronic records for her has no legal basis. The PRA does not require new records be created in response to requests. Washington courts have expressly acknowledged that is the law. The trial court correctly issued a declaratory judgment that, as a matter of law, the County is not obligated by the PRA to create electronic records from records it holds in paper only format.

V. CONCLUSION

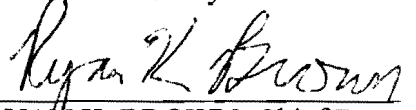
Ms. Zink has requested thousands of pages of documents that will take the County years to locate. Most of those documents are held only in paper format. Of those that the County does have electronically, nearly all must be redacted. In addition to asking the County to locate all these documents, she also wants the County to spend its time and resources to create electronic versions of these documents free of charge.

Ms. Zink has made it clear she intends to force the County to do so and sue it for penalties for its failure to do so to date. However, the trial court correctly declared that the PRA does not require the County to use its own staff and equipment to create these records and that it can recover from her the costs a third party charges if it agrees to do so. It also correctly ruled that the PRA does not require the County to have anyone create electronic records from the paper records it has or from the electronic records it has that must be redacted. Such rulings are consistent

with all the legal authority presented to the trial court, and its declaratory judgment should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

ANDY MILLER
Prosecuting Attorney
for Benton County



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Donna and Jeff Zink P.O. Box 263 Mesa, WA 99343	☒ U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington this 5th day of June, 2015.

Courtney Sheafer
Appellate Secretary