No. 94271-4

SUPREME COURT
OF THE STATE OF WASHINGTON

GEORGE E. FAILING COMPANY, dba GEFCO, a division of Blue Tee Corp., a Delaware corporation,

Respondent,

v.

CASCADE DRILLING, INC., a Washington corporation,

Petitioner,

BRUCE NIERMEYER,

Aggrieved Non-Party/Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Susan Craighead

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After three years defending against counterclaims lodged by Cascade Drilling, Inc., Gefco discovered that Cascade and its president, Bruce Niermeyer, had misrepresented critical facts regarding the repair history of the equipment at issue and fabricated the physical evidence they had produced. Cascade then abruptly dismissed its counterclaims, to which this evidence had been central. After an evidentiary hearing on Gefco's motion for sanctions, the trial court determined it would sanction Cascade for bad-faith litigation, under its inherent powers to control and manage proceedings and parties. The trial court entered a judgment against Cascade and Niermeyer of over $1.6 million, representing a portion of the fees and costs needlessly expended by Gefco in defending against Cascade's counterclaims.

Cascade and Niermeyer untimely raised in the trial court the issues they now raise in their petition for review, thus waiving consideration of these issues by the Court of Appeals or this Court. Even absent waiver, review would be unwarranted because the Court of Appeals' unpublished decision neither conflicts with precedent nor raises an issue of substantial public interest that this Court should resolve. *See* RAP 13.4(b). There is no Washington precedent for applying a heightened standard of proof before a trial court may exercise its inherent powers, and recent federal decisions counsel against doing so. The doctrine of unclean hands does not apply in these circumstances, per long-established precedent. And the

trial court correctly determined the legally applicable rate of post-judgment interest.

This Court should deny Cascade and Niermeyer's petition for review.

II. COUNTERSTATEMENT OF THE CASE

A. After litigating Cascade's counterclaims for three years, Gefco discovered that Cascade and its president, Bruce Niermeyer, fabricated the physical evidence they had produced to support Cascade's counterclaims.

Gefco manufactures and sells portable drilling rigs, including the "50K" model. *See* CP 2991. Cascade bought a 50K rig from Gefco in 2004, CP 4449-56, and used it to drill water wells for customers in California, including at Wheeler Canyon in 2008. CP 1475 (FOF 6).

Four pumps on the rig maintained hydraulic pressure to enable different functions used in drilling. CP 1475 (FOF 5). At issue in this litigation were two steel drive shafts that spun the four pumps. The input shaft of each hydraulic pump was inserted into either end of a drive shaft. CP 1475 (FOF 5). The drive-shaft ends were female, with interior splines that fit precisely with the exterior splines of a male pump input shaft, allowing the drive shafts to exert their torque and spin the pumps. CP 1475 (FOF 5), 1479 (FOF 33). *See also* CP 4909 (diagram). During Cascade's Wheeler Canyon job, the two original drive shafts and their two replacements failed, in that the splines were stripped out through interaction with the attached pump input shafts. CP 323, 1475 (FOF 7-8).

Cascade's mechanic, Charles Rider, replaced each failed drive shaft at Wheeler Canyon, together with associated pumps. CP 1475 (FOF 9-10), 4897-98. He obtained the replacement drive shafts from Gefco. CP 861-64. He traded in the old pumps for rebuilt ones from a supplier called Western Hydrostatics. RP (11/1/12) 637-38; CP 1475-76 (FOF 10, 15), 4872; Exh. 23 at 103. He saved the latter three failed drive shafts in a box in his shop and eventually shipped them all to Cascade's president, Bruce Niermeyer. CP 1475 (FOF 9-10), 4876, 4897-98.

In mid-2009, after Gefco sued Cascade to collect an unpaid invoice for less than $40,000 in parts for a different rig, CP 1-8, Cascade counterclaimed alleging various torts and violation of the Consumer Protection Act and seeking millions of dollars in damages based on the drive-shaft failures at Wheeler Canyon. CP 13-17, 3382-88. Cascade alleged essentially that the splines failed quickly because the metal was too soft. CP 3383. For the next three years, the parties vigorously litigated Cascade's counterclaims.

Gefco, along with drive-shaft manufacturer Hub City (then a third-party defendant, CP 28-29), consistently sought discovery of all maintenance records for Cascade's 50K rig. CP 1476 (FOF 14). The records Cascade initially produced disclosed no drive-shaft or pump replacements predating the Wheeler Canyon job. CP 1476 (FOF 14); RP (10/31/12) 507. Both Niermeyer and Rider attested that Cascade made no significant repairs to the 50K before Wheeler Canyon, and specifically replaced no drive shafts or pumps. CP 4279-80, 4894.

Testifying for Cascade, Niermeyer identified particular drive shafts produced by Cascade as the second, third, and fourth to fail at Wheeler Canyon, in the supposed order of their failure. CP 1475 (FOF 12); CP 4226-27, 4232-37, 4896. Corresponding with this same order, Cascade had stamped "2," "3," and "4," respectively, into the metal. CP 3493, 4877. Based on Niermeyer's representations, and at significant expense, experts for Gefco and Hub City then examined and tested the shafts to determine causation of the failures. *See* CP 4351-59; RP (10/30/12) 331.

In mid-2012, after nearly three years of litigation, including significant discovery, persistent investigation led Gefco to depose Starke Scott, owner of Western Hydrostatics. CP 1476 (FOF 15), 4868. Scott had kept records of the first pumps Rider had removed from the 50K at Wheeler Canyon, and the serial numbers showed that the pumps were manufactured in 2005 and 2007—*after* Cascade bought the rig from Gefco. CP 4868-69; *see also* CP 1896-1902, 1904-07. This meant that, contrary to Niermeyer's and Rider's deposition testimony, Cascade *had* replaced pumps before the Wheeler Canyon job, reattaching them to the original-equipment drive shafts. CP 1476 (FOF 16).

Around the same time, Gefco and Hub City produced expert reports that concluded it was *physically impossible* that the drive shafts produced by Cascade and identified by Niermeyer were the ones that had failed at Wheeler Canyon. In his report, materials-science professor David Howitt, Ph.D., offered two independent reasons for this conclusion. *First*, the second shaft to fail at Wheeler Canyon had reportedly been attached to

one kind of pump (a "mud" pump), but wear patterns in the damaged drive-shaft splines showed that *all three* had been attached to a different kind of pump with a distinctive input shaft (a "pull-down" pump). CP 4972-75. *Second*, the drive shaft represented as being the first to fail at the mud-pump connection was conclusively shown *not* to have been original equipment on the 50K because it was manufactured by a company that made only replacement parts. CP 1480 (FOF 37), 4973-74. *See also* CP 4260-61.

Following these revelations, the trial court authorized Gefco to re-depose Rider on the existence of pre-Wheeler Canyon repairs and ordered Cascade to produce all related documents. CP 3752, 4996. On the eve of Rider's deposition, Cascade produced, from its own records, Western Hydrostatics invoices for the pumps Cascade had replaced before Wheeler Canyon and Rider's timesheets showing that he had done the work. CP 4192, 4283-88. Recanting his prior testimony, Rider admitted at the deposition that he had replaced the two pumps before Wheeler Canyon. CP 4875-76.

Two other significant facts came out at Rider's new deposition. First, Rider admitted he had not marked or tagged any of the three failed drive shafts he saved at Wheeler Canyon and had no way to identify which shaft was from which failure. CP 4876, 4897-98. Moreover, he had told Niermeyer he could not identify the shafts and could not explain how Niermeyer could purport to attest to the order of failure as he did. CP 4877. Second, Rider testified that, contrary to directions from Gefco, he

had installed the replacement drive shafts with zero "end play," meaning he left no space for heat expansion. CP 4865, 4871; RP (10/29/12) 24-25, 105-06, 166.

As to the latter fact, in his testimony at the eventual evidentiary hearing on sanctions, Dr. Howitt would identify this as yet another reason why at least two of the three drive shafts Cascade produced could not have been the ones that failed at Wheeler Canyon: shafts installed with zero end play that failed quickly should have shown evidence of oxidation—called "blueing"—from the extreme heat caused by friction, but no blueing was visible on any of the shafts produced by Cascade. RP (10/29/12) 166; RP (10/31/12) 487.

Just three days after Rider's deposition, Cascade agreed to dismiss voluntarily its counterclaims against Gefco. CP 4197, 4290. Soon thereafter, Cascade paid in full Gefco's invoice that had given rise to the lawsuit, with interest. CP 264.

B. After an evidentiary hearing, the trial court exercised its inherent powers to sanction Cascade and Niermeyer for bad-faith litigation.

Gefco and Cascade moved for sanctions against each other. Gefco sought sanctions based on Cascade's failure to disclose the 50K's repair history and its falsification of the drive-shaft evidence. CP 345-73. Cascade alleged that Gefco wrongfully withheld discoverable facts pertinent to Cascade's counterclaim, ostensibly relevant to show Gefco knew that other customers had complained about its drive shafts. CP 374-402. Judge Susan J. Craighead, who had presided over the litigation and

was closely involved with discovery matters, held a four-day evidentiary hearing on Gefco's motion. *See* RP (3/16/12) 70-71.

At the hearing, Dr. Howitt demonstrated his conclusions, using the physical drive-shaft parts produced by Cascade, and opined that the Cascade had falsified the evidence by substituting shafts from other rigs. RP (10/30/12) 288-300. *See* CP 1478-81 (FOF 29-41). (The actual failed shafts probably showed evidence of misuse, including blueing.) Cascade presented conflicting expert testimony based on microscopic analysis. CP 1481-82 (FOF 42-48). Niermeyer testified that the sequential numbers Cascade stamped into the shafts were never meant to indicate the order of failure and that the shaft stamped "3" was actually from the second failure. CP 795; RP (11/1/12) 612, 615. Although Rider did not testify, Cascade submitted a last-minute declaration from him, claiming that Niermeyer had "refreshed" his recollection and that he had, in fact, marked the shafts by order of failure, with handwritten marks. CP 1373.

In its findings of fact and conclusions of law, the trial court found that Niermeyer was not credible and rejected his story. CP 1477, 1481 (FOF 22, 43). The court found that Cascade "failed to admit candidly that there was no way to be sure which shaft came from which failure (assuming that the shafts all came from the 50k rig)[.]" CP 1482 (FOF 50). The court found that Dr. Howitt was "candid" and had "impeccable" credentials. CP 1478-79 (FOF 29-30). Adopting his opinions, the court ultimately determined that "Cascade and Mr. Niermeyer fabricated the evidence upon which Cascade's counterclaims were based." CP 1488

(COL 1). The court observed that "[b]ad faith on this level exceeds any conduct described in Washington case law." CP 1488 (COL 1). The court directed Gefco to submit a fee application. CP 1489. The court ruled that Niermeyer would be personally liable for the sanction. CP 1489.

On Cascade's motion, the trial court found that Gefco had failed to produce certain documents that were responsive to discovery requests, but found that, "[i]n light of the litigation strategy and conduct of Cascade, however, Gefco's efforts to protect itself are understandable if not appropriate." CP 1487 (FOF 88). The court further found it "difficult to conclude that Gefco's transgressions prejudice[d] Cascade's case[,]" given that "Cascade's counterclaims would have been fatally undermined had it been candid about the provenance of the shafts" it had produced. CP 1487 (FOF 89). The court ordered Gefco to pay $10,000 to the Jon and Bobbe Bridge Drop-in Child Care Center at the Maleng Regional Justice Center. CP 1489 (COL 6). Gefco paid the sanction. CP 4997-99.

C. After the trial court made its decisions, Cascade and Niermeyer untimely raised the issues they now raise in their petition for review.

In response to Gefco's fee application, citing no authority, Cascade argued for the first time that the doctrine of unclean hands should bar a sanction in the form of a monetary award to Gefco. CP 2256-57. Implicitly rejecting this untimely argument, the trial court entered findings of fact and conclusions of law and ordered Cascade to reimburse Gefco $1,641,721 of the fees and costs it had spent litigating Cascade's

counterclaims, CP 2315—about 55% of the nearly $3 million Gefco initially requested. CP 1598.

Gefco moved to amend the judgment to state that Niermeyer was personally liable, consistent with the earlier findings of fact and conclusions of law, and to confirm that the applicable rate of post-judgment interest was 12% per annum under RCW 4.56.110(4). CP 4159-62. Without addressing the interest-rate issue, Cascade responded mainly by contesting that it committed the sanctionable misconduct already found. CP 2318-29. Cascade argued for the first time in this response that a finding of fabrication of evidence for purposes of imposing a sanction is a finding of fraud that must be proven by clear and convincing evidence. CP 2320.

After the court granted Gefco's motion, Cascade and Niermeyer moved under CR 59(h) to amend the judgment to change the post-judgment interest rate from 12% to the rate applicable to judgments founded on tortious conduct under RCW 4.56.110(3)(b), then 5.25%. CP 4166-68. The court declined to change the interest rate. CP 3281-82. Cascade and Niermeyer appealed.

D. The Court of Appeals affirmed in an unpublished opinion.

The Court of Appeals issued an unpublished opinion, finding no error and affirming the judgment in total, but declining Gefco's request for fees and costs on appeal. Slip Op. 18. The Court denied Cascade and Niermeyer's motion to publish the decision.

As to the issues Cascade and Niermeyer now raise, the Court held that they had waived the standard-of-proof issue in the trial court, but nevertheless proceeded to apply the advocated clear-and-convincing standard to the fabrication-of-evidence finding and affirmed on that basis. Slip Op. 9-14. The Court rejected Cascade and Niermeyer's argument that the doctrine of unclean hands barred the trial court from awarding fees and costs to Gefco as a sanction. Slip Op. 14-15. The Court also rejected Cascade and Niermeyer's argument that the trial court erred in setting the post-judgment interest rate. Slip Op. 15-16.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Cascade[1] waived its standard-of-proof issue and, in any event, review is not warranted.

1. Cascade waived its objection on the standard-of-proof.

A trial court may impose sanctions for bad-faith litigation under its inherent power to control and manage proceedings and parties. *State v. Gassman*, 175 Wn.2d 208, 210-011, 283 P.3d 1113 (2012). Cascade contends that, if the alleged bad faith would constitute fraud, it must be established under a heightened standard of proof, *i.e.*, clear and convincing evidence. But as the Court of Appeals correctly found, Cascade failed to preserve this issue for appellate review.

Gefco requested sanctions based on bad-faith litigation by Cascade, including fabrication of evidence. CP 345-72. Cascade did not

[1] From this point forward, following the example of the Court of Appeals, Gefco will use "Cascade" to refer to both Cascade and Niermeyer.

argue that Gefco had to satisfy a heightened standard of proof until after the evidentiary hearing and after the trial court had found that Cascade fabricated evidence. Slip Op. 10. Indeed, it first raised the issue *more than a year* after the court had made that finding, long after the deadline to seek reconsideration. CP 2320. The Court of Appeals correctly held that, as a result of Cascade's failure to raise the standard-of-proof issue timely, the question before the trial court was whether Cascade's bad-faith litigation was shown by a preponderance of the evidence. Slip Op. 10. *See River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (holding that the trial court has discretion to refuse to consider an argument first raised on reconsideration).

In its petition for review, Cascade fails to acknowledge the timeliness problem or the Court of Appeals' determination that it waived the issue. Because of this waiver, review by this Court is unwarranted.

2. The Court of Appeals affirmed under the standard advocated by Cascade.

Even assuming Cascade had preserved its standard-of-proof issue for review, the criteria for review by this Court are not met for two reasons:

First, the Court of Appeals determined that the trial court's findings of bad-faith litigation were a sufficient basis to affirm the sanction imposed, even *setting aside* the ultimate finding of fabrication of evidence. Slip Op. 9 ("These findings alone constitute substantial

evidence supporting the trial court's finding that Cascade engaged in bad faith litigation."). Cascade fails to acknowledge this.

Second, the Court of Appeals separately reviewed the fabrication finding under the clear-and-convincing standard advocated by Cascade and held it was "affirmable" on that basis. Slip Op. 10. After four full pages of analysis of the record, the Court of Appeals determined that "clear, cogent, and convincing evidence supports the court's determination that Cascade fabricated evidence and that the fabrication supported the finding of bad faith." Slip Op. 14. The evidence highlighted by the Court of Appeals included the physical facts demonstrated by Dr. Howitt at the evidentiary hearing and personally observed by Judge Craighead. Slip Op. 10-11. Because the Court of Appeals applied the standard advocated by Cascade, there can be no decisional conflict and no issue for this Court to review.

Even so, Cascade asserts that the Court of Appeals applied the clear-and-convincing standard *incorrectly*. This similarly presents no decisional conflict or other basis for review by this Court. In any event, the reasons Cascade offers are without merit.

First, in asserting that the Court of Appeals' decision "does not acknowledge the 'highly probable' standard of review," Petition at 10, Cascade confuses standard of review with standard of proof. "Highly probable" is not a standard of review but rather is simply another way of stating the clear-and-convincing standard of proof. *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) ("[C]lear, cogent and convincing

evidence….is the equivalent of saying that the ultimate fact in issue must be shown by evidence to be 'highly probable.'"). Findings of fact are reviewed for substantial evidence to support them under the applicable standard of proof. *See id.*

Second, the Court of Appeals properly rejected the notion that the trial court's findings demonstrated a misunderstanding of the evidence. As the Court of Appeals noted, there is a presumption in favor of a trial court's findings. *See* Slip Op. 7, 12, citing *State v. Merrill*, 183 Wn. App. 749, 755, 355 P.3d 444 (2014). And findings will be construed as consistent with the evidence, even if they suffer from an "occasional lack of precision as to terminology." Slip Op. 12. *See also Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983) (quoting *Shockley v. Travelers Ins. Co.*, 17 Wn.2d 736, 743, 137 P.2d 117 (1943)) ("[W]hen the language of findings is equivocal and susceptible of…another construction, the findings will be given that meaning which sustains the judgment rather than one which would defeat it.").

Third, Cascade argues that the Court of Appeals failed to scrutinize the trial court's resolution of fact issues based on a finding that Niermeyer was not credible. But the Court of Appeals did not rely on that finding in its review of the fabrication finding for clear and convincing evidence. *See* Slip Op. 10-14.

3. There is no Washington precedent for applying a heightened standard of proof, and doing so would be contrary to recent federal decisions.

Even ignoring all of this, review is not warranted because, despite Cascade's assertion that the Court of Appeals' decision to affirm conflicts with established precedent, as the Court of Appeals observed, no Washington court has held that a heightened standard of proof must be satisfied before a trial court may exercise its inherent powers in any circumstances. Slip. Op. 10. Citing two 40-year-old *federal* decisions, Cascade asserts that bad faith in the form of fabrication of evidence must be proven by clear and convincing evidence.[2] But those decisions have been severely called into doubt.

Most recently, the United States Court of Appeals for the Seventh Circuit overruled its own prior decision and held that "a preponderance of the evidence is sufficient" to establish the basis for an inherent-powers sanction, including a fraud on the court. *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776-77 (7th Cir. 2016).[3] The court reasoned that "imposition of even severe civil sanctions that do not implicate [particularly important individual] interests has been permitted after proof by a preponderance of the evidence." *Id.* at 778 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90, 103 S. Ct. 683, 74 L. Ed.

[2] A third case cited by Cascade, *United States v. Estate of Stonehill*, 660 F.3d 415 (9th Cir. 2011), did not involve an inherent powers sanction but rather a motion to vacate a judgment based on a fraud on the court under Fed. R. Civ. P. 60(b). *Id.* at 443-44.

[3] The Seventh Circuit panel circulated its opinion to all active judges of the circuit, and none wished to hear the case *en banc*. *Ramirez*, 845 F.3d at 781.

2d 548 (1983)). The court further reasoned that "any standard other than a preponderance of the evidence 'expresses a preference for one side's interests,'" and the clear-and-convincing standard "would reflect an unwarranted preference" for the party accused of misconduct. *Id.* (quoting *Huddleston*, 459 U.S. at 390).

In so holding, the Seventh Circuit Court was mindful of the presumption that the burden of proof in civil cases is proof by a preponderance of the evidence, "a presumption reinforced by the Supreme Court's repeated rejection of more demanding evidentiary burdens in the civil setting." *Ramirez*, 845 F.3d at 777 (citing cases). Indeed, the U.S. Supreme Court again reinforced that presumption in an even more recent decision involving an inherent powers sanction, holding that a sanction imposed under civil (as opposed to criminal) procedures must be compensatory rather than punitive, as a punitive sanction would require a heightened standard of proof (*i.e.*, beyond a reasonable doubt). *Goodyear Tire & Rubber Co. v. Haeger*, _ U.S. _, _ S. Ct. _, _ L. Ed. 2d _, 2017 WL 1377379 at *5 (April 18, 2017).

Particularly given these legal developments, there is no substantial public interest that warrants this Court's considering whether to impose a heightened standard of proof for inherent-powers sanctions in Washington, which would only discourage victimized parties from exposing bad-faith litigation and make it more difficult for courts to address such misconduct.

B. Cascade waived its "unclean hands" issue and, in any event, review is not warranted because, under established precedent, the unclean-hands doctrine does not apply.

Cascade waived its unclean-hands argument by failing to raise it in response to Gefco's motion for sanctions and instead raising it for the first time in response to Gefco's fee application, submitted after the trial court had decided to sanction Cascade and after the deadline to seek reconsideration. CP 2256-57. *See River House*, 167 Wn. App. at 231.

The Court of Appeals elected to reach the merits of Cascade's unclean-hands argument. In concluding that the trial court did not abuse its equitable discretion, the Court of Appeals did not issue a holding that conflicts with precedent. Cascade points to no authority for the proposition that a court is deprived of its inherent power to sanction one party's misconduct merely because the other party committed some unrelated, sanctionable conduct. If that were the case, a culpable party could avoid sanctions and frustrate the court's ability to police itself merely by pointing to any transgression by the opposing party, however insignificant.

Although an award of fees and costs as an inherent-powers sanction may seek to achieve equity, a court's decision to sanction does not appear to be subject to doctrines that ordinarily would guide its fashioning of equitable relief as between the parties. The U.S. Supreme Court has held that imposition of sanctions "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself[.]" *Chambers v. NASCO, Inc.*, 501 U.S. 32,

43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). This makes sense because the inherent powers arise out of "the control necessarily vested in courts to manage their own affairs to as to achieve the orderly and expeditious disposition of cases." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (quoting *Chambers*, 501 U.S. at 46). "[T]he courts are empowered to do all that is reasonably necessary for the efficient administration of justice." *State v. Wadsworth*, 139 Wn.2d 724, 742, 991 P.2d 80 (2000).

Regardless, even assuming the unclean-hands doctrine curtailed a court's ability to exercise its inherent powers, the doctrine would not have applied here because it may be invoked only where a party acted in bad faith (1) "in connection with the subject matter or transaction in litigation," *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940), and, more specifically, (2) "in the very transaction concerning which he complains." *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (quoting *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 74, 113 P.2d 45 (1941) (emphasis omitted)). Gefco's transgressions occurred *during the litigation itself*, not "in connection with the subject matter or transaction in litigation": drive-shaft failures. Moreover, Gefco's conduct had nothing to do with the "transaction concerning which" it sought sanctions: Cascade's bad-faith litigation, including its fabrication of the central evidence produced in support of its counterclaims.

The cases Cascade cites where the unclean-hands doctrine was mentioned as a basis to deny fees are distinguishable because, there, the

parties seeking fees lacked clean hands "in connection with the subject matter or transaction in litigation." *See Burt v. Wash. State Dep't of Corrs.*, 191 Wn. App. 194, 210, 361 P.3d 283 (2015) (holding that trial court did not abuse its discretion in denying fees to prisoner who prevailed on procedural issue but had requested employment records of prison workers to harass them); *Reeves v. McClain*, 56 Wn. App. 301, 308, 783 P.2d 606 (1989) (declining to affirm erroneous statutory fee award on alternate ground of equity where the party awarded fees "did not enter this suit with clean hands" because they retained more than their share of funds from a real estate transaction). Discovery violations, in contrast, occur during the litigation and not "in connection with the subject matter or transaction in litigation."

The equitable unclean-hands doctrine did not bar the trial court from addressing Cascade's litigation misconduct, and the court was well within its authority to sanction both Cascade and Gefco. The Court of Appeals thus accurately characterized Cascade's objection as "a matter of proportionality, not equity or unclean hands." Slip Op. 15. There is no decisional conflict, and review is unwarranted.

C. Cascade waived its post-judgment interest rate issue and, in any event, review is not warranted because the Court of Appeals decision does not conflict with precedent.

Cascade waived the right to challenge the post-judgment interest rate when it failed to respond to Gefco's request to set the rate at 12% per annum. *See* CP 2318-29, 4159-62. Regardless, that was in fact the legally applicable rate, and the Court of Appeals' decision to affirm does not

conflict with precedent. Cascade cites no authority for the proposition that a sanction imposed by a trial court under its inherent powers to police itself amounts to a legal remedy "founded upon tortious conduct," which would accrue interest at just 5.25% under RCW 4.56.110(3)(b). Indeed, as discussed above, Cascade maintains such a sanction is an *equitable* remedy.

The Court of Appeals decision does not conflict with decisions holding that judgments on insurance bad-faith claims are founded upon tortious conduct. The contention that tortious conduct includes *any* "[a]ction taken with improper motive that harms another," Petition at 18, ignores fundamental differences between tort claims and an inherent-powers sanction. Significantly, Cascade cites no authority suggesting a court must find the elements of a tort established before it may sanction bad-faith litigation.

Because a sanctions judgment fits into none of the specific categories in subsections (1) through (3) of RCW 4.56.110, it is subject to the "catch-all" provision of subsection (4), providing for interest at the "maximum rate permitted under RCW 19.52.020," which is the rate applied by the trial court here. There is no decisional conflict, and review is unwarranted.

IV. CONCLUSION

This Court should deny Cascade and Niermeyer's petition for review.

Respectfully submitted this 2nd day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 2nd day of May, 2017.

Patti Saiden

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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