Supreme Court No. 92276-4
Court of Appeals No. 45742-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GREG HOOVER,

Respondent,

v.

SCOTT WARNER and "JANE DOE" WARNER, individually and the marital community comprised thereof, ERNEST WARNER and "JANE DOE" WARNER, individually and the marital community comprised thereof,

Petitioners,

and WARNER FARMS, defendant.

ON APPEAL FROM THE COURT OF APPEALS
DIVISION II

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. PARTY SEEKING RELIEF

Greg Hoover, the respondent herein, requests the relief set out in Section II.

II. RELIEF SOUGHT

The Petition for Review should be denied.

III. FACTS

Respondent Greg Hoover owns and lives on approximately 7.5 acres at 16547 Smith Prairie Rd. SE, in Yelm, Washington. (CP 13) Appellant Ernest Warner owns 20 acres at 16541 Smith Prairie Rd. SE. that borders Hoover's property to the west and to the north. (CP 92; Exh. 15). Hoover's property is higher in elevation than the Warner property. (RP 209-10; Exh. 13; Exh. 39 p. 4). Water naturally drains downhill across the Hoover property and onto the Warner property in a north to northwest direction. (RP 145, 149, 209-10, 381-82) Hoover's house sits at the north end of his property. (RP 210)

Prior to the Warners' filling and grading project in 2006 there were no areas on the Hoover property that puddled or naturally collected water, even in heavy rains. (RP 30, 115-16). The Hoover property never experienced any septic failures or well problems prior to 2006. (RP 46-47, 56, 118) One could not see in which direction storm water drained prior to 2006 because it never collected on the surface. (RP 44, 116)

However, the scientific testimony, accepted by the trial court, proved that prior to the Warner's project the precipitation hit the surface organic layer, soaked down to the impermeable silt loam layer, and then flowed downhill, following the west/northwest downslope onto the Warner property. Extensive expert testimony and evidence from test pits verified a three-layered soil composition: (1) a top zone or "A" zone, which is dark in color due to a high content of organic material; (2) a "B" zone at intermediate depth, of

lighter color due to higher salt and clay content and (3) the lightest colored and densest "C" zone, consisting of the impermeable Skipopa silt loam. (RP 224-25). The silt loam soils in the "C" layer are non-gravelly silty soils at 2 -3 feet in depth that developed thousands of years ago from sediments in horizontal plates on slopes of zero to 3 degrees in an old glacial lakebed. (RP 222, 226-27, 369, 414).

To Hoover's north there is a 10' - 12' wide driveway on the Warner property, having a surface of non-native sand and cobble stones,[1] running east-west from Smith Prairie road back to the remains of a long-abandoned cabin just off of Hoover's northwest corner. The historical driveway serves a residence north of the driveway between Smith Prairie Road and the old cabin. (RP 60, 319, 324).

On the Warner property, roughly paralleling Hoover's western boundary, south of the remains of the old cabin, are irregular deposits of non-native materials consisting of sand mixed with rounded gravel and cobbles.[2] The material in these fill ridges is by its nature very permeable, such that surface water could be expected to flow right through them. (RP 313-14) There has never been a road or driveway on the Warner property running along Hoover's west boundary, and the Warners never used this portion of their property for anything. (RP 313-4, 375)

Beginning in May 2006, Scott Warner and Ernest Warner, using dump trucks, a bulldozer and a backhoe, cleared, filled, graded and compacted road accesses on the Warner land directly adjacent and parallel to Hoover's north and west boundaries. This project went on for several months.

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[1] "Gravel" is defined as stones of up to 2" diameter; "cobbles" are defined as stones with 3" - 5" diameters; and a "boulder" is anything larger than a cobble. (RP 394)

[2] These fill ridges probably originated years ago by farmers plucking unwanted rocks from their fields and piling them along the property line. (RP 440, 512)

The Warners had *actual knowledge* from 2006 on that their grading and filling project would impact Hoover's drainage. Scott Warner testified that he and his brother dug three ditches intended to convey water away from the Hoover property as part of the original project:

> Q. . . . Now, it's your testimony that you dug all three ditches that were to convey water away from the Hoover property in 2006, correct? And you did that at Mr. Hoover's request?
>
> A. No, sir.
>
> Q. Okay.
>
> A. My brother dug two. I dug one. He dug the two on the - - not - -
>
> Q. I don't need a big narrative answer. What I'm asking is the timing of the digging of the three ditches was 2006, correct?
>
> A. Correct.[3]

There is further substantial evidence that Greg Hoover placed both Scott and Ernest Warner on *actual notice in 2006* that their project would have direct drainage impacts on his property. Mr. Hoover testified:

> Q. Okay. So in 2006 then did you notice some changes to the – that were being made to the property to the north and to the west of your property?
>
> A. Yes.
>
> Q. Tell the court what you - -
>
> A. . . . [Scott Warner] told me that they were going to build the road and that **they knew that there was a drainage problem on this end of the property and they would be down with the appropriate culverts before it rained.**[4]

Mr. Hoover requested numerous times after 2006 that the Warners put in culverts or to take other steps to alleviate the water backing up on his property. The Warners

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[3] 12/28/13 RP 20-21.
[4] 10/28/13 RP 37. Emphasis added.

agreed that their ditches were ineffective, and they finally agreed to take the whole road out. As Mr. Hoover testified:

> A. I had been asking Scott since the time that he put this road in to come down and put the culverts or whatever it was that they were going to do to fix it, and he kept telling me he'd get around to it. In the - - in 2008 this was completely covered with water right up to our doorstep, and I had been on - - I had asked Scott several times that year and some - - several times just in the last month I kept telling him that water was gathering.
>
> . . .
>
> Q. Tell me about the 2011 ditch. How did that come about?
>
> A. . . . I was pointing out the problems with my property and the damage that was being done to it, and they both agreed right then we're not digging anymore ditches. This isn't doing - - ditches aren't sufficient. We will be down before it rains again and take the whole road out, and they even told me where they were going to take it and dump the material.[5]

On 9/24/13, Plaintiff served Requests for Admission on the Warners. (Exh. 32) The Warners' Requests and Responses read as follows:

> REQUESTS FOR ADMISSION NO. 1: Admit that in 2006 you or others under your direction and control caused rock and fill material to be brought in from off site and deposited at one or more locations within the area circled and labeled "A" on Exhibit 1.
>
> RESPONSE: DENY
>
> REQUESTS FOR ADMISSION NO. 2: Admit that in 2006 you or others under your direction and control caused rock and fill material to be brought in from off site and deposited at one or more locations within the area circled and labeled "B" on Exhibit 1.
>
> RESPONSE: DENY

Warners responses were sham. Scott Warner told Greg Hoover that he and his brother had brought in over a hundred dump truck loads of fill. (RP 41- 42). Eyewitness Linda Seamount testified: "It was all just large as in much larger rocks. . . . there was no dirt mixed with it." (RP 76) Eyewitnesses Scott Hyderkhan and Jerry Hoover saw dump

[5] RP 10/28/13 pp. 47-48.

truck loads of fill being brought in and dumped. (RP 64); Deposition of Jerry Hoover (CP 238 at 248). A 2006 aerial photo (Exh. 8) verified extensive areas of fill south of the old driveway north of Hoover and also along Hoover's west boundary. (RP 210)

Robert Manns, Compliance Coordinator for Thurston County Resources Stewardship Department, confirmed in a site visit on 5/24/12 that the Warners had graded without a permit. Manns observed fill material 2 to 3 feet in depth and 10 to 12 feet in width. (RP 191-92) He sent Ernest Warner a letter dated 5/31/12 (Exh. 18) directing him to get a grading permit within 30 days. At a 6/12/12 site visit, Ernest Warner denied they had brought in any fill, falsely representing that he and his brother were just maintaining existing roads. (RP 192-93) Upon further investigation, including site inspection and inspection of aerial photos, Manns concluded that 2 to 3 feet of fill material had been brought in. (RP 193-94) He required Warner in a 6/26/12 letter (Exh. 19) to get a grading permit.

The Warners filed a Master Permit Application with the Thurston County Permit Assistance Center on 9/25/12 (Exh. 20), asserting that their project was exempt from construction permits, repeating the lie that they had just bladed vegetation off of preexisting roads and that no fill had been brought in. The Master Application was supported by false affidavits from various individuals claiming there had always been a driveway running north-south along Hoover's west boundary.

The trial court rejected this evidence and found that some rock and/or other material had been deposited in the areas in question. (CP 431; Finding of Fact 1.11) The trial court concluded from the expert testimony that as a result of the Warners' project, the subsurface drainage pathways were cut off, due to filling and compaction, causing

water to collect on Hoover's property where it had not collected before. (CP 431; Finding of Fact 1.12)

Warner attempted to blame Hoover's problems on overgrazing by Hoover's horses. The trial court weighed the opposing expert testimony and concluded that that overgrazing was not a substantial causative factor to Hoover's damages.

On 12/24/13, the Court entered a judgment in favor of Hoover and against the Defendants, jointly and severally for:

- Permanent property damage in the amount of $156,000.00.
- General damages for annoyance and inconvenience: $25,000.00.
- Damages for actual repairs made by Hoover: $12,000.00.
- Damages to the foundation in the amount of $40,000.00.
- Damages for loss of use and enjoyment: $60,000.00.
- Previously awarded and unpaid sanctions: $1,000.00.
- Attorneys' fees of $32,714.85 and costs of $17,933.60 ($56,273.80 fees and $9,156.70 in costs reduced by 50%).[6]

The Court also entered a permanent injunction, precluding the Warners from taking any further actions on their property that "adversely affect the drainage on the Hoover property." (CP 433; Conclusion of Law 2.10) The Court gave the Defendants the opportunity to purge themselves of the $156,000.00 permanent damage award, provided they prepare and present to the Court for approval within 180 days a plan for remediation designed by a licensed engineer and approved by the Court. (CP 433-34). In compliance with the trial court's Order, the Warners' submitted a remediation plan which the trial court approved. (CP 496, 504)

The Warners appealed. The Court of Appeals affirmed as to all points, except as to the permanent injunction, which it reversed. The Warners moved for reconsideration, which was denied. They now petition this Court for review.

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[6] CP 433

IV. GROUNDS FOR RELIEF AND ARGUMENT

a. The Warners' Petition does not meet the RAP 13.4 standards for review.

Under RAP 13.4(b), "A petition for review will be accepted by the Supreme Court only" if one or more of the following conditions are met:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

The Petitioners seek review under subsections (1) and (4) asking this Court to grant review to address "two clusters of issues." (Petition at 8). The first "cluster" claim involves a claim under RAP 13.4(b)(1) that the Court of Appeals decision conflicts with *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999). The second "cluster" claim asserts that review of the trial court's sanctions award under CR 37(c) is of such substantial public importance that review is warranted under RAP 13.4(b)(4). These contentions will be addressed in turn.

b. Warners' Petition seeks an advisory opinion from this Court based upon hypothetical facts, which is not a proper basis for a request for review.

Warners seek review of whether "non-negligent improvers" of land will be found liable if they subsequently fail to correct the adverse drainage consequences of their actions. (Petition at 8). The Petitioners' "non-negligence" theory is based upon invented

facts not in the trial record or the trial court's ruling. Later in the petition, the Petitioners seem to argue that their actions were non-negligently performed with "due care." (Petition at 11). Again, the Court of Appeals' decision does not address the question of "non-negligent improvers" or those who take action non-negligently with "due care" because the trial court, in reviewing the conflicting facts, found substantial evidence of the Petitioners' bad faith and failure to exercise due care. What would happen to "non-negligent improvers" who exercise due care is purely hypothetical. This Court should not accept review, merely to give an advisory opinion based upon such hypothetical question. *Obert v. Environmental Research*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989)(court does not consider hypotheticals). Under the facts and the actual trial record in the instant case, the Petitioners were unconvincing in their effort to portray themselves as "non-negligent improvers." There was sufficient evidence for the trial court's determination that the Petitioners failed to act in good faith and to exercise "due care." The Petitioners offer no basis for replacing the trial court's determination, which the Court of Appeals' decision correctly references, and granting review to determine what would happen in a case involving *different facts*. Moreover, the Court of Appeals' decision correctly cites and expressly follows the legal reasoning of this court in *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 858 (1999).

The Court of Appeals also correctly interpreted another one of its own decisions, *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (Division II, 2002)(disputed issue of fact remained concerning the city's exercise of due care when it failed to properly analyze the lands' drainage capabilities). The Court of Appeals, in reviewing one of its own decisions, accurately referenced *Borden* in the context of the

Petitioners' failure to exercise due care. Notably, the Court of Appeals granted the Petitioners relief from the terms of the injunction which did not correctly incorporate the *Currens* and *Borden* principles to future improvements the Petitioners may wish to make to their land.[7]

c. The decision of the Court of Appeals does not conflict with *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 858 (1999).

The Warners made no "foreseeability" arguments in the context of *Currens*, either to the trial court or to the Court of Appeals.[8] In the trial court they argued that they were aware of the drainage issues and had adequately addressed them by installing three east-west ditches. Their expert testified that that the three ditches were adequate to handle any water backups caused by berms caused by the newly installed roads on the Warner property. The Warners are precluded by the doctrine of judicial estoppel from taking an inconsistent position they take before this Court. Judicial estoppel precludes party from taking the position in a legal proceeding that is inconsistent with the position asserted in a prior action. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). Judicial estoppel exists for the protection of the court, not the litigants. *Id.* at 908. It seeks to preserve respect for the court and to avoid inconsistency, duplicity, and the waste of time. *Id.* at 906 (quoting *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194, review denied, 97 Wn.2d 1023 (1982)). It applies where a litigant benefited from a

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[7] The "products liability" argument advanced by the Petitioners (see Footnote 19) has no place in the common enemy doctrine and its exceptions. Additionally, the Petitioners' hypothetical in Footnote 20 makes no sense, and should not be grafted onto the present case.

[8] This Court should not consider the "foreseeability" argument in the first place, because the Warners never made such argument to the trial court. Appellate courts do not consider arguments raised for the first time on appeal. RAP 2.5(a); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

prior inconsistent position or if the position was accepted by the court. *Johnson*, 107 Wn. App. at 912.

All of the Warners' arguments to the Court of Appeals were based upon the contention that substantial evidence did not support the trial court's findings. Specifically, they argued: (1) that no substantial evidence existed of pre-2006 surface water flows off of the Hoover property to the north and northwest; (2) that no substantial evidence existed of pre-2006 subsurface water flows off of the Hoover property to the north and northwest; (3) that there was no substantial evidence that the Warners' grading project impeded surface and/or subsurface water flows; and (4) even if the Warners' actions impeded surface or subsurface flows, the Warners were shielded by the common enemy doctrine.

The Court of Appeals rejected such arguments, noting that the experts agreed: (1) water flowed downhill from Hoover's property to the Warners' property; (2) Hoover's property slopes to the north and west and (3) water drains through the soil to reach an impermeable layer and then travels "downslope."[9] This Court rejected any notion that Hoover had to have eyewitness testimony of actual water flowing to prove his case, holding that although Hoover may have relied on circumstantial evidence to prove that the Warners impeded the flow of subsurface water, such a theory was not purely conjecture, because it was the unequivocal opinion of an expert witness.[10]

The Court of Appeals correctly applied *Currens v. Sleek, supra*, which held that common enemy doctrine notwithstanding, property owners must use "due care" by (1) acting in good faith and by (2) avoiding unnecessary damage to the property of others. In

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[9] Opinion at p.12.
[10] *Id.*

Currens, water from the Sleek property naturally seeped into a low-lying forested area on the *Currens* property. Sleek decided to clear-cut her property and develop four building sites. As a condition for the clear-cutting, Sleek was required by the Department of Natural Resources to mitigate the storm water impacts of the clear-cutting by planting trees and installing drywells. No drywells were ever installed, which caused flooding damage to *Currens*, who filed suit. *Currens*, 138 Wn.2d at 860. The trial court dismissed the lawsuit on summary judgment on the basis that the common enemy rule shielded Sleek from any liability. The Court of Appeals affirmed. *Id.* at 860-61. The Supreme Court reversed the Court of Appeals, holding that a "reasonable use" or "due care" exception to the common enemy doctrine applied, requiring property owners to: (1) act in good faith and (2) avoid unnecessary damage to the property of others. *Id.* at 865. Accordingly, the Court held that under the reasonable use rule, an owner altering the natural drainage "will be shielded from liability only where the changes in surface flow are made both in good faith and in such way as to not cause unnecessary damage." *Currens,* 138 Wn.2d at 868.

In their instant Petition, the Warners simply rehash their "substantial evidence" arguments under the new guise of whether the Warners "knew or should have known" that surface and subsurface water actually flowed to the west and northwest from Hoover's property. They argue that since now nobody saw such surface water flowing the Warners lacked actual or constructive knowledge that their grading and filling would block Hoover's drainage. Hence, based upon these completely invented hypothetical facts, they contend the Court of Appeals decision conflicts with *Currens* by abandoning the concept of foreseeability in favor of strict liability.

First, the Warners confuse and misapply the concept of foreseeability. In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). When a duty is found to exist from the defendant to the plaintiff then the concept of foreseeability serves to define the scope of the duty owed. *Burkhart v. Harrod*, 110 Wn.2d 381, 395, 755 P.2d 759 (1988). Foreseeability is normally an issue for the trier of fact. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

> The foreseeability element of proximate cause is established by proof that [the] actor, as [a] person of ordinary intelligence and prudence, should reasonably have anticipated [the] danger to others created by his negligent act, whether by [the] event that occurred or some similar event, without regard to what [the] actor believed would occur or [his] anticipation as to just how [the] injuries would grow out of [the] dangerous situation created by him.

Blacks' Law Dictionary, 5th Ed.

> Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.
> . . .
> The sequence of events, of course, need not be foreseeable. **The manner in which the risk culminates in harm may be unusual, improbable and highly unacceptable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.**

McLeod v. Grant County School Dist. No. 128, 42 Wn.2d 316, 365, 255 P.2d 360 (1953) (Emphasis added).

Second, the Warners had constructive knowledge that their grading project would foreseeably result in flooding damage to Hoover. Constructive notice is demonstrated because the Warner property is subject to Critical Areas Ordinances, requiring Warners

to get a grading permit, which they failed to do. RP 191-93; (Exh. 19). The filed a Master Permit Application (Exh. 20), which falsely asserted that their project was exempt from construction permits because they only bladed off vegetation. The trial court in this case obviously found otherwise. The Warner's failure to comply with permitting requirements – like Sleek's failure to abide by the mitigation conditions of her DNR permit – satisfies both the bad faith and foreseeability elements of the trial court's negligence determination under *Currens*. There is substantial evidence in the record from which a trier of fact could reasonably conclude that the correct permit application would have required an engineering study which would have addressed the drainage impacts before the project even started.

Finally, it is not necessary for this Court to delve into the record to determine whether the Warners had *constructive* notice of the potential drainage impacts from their project because there is substantial evidence that they had actual notice. There is substantial evidence in the record of discussions during the project in 2006 between Hoover and Warner regarding the potential drainage impacts. Scott Warner testified that the Warners had dug three drainage ditches in 2006 to attempt to address potential water backups, and their expert testified that such ditches were effective. The Warners gave assurances in 2008 they intended to follow through with putting in culverts and taking other measures to correct the problems, and in 2011 they agreed to take the entire road out. It was up to the trial court to weigh the credibility of the witnesses and it obviously accepted this evidence, which was sufficient to fulfill the *Currens* "reasonable use" standard. The Court of Appeals correctly applied *Currens*.

d. Court of Appeals to affirmance of the trial court's award of CR 37(c) sanctions does not present any issue of substantial public interest.

The Warners have provided this Court with no analysis in support of their contention that there exists some need to harmonize CR 37(c) with Fed.R.Civ.P. 37(c)(2) involves an issue of substantial public interest that should be determined by this Court. In deciding if an issue involves a "substantial public interest," this Court will consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

This entire section of Warners' Petition is devoted to arguing the merits as if this Court has accepted review. There is no ambiguity about CR 37(c) or its application that requires clarification by this Court. Petitioners have cited no legal authority for the proposition that "harmonizing the interpretation of identical state and federal civil rules" creates an issue of substantial public interest that should be determined by this Court. While federal court interpretations of identically worded federal rules of civil procedure are persuasive authority for interpreting state rules,[11] the federal court's interpretations are not binding on this Court. The Petitioners have cited no case expressing any compelling public interest in having this Court accept review in order to harmonize state and federal court interpretations of federal rules.

e. The Warners' CR 37(c) arguments fail on the merits.

In any event, the Warners' arguments fail on the merits. The Court of Appeals correctly applied the abuse of discretion standard of *Rivers v. Wash. State Conference of*

[11] *Carle v. Earth Stove, Inc.*, 35 Wn. App 904, 907, 670 P.2d 1086 (1983).

Mason Contractors, 145 Wn.2d 674,684, 41 P.3d 1175 (2002) in affirming the trial court's award of costs and fees.

CR 37(c)(4) provides for an award of "expenses" which is defined as "including attorney fees," which clearly means that both costs and attorneys' fees are included in the definition of "expenses" for purposes of the award of sanctions. The Court of Appeals upheld the award of fees in the amount of $32,714.85, and also held that "Hoover incurred additional expenses in making his proof, and the trial court did not abuse its discretion in ordering a reasonable amount."[12] By "additional costs" the Court was referencing the $17,933.60 in costs awarded by the trial court. There is nothing this Court of Appeals overlooked or misapprehended, and this Court should reject Warners' attempt to read ambiguity into the opinion where none exists.

There is no merit to Warners' argument that CR 37(c) allows a trial court to only award expenses incurred *after* the date of the responding party's answer to a request for admission. Such reading of CR 37 is nonsensical. A Plaintiff is required to make a reasonable investigation prior to filing suit and to exercise due diligence at all times in identifying and proving his factual claims. Elements of due diligence include deposing witnesses, propounding interrogatories, hiring experts and submitting requests for admission. To be sanctioned, the responding party must deny the truth of a matter, and the requesting party must thereafter present evidence that establishes: the truth of the matter, that the truth of the matter was substantial to the case; and that the defendant had no valid justification for the denial. The CR 37(c) sanction rule does not place a temporal limit on the evidence that the plaintiff can submit to prove that the defendant's denial was false. Indeed, it is more likely that the plaintiff will have collected evidence to support

[12] Opinion, at P.20.

the CR 37 request prior to submitting the request. Requests for admission are not designed to be shots in the dark, offered without any basis by the plaintiff, in the hope a defendant will answer them wrong.

Here, Hoover presented the trial court with evidence gathered before and after Warners' false responses. Such evidence was not objected to by Warner at trial when offered by Hoover to prove the falsity of the responses. The evidence establishes that not only were Warners' responses false, but that there was no good reason for Warners to make the false statements that formed the basis of their denials. Courts have particularly broad discretion in awarding or denying costs and attorneys' fees under Rule 37(c):

> The inherent nature of the decision to allow or deny costs and attorneys' fees sanctioned by CR 37(c) requires the exercise of judicial discretion. There are not categorical criteria to guide a trial judge.

Reid Sand & Gravel, Inc. v. Bellevue Properties, 7 Wn. App. 701, 705, 502 P.2d 480 (1972).[13]

Further there was no error in the way the Court apportioned the award of attorneys' fees for the failure to admit. The attorney billing records demonstrate that Plaintiff was represented by the law firm of Stone Novasky, LLC from 7/30/12 until June 2013, at which point the Worth Law Group opened its file on 6/7/13. The billing records verify that Plaintiff's counsel received the responses on 10/14/13. (CP 329) Hoover sought entry of judgment for attorneys' fees in the amount of $8,256.70 from the Stone

[13] In their opening brief in the Court of Appeals, Warners quoted part of a sentence stating that CR 37 sanctions are for "the costs associated with the time period after which a reasonable person . . . should have conceded the issues," from the Supreme Court's *factual summary* in *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 452, 105 P.3d 378 (2005). See opening brief of appellants, at p. 41, note 67. Warners admitted in their brief that this quote, which was taken from the Supreme Court's recitation of the trial court's decision, was not part of the Supreme Court's holding and is not authority for anything. The Court of Appeals correctly rejected such argument in the instant case.

Novasky firm and $57,173.80 from the Worth Law group, for a total of $65,953.23. The Court added these amounts, reduced the figure by 50%, and awarded attorneys' fees in the amount of $32,714.85.

The methodology was proper, as is illustrated by the fact that when one adds all of the itemized attorney's fees charges prior to receipt of the responses to requests for admission on 10/14/13, the amount of such hourly charges is $30,347.41. When one subtracts this figure from the $65,430.50 that were requested, one arrives at a figure of $35,083.09 for attorneys' fees actually incurred after the requests for admission were received, which is slightly more than what was awarded by the Court. The Court was in the best position to make this apportionment, which was well within its discretion. There was no error.

In terms of the awarding of costs, it was similarly within the Court's discretion to award all of the requested costs, since all such costs were actually and necessarily incurred in the trial of the matter. The Court did not err in this regard.

In summary, the trial court exercised its discretion and awarded expenses in an amount that was significantly less than what Hoover had requested. There was no abuse of discretion.

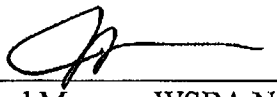
V. CONCLUSION

In conclusion, for the foregoing reasons, this Court should deny review. The Court should reject the Warners' false characterization of themselves as lacking constructive or actual knowledge that their project would have adverse drainage impacts on Hoover, when (1) they failed to make the "knew or should have known" argument

either to the trial court or in their initial briefing in the Court of Appeals, (2) there is substantial evidence that they had actual knowledge their project would adversely affect Hoover's drainage and (3) they are judicially estopped from taking inconsistent positions in order to gain unfair advantage. The Court of Appeals decision in this matter did not conflict with *Currens v. Sleek* or any other decision of the Supreme Court, such that review by this Court would be warranted. Warners have failed to demonstrate that the trial court's award of sanctions under CR 37(c) sufficiently involves any issue of substantial public interest sufficient to justify review under RAP 13.4(b)(4). In any event, such argument fails on the merits. The trial court apportioned the award of sanctions, awarding significantly less than what the Plaintiff requested, in a manner that was well within its discretion.

Respectfully submitted this 16 day of October, 2015.

WORTH LAW GROUP, P.S.



J. Michael Morgan, WSBA No. 18404
Attorney for Respondent Greg Hoover

VI. DECLARATION OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on October 16, 2015 I emailed a PDF copy of Answer to Motion for Discretionary Review, to Petitioners' counsel David J. Corbett who has agreed
to accept electronic service, at the following email addresses:

david@davidcorbettlaw.com

DATED this 16 day of October, 2015.

WORTH LAW GROUP, P.S.

J. Michael Morgan, WSBA No. 18404
Attorney for Respondent Greg Hoover

OFFICE RECEPTIONIST, CLERK

To: Andrea Nielsen
Cc: J. Michael Morgan; Julie Fulks; david@davidcorbettlaw.com
Subject: RE: Supreme Court No. 92276-4 / Greg Hoover v. Scott Warner, et ux., et al.

Received on 10-16-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Friday, October 16, 2015 12:23 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: Supreme Court No. 92276-4 / Greg Hoover v. Scott Warner, et ux., et al.

The Supreme Court State of Washington:

Please find for filing Answer to Motion for Discretionary Review for the following matter:

Case No. 92276-4 *Hoover v. Warner et al.*
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