73017-7

73017-7

No. 73017-7-I

COURT OF APPEALS, DIVISION I
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,

Appellant,

BRUCE NIERMEYER,

Aggrieved Non-Party/Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUSAN J. CRAIGHEAD

REPLY BRIEF OF APPELLANTS

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

FREY BUCK, P.S.

By: Theron A. Buck
WSBA No.

1200 5th Avenue, Suite 1900
Seattle, WA 98101
(206) 486-8000

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

Far from being based on "incontrovertible physical facts" (Resp. Br. 2), the trial court's confused, conflicting, and ultimately erroneous findings demonstrate a fundamental misunderstanding of the evidence. The trial court's findings, which equivocate on whether Cascade was simply "careless" or fraudulent, must be reversed because they are not supported by the clear, unequivocal, and convincing evidence required to sustain a finding of fraud.

Even should this Court sustain the finding of fraud, it should still reverse because – in unchallenged findings – the trial court found Gefco committed its own "stunning" bad faith by "withholding critical information from [Cascade] and the Court." Gefco thus has "unclean hands" precluding any equitable relief, let alone a $1.6 million fee award. The trial court's judgment against Cascade's principal, who was not a party to this litigation, is unsupported by the law. At a minimum, the fee award fails to account for Gefco's own discovery violations requiring a remand.

II. REPLY ARGUMENT

A. Cascade timely appealed the sanction decision.

Gefco's argument that Cascade's appeal is untimely under RAP 2.4 (Resp. Br. 31-32) ignores the critical fact that Cascade is

not seeking review of a "judgment on the merits" (Resp. Br. 31), or an award of fees related to the merits, but the trial court's award of sanctions to Gefco that was collateral to and resolved separately from the merits. The trial court's November 27, 2013, Findings and Conclusions, in which it held that Cascade had committed a fraud on the court and that Gefco had withheld discovery (CP 1473-90) was not an appealable order under RAP 2.2(a) because it did not finally resolve the sanctions issue. The sanctions award only became final and appealable when the trial court determined the amount of sanctions ($1.6 million) on December 29, 2014. Cascade timely appealed that order on January 26, 2015. (CP 2457-71)

Because Cascade is not seeking review of any aspect of the underlying judgment on the merits of the parties' competing claims, Gefco's reliance on RAP 2.4 is misplaced. RAP 2.4(b) precludes a party from bringing up for review a decision that is otherwise appealable by appealing a later order related to attorney's fees:

> A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

Thus, for example, "an appeal from an attorney fee decision does not bring up for review a separate judgment on the merits."

Bushong v. Wilsbach, 151 Wn. App. 373, 377, ¶ 6, 213 P.3d 42 (2009) (citing *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 825-26, ¶ 6, 155 P.3d 161 (2007)); *see also* RAP 2.2(a)(1) (final judgment on the merits is appealable "regardless of whether [it] reserves for future determination an award of attorney fees").

This appeal of the sanction is unlike *Bushong* and *Carrara* (Resp. Br. 31-32), where the parties sought review of summary judgment orders on the merits by appealing a later fee decision. Here, Cascade is not seeking review of any aspect of the "merits" litigation, which ended in the fall of 2012 when Cascade dismissed its counterclaims, Cascade and Hub City signed a CR 2A agreement, and the trial court entered summary judgment on Gefco's claims under its invoice and dismissed Gefco's third-party claims against Hub City. (CP 194-201, 628-31; Sub. No. 263, Supp. CP ___)

In contrast to *Bushong* and *Carrara,* the trial court did not order Cascade to pay $1.6 million in attorney fees to Gefco as part of this resolution of the merits. Indeed, Gefco acknowledges that as part of the trial court's final judgment on the merits Gefco recovered an award for its fees in collecting on its invoice, an issue addressed in this Court's 2014 unpublished opinion, *George E. Failing Co. v. Cascade Drilling, Inc.,* 179 Wn. App. 1032, 2014 WL 645416 (2014)

(Resp. Br. 20 n.14). Addressing the issues in that appeal, this Court's Commissioner held that "the trial court orders resolved all claims and counterclaims and there are no remaining claims other than attorney fees." (Comm. Ruling Jan. 22, 2013, No. 69627-1-I) (App. A) This appeal, by contrast, addresses that remaining issue of attorney fees that arose from the parties' competing claims for sanctions, and not from a resolution of the merits of the parties' claims. (CP 345, 374)

The trial court's sanctions award did not become appealable until there was a final order establishing those sanctions. *See* RAP 2.2(a)(13) (allowing appeal from "[a]ny *final order* made after judgment that affects a substantial right") (emphasis added). The sanctions award did not become final and appealable under RAP 2.2(a)(13) until the trial court determined not just the right to recover sanctions, but also the amount of the award. *See Miller v. City of Port Angeles*, 38 Wn. App. 904, 907 n.2, 691 P.2d 229 (1984) ("A judgment of liability is not ordinarily appealable until damages have been awarded."), *rev. denied*, 103 Wn.2d 1024 (1985); *Zimmerman v. W8LESS Products, LLC*, 160 Wn. App. 678, 691, ¶ 27, 248 P.3d 601 (2011) (summary judgment order on liability was not appealable until after determination of damages).

Consistent with RAP 2.4, federal courts hold that an award of sanctions is collateral to the merits of the lawsuit,[1] thus allowing an appeal of a sanctions award only once it has been quantified. "A district court decision imposing Rule 11 sanctions is not final, and hence not appealable, until the amount of the sanction has been decided." *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 115 F.3d 962, 964 (Fed. Cir. 1997); *see also Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989); *O & G Indus., Inc. v. Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 167 (2d Cir. 2008), *cert. denied*, 556 U.S. 1182 (2009). Cascade timely appealed the order setting the amount of the sanction. (CP 2457-71)

Moreover, as Gefco concedes, the trial court did not "enter[] formal judgment" on its motion for sanctions until February 27, 2015, in an order Cascade timely appealed. (Resp. Br. 29-30 (citing CP 2472-73); CP 2475-76 (March 2nd notice of appeal))[2] Cascade

---

[1] *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03, 108 S. Ct. 1717, 1722, 100 L. Ed. 2d 178 (1988) ("a decision on the merits is a 'final decision' . . . whether or not there remains for adjudication a request for attorney's fees attributable to the case").

[2] The trial court's December 29, 2014, findings quantifying the sanctions do not use the word "judgment," do not direct entry of judgment, do not contain an interest rate or otherwise comply with the form of judgments required by RCW 4.64.030, and do not assess sanctions or order a judgment against Mr. Niermeyer personally. (*See* CP 4174 (Gefco: February 27 judgment was first time "formal statutory requirements for the clerk's entry of a judgment" were met))

timely appealed both the order quantifying sanctions, RAP 2.2(a)(13), as well as the decision Gefco itself characterizes as the final "judgment" granting sanctions. RAP 2.2(a)(1).

B. The trial court's finding that Cascade fabricated evidence is not supported by the necessary evidence.

The trial court's finding that Cascade fraudulently presented false evidence is not supported by clear, unequivocal, and convincing evidence, the burden of proof universally applied to a claim of fraud. Because the trial court's findings are not supported by the requisite evidence, this Court should reverse its sanction.[3]

1. Washington law requires fraud be proven by clear, unequivocal, and convincing evidence.

Gefco did not accuse Cascade of simple "litigation misconduct." (Resp. Br. 53) It alleged Cascade knowingly and purposefully presented false evidence in an attempt to defraud the Court. (*See, e.g.*, CP 360 ("This case was a fraud"), 366 ("fraud on the court"), 370 ("fraud . . . in this Court")) That charge must be proven by clear, unequivocal, and convincing evidence.

Gefco refutes its own contention that Cascade failed to preserve its burden of proof argument by admitting Cascade

---

[3] This Court should reject Gefco's request for remand to "clarify" the findings. (Resp. Br. 50) When findings are reversed for lack of evidence, the remedy is reversal, not a "do-over." *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 747, 790 P.2d 195 (1990).

"characterize[d] Gefco's motion for sanctions as a common-law fraud claim, and argued [for] . . . the heightened standard applicable to such claims." (Resp. Br. 50-51) Cascade argued Gefco's "fraud claim rests on hundredths of inches," was "nothing more than a labeling error," and that it had to be proven by "clear, cogent, and convincing evidence," citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996), which reversed a fraud verdict because the evidence did not satisfy that standard. (CP 907-08, 926) Contrary to Gefco's contention, Cascade repeated this argument at the sanctions hearing. (*Compare* Resp. Br. 50, *with* RP 383 ("A fraud claim in civil court requires clear and convincing evidence."), 725 ("the law puts a clear and convincing standard on the fraud claim")) Gefco cannot show *Cascade* failed to preserve this issue by relying on the arguments *Gefco* made. (Resp. Br. 51 (describing "Gefco's contention"))

Gefco's own authority, relied on by the trial court, confirms a heightened burden applies to a claim of fraud on the court. (*See* Resp. Br. 52, citing *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000), and *State v. Gassman*, 175 Wn.2d 208, 283 P.3d 1113 (2012); CP 1488-89). *S.H.* and *Gassman* rely on federal law, which requires fraud on the court be proven by clear, unequivocal, and convincing evidence. *Shepherd v. American Broadcasting Companies,*

Inc., 62 F.3d 1469, 1476 (D.C. Cir. 1995).[4] This standard applies because, as with any claim of fraud, the interests at stake are "'more substantial than mere loss of money,'" and, as here, include the defendant's reputation. *Shepherd*, 62 F.3d at 1477 (quoting *Addington v. Texas*, 441 U.S. 418, 424, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)); *see also Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 527, 29 P.3d 689 (2001) ("'clear and convincing' standard is typically used in civil cases 'involving allegations of fraud'") (quoting *Addington*), *cert. denied*, 535 U.S. 904 (2002) (Resp. Br. 53).

Moreover, a court's inherent equitable powers "must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Inherent powers sanctions are restricted because of their "fundamentally punitive" nature, their "very potency," and because they are "not grounded in rule or statute." *Shepherd*, 62 F.3d at 1475-76, 1480; *see also Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180 (D.C. Cir. 1980) (fee-shifting sanctions are "punitive" and thus "[n]ot surprisingly . . . invocable only for some dominating reason of

---

[4] *See also United States v. Estate of Stonehill*, 660 F.3d 415, 445 (9th Cir. 2011); *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1288 (10th Cir. 1986).

justice"). Despite electing its judges, Washington recognizes the same restrictions on inherent powers as federal courts. (*Compare* Resp. Br. 52 n.37, *with Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 470, ¶ 48, 360 P.3d 855 (2015), *rev. denied*, __Wn.2d __ (Mar. 30, 2016); *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, ¶ 23, 280 P.3d 1133, *rev. denied*, 175 Wn.2d 1028 (2012) (both citing *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)))

The heightened burden of proof and the limits of inherent powers means that appellate "review is not perfunctory," but instead exercised carefully to "protect[] against the misuse of the inherent power." *Shepherd*, 62 F.3d at 1475, 1484 (reversing inherent power sanctions not supported by clear and convincing evidence); *Gassman*, 175 Wn.2d at 213, ¶ 9 (reversing inherent powers fee award); *Greenbank*, 168 Wn. App. at 528, ¶ 32 (same). This Court should reverse the trial court's misuse of its inherent powers.

2. No clear, unequivocal, and convincing evidence supports the trial court's findings.

Interpretation of a trial court's findings is a question of law guided by the same principles for construing statutes, contracts, and other writings, as Gefco recognizes. (Resp. Br. 46, citing *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970)) Foremost of

those principles, is that "[i]f the plain language is subject to only one interpretation, [the] inquiry is at an end." *Washington State Dep't of Transp. v. City of Seattle*, No. 72719-2-I, 2016 WL 783919, at *6 (Wash. Ct. App. Feb. 29, 2016). The plain language of the trial court's findings leads to only one conclusion – it found Cascade committed fraud based on its fundamental confusion of the facts.

a. The trial court confused two distinct machine parts, finding Cascade's replacement of one was "bombshell" evidence it replaced the other.

The trial court found "bombshell" evidence Cascade replaced the disputed part, the pump drive shafts, based on evidence a different part, the hydraulic pumps, had been replaced. Gefco can only defend the trial court's confusion by adding to its findings or by relying on "context" that purportedly explains the confusion. But a court "must not add words" to findings. *Dep't of Transp.*, 2016 WL 783919, at *7. This Court should reverse the erroneous findings the trial court actually made, and reject those Gefco wishes it had made.

In August 2012, Gefco obtained invoices showing that before the Wheeler Canyon project Cascade replaced hydraulic pumps on the 50K drilling rig. The trial court called the invoices a "bombshell" discovery because they showed "that Wheeler Canyon was not the first time a shaft on the PTO box on this 50k rig had

failed. Importantly, the mud pump had been replaced before" and "[t]his meant that the shaft at the mud pump location that failed at Wheeler Canyon was not . . . original equipment." (CP 1466-67; FF 16-17, CP 1476 (emphasis added); *see also* FF 39, CP 1481) The trial court was plainly confused in finding that "a shaft on the PTO box" must have been replaced because a distinct part, "the mud pump," had been replaced. Thus, there was no "bombshell"; Cascade did not replace, before Wheeler Canyon, the part that was the centerpiece of this litigation – the PTO's pump drive shafts. (*See* Resp. Br. 57 (pump drive shafts were "the central evidence"))

The trial court did not intend to use the words Gefco alleges it omitted because of a "scrivener's error." (Resp. Br. 49) For instance, Gefco suggests adding the word "input" before "shaft" in Findings 16-18, arguing the trial court meant to refer to the "input shaft" on the hydraulic pumps that insert into the pump drive shafts, and not the pump drive shafts themselves. (Resp. Br. 47-49)[5] But the trial court referred to "a shaft on the PTO Box." (FF 16, CP 1476) The only shafts "on the PTO box" are the pump drive shafts; the input shafts are not part of the PTO box, but are part of

[5] As explained in Cascade's opening brief, the pump drive shafts are like a power outlet into which the pumps "plug in" to draw power from the drilling rig's engine. (*See* App. Br. 5-10; CP 2922 (picture showing hydraulic input shaft on right, and pump drive shaft on left))

the "four hydraulic pumps mounted on the sides of the PTO," as Gefco itself states. (Resp. Br. 5; FF 5, CP 1475; RP 48 (Gefco's expert: "On that PTO box there are two pump drive shafts . . . . [and] [t]here are four different pumps attached to that PTO case")) Indeed, Gefco's expert disavowed its position on appeal that the input shafts failed before Wheeler Canyon, stating "We don't know whether . . . the input shaft on that hydraulic pump failed." (RP 81)

Even if this Court accepts Gefco's proposed rewrite, it only raises another question: why is it a "bombshell" discovery that the input shafts on the hydraulic pumps had been replaced before Wheeler Canyon? The trial court characterized the replacement of the mud pump as a "bombshell" because it mistakenly thought it proved the second pump drive shaft that failed at Wheeler Canyon (the first at the mud pump location) was not original equipment (manufactured by Foote Jones), as Cascade asserted, and thus must have been fabricated. (FF 17, CP 1476) If, as Gefco now asserts, the trial court found that the input shaft on the mud pump had been replaced before Wheeler Canyon that replacement does not support

the trial court's findings that Cascade fraudulently represented the provenance of the pump drive shafts.[6]

Gefco's other attempt to rewrite the findings likewise makes no sense. Gefco suggests the trial court omitted the word "at" from Finding of Fact 39 and that it should read "the mud pump had been replaced before [at] Wheeler Canyon, so it could not have been a Foote Jones spline." (Resp. Br. 48-49) Even if rewritten the trial court still mistakenly found that because a pump was replaced, the pump drive shaft could not have been the original part. Gefco's related suggestion that "it" in Finding 39 refers not to "mud pump" in the same sentence, but to "shaft" in Finding 38 (Resp. Br. 49), ignores that courts avoid interpretations that "have words leaping across stretches of text, defying the laws of both gravity and grammar." *State, Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 450, ¶ 21, 312 P.3d 676 (2013) (quotation omitted), *rev. denied*, 180 Wn.2d 1007 (2014). Moreover, because the original shaft made by Foote Jones (Shaft 3) came from the *first* failure at the mud pump, the trial court could not have found that it had been replaced "before at Wheeler Canyon." (RP 669; CP 2909)

---

[6] Gefco has never disputed that because it was the only source of replacement shafts, had Cascade replaced the pump drive shafts prior to Wheeler Canyon it would have ordered those shafts from Gefco (as it did at Wheeler Canyon) and that it has no records reflecting such a purchase.

The "context" of the trial court's findings confirms its confusion. (Resp. Br. 48-49) When referring to pump drive shafts the trial court specified a "location," *i.e.*, which pump the failed end of the pump drive shaft was attached to when it failed. (*See, e.g.*, FF 8, 38, CP 1475, 1480) Thus, when the trial court specified "the shaft at the mud pump location . . . was not . . . original equipment," it could only have been referring to a pump drive shaft, and not an input shaft. (FF 17, CP 1476) It would be redundant to specify the mud pump's input shaft failed "at the mud pump location."

Gefco also contends the trial court's findings reflect only the imprecision displayed by all parties when referring to the parts. (Resp. Br. 45-46) That is no excuse, particularly when the trial court took *over a year* to issue findings accepting Gefco's weighty allegation that Cascade fabricated evidence. An attorney's use of imprecise language in the heat of a hearing is far different than a trial court purporting to find clear, unequivocal, and convincing evidence that a party committed bad faith on a "level [that] exceeds any conduct described in Washington case law." (CL 1, CP 1488)

b. Neither Cascade nor Mr. Niermeyer had a motive to falsify the shafts.

The trial court (correctly) found Cascade could prove its claim that Gefco's pump drive shafts were defective with any shaft, including

those from Wheeler Canyon, because it alleged "they were all too soft." (CP 1467; FF 53, CP 1483) Gefco apparently believes the trial court was wrong, arguing the shafts from Wheeler Canyon would have shown "blueing" that allegedly undermined Cascade's claim. (Resp. Br. 42) As discussed below (§ II.B.2.c), the shafts from Wheeler Canyon (*i.e.*, the ones produced in this case) had no reason to show blueing. Mr. Niermeyer and Cascade thus had nothing to gain by falsifying evidence because they already had shafts that proved Gefco's shafts were defective and did not meet industry standards. (App. Br. 35-40)

The trial court's equivocation undermines Gefco's assertion that Cascade's failure to maintain a precise "chain of custody" shows its intent to falsify evidence. (Resp. Br. 42-43) The trial court conceded Cascade may have simply "carelessly preserved evidence." (CL 3, CP 1489; *see also* CP 1469 (evidence "at best" showed Cascade "could not accurately identify" pump drive shafts); 3/24 RP 22 (pump drive shafts "could have been" from different rig); Fee CL 1, CP 2314) And that makes sense. When the pump drive shafts failed in 2008, Cascade was not contemplating litigation (CP 794; RP 571, 616), and thus had no "duty to preserve evidence." *Cook*, 190 Wn. App. at 470, ¶ 49 (*But see* CP 1471 (faulting Cascade for not instructing mechanic to "be careful" when removing pump drive

shafts); FF 11, CP 1475-76 (faulting Cascade for not "saving these items"). The trial court's findings thus recognize the very real likelihood that, as Cascade has repeatedly asserted, it merely mislabeled nearly identical machine parts years after they failed. If Cascade's conduct was simply "careless," it could not support an adverse inference at trial, let alone the trial court's $1.6 million sanction. *Cook*, 190 Wn. App. at 470, ¶ 49; *Gassman*, 175 Wn.2d at 213, ¶ 8 (reversing inherent powers sanction on "careless" conduct).

c. The trial court's findings on Gefco's "blueing" theory are irreconcilable.

The trial court's confusion only deepened when it reached Gefco's "blueing" theory. Gefco alleged the pump drive shafts failed not because they were defective but because Cascade installed bearings too tightly, causing the shafts to overheat and that the over-heated shafts should have "blued" after cooling. (App. Br. 40-43) In order to accept Gefco's blueing theory, however, the trial court necessarily had to find that the pump drive shafts failed because the bearings were installed too tightly; it did not.[7] Instead, it stated "it will not make any finding as to why the pumps failed." (CP 1466

[7] Gefco offers no defense of the trial court's error on the cause of blueing, which both of Gefco's experts alleged was caused only by the bearings being installed too tightly, not as the trial court found, from the rig being "misused and worked too hard." (*Compare* FF 36, CP 1480; CP 1468, *with* RP 26, 93, 333-34)

(emphasis in original)[8]; 3/24 RP 23 ("I didn't make any findings about how the rig was used")) Gefco makes no attempt to reconcile these findings. *See Welfare of A.B.*, 168 Wn.2d 908, 921, ¶ 33, 232 P.3d 1104 (2010) (reversing "a number of findings that affirmatively conflict"); *May v. Robertson*, 153 Wn. App. 57, 89 n.27, ¶ 75, 218 P.3d 211 (2009) (reversing "internally inconsistent" findings).

Regardless, Gefco's blueing theory was not supported by clear, unequivocal, and convincing evidence. In response to Cascade's observation that the hydraulic input shafts used at Wheeler Canyon showed no blueing (App. Br. 41), Gefco alleges that only the pump drive shafts, and not the input shafts they mated with would blue. That defies logic and Gefco's own evidence. The input shafts must fit very tightly into the opening of the pump drive shafts where the bearings are located. (*See, e.g.*, CP 2922, 4964) Gefco's expert acknowledged that "once you get th[e] bearings this hot . . . everything connected" would be damaged. (RP 25) Gefco played an animation showing that the entire pump drive shaft would overheat. (App. B)[9] Gefco's assertion that heat from the bearings would overheat the pump drive shafts – but not the input

[8] This statement again confuses pumps and pump drive shafts.

[9] Appendix B is a screenshot of the animation played by Gefco. Cascade provided the Court the animation on a CD via a letter filed with this brief.

shafts inside those shafts – is absurd, and underscores that the trial court's findings are not supported by the requisite evidence.

Moreover, Gefco's argument (and the trial court's findings) that *all* of the shafts should have shown blueing conflicts with its expert's testimony that blueing would only occur in a "really short-term failure" that "occurred within a matter of weeks." (*Compare* Resp. Br. 25, 41-42 *with* RP 285, 317-18) Only the second failure at the mud pump occurred within a few weeks of being installed – the others lasted at least three months and thus even according to Gefco's expert would not have shown blueing. (FF 7-8, CP 1475)

d. Five hundredths of an inch differences – observed with the naked eye – are not clear and convincing evidence of fraud.

The evidence allegedly proving Cascade's fraud boiled down to a few hundredths of an inch as measured with an ordinary ruler and the naked eye. Gefco's experts alleged that by measuring the "chamfers" (angled cuts) on the end of the hydraulic pump input shafts and the impressions they left on the pump drive shafts they could tell the pump drive shafts did not come from Wheeler Canyon. Specifically, they alleged the failed "A" ends of the pump drive shafts had impressions that "matched" the .08" chamfer of a Parker brand pump and not the .03" chamfer of a Sundstrand

brand pump, which was the mud pump used at Wheeler Canyon. (CP 2611-16, 3360-61) At the evidentiary hearing, Gefco's expert Dr. Howitt alleged he did not even need a ruler and could observe this difference with the naked eye. (RP 297-300)[10] Gefco now makes much of this testimony, asserting it shows "incontrovertible physical facts" establishing Cascade's fraud. (Resp. Br. 2, 32-38)

Rather than use a ruler with 1/32" increments and the naked eye, Cascade's experts measured the impressions on the pump drive shafts with a digital microscope, confirming they were consistent with the hydraulic pumps used at Wheeler Canyon. (CP 977; RP 456-58; Ex. 20)[11] The impression on Shaft 4 was significantly different than those on Shafts 2 and 3, just as one would expect if, as Cascade asserted, Shafts 2 and 3 were attached to a Sundstrand pump and Shaft 4 was attached to a Parker pump. (RP 462) The superficial handling of the shafts by Gefco's expert is no substitute

---

[10] Gefco's suggestion the Court "replicate" Dr. Howitt's physical manipulation of the mechanical parts (Resp. Br. 37 n.27) would only confirm why a court should rely on precision measurements, and not naked eye observations, because widely different "matches" can result from the most subtle adjustments in manipulating the shafts, particularly where the input shafts have different levels of wear (the Parker input shaft is worn, whereas the Sundstrand is brand new). (*See* RP 297-98 (noting "worn Parker shaft" and "new" Sundstrand shaft)

[11] Gefco faults Cascade for relying on the very pictures submitted by *Gefco's experts*, (Resp. Br. 36), used only to highlight the absurdity of Gefco's contention those photographs established a "match" between the failed ends of the pump drive shafts and a Parker input shaft.

for these precision measurements. Here, the facts are not only controverted, but the evidence is far from clear and convincing. The court is not required to "follow the physical facts . . . [if] the physical facts are controverted . . . ." *See Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 559, 524 P.2d 251 (1974).

Indeed, other courts have rejected as *inadmissible* Gefco's "naked eye" evidence purporting to discern miniscule details. *See, e.g., Parvin v. State*, 113 So.3d 1243, 1250 (Miss. 2013); *Hunt-Watkins v. Darden Restaurants, Inc.*, No. 208-CV-02539-JPM-TMP, 2010 WL 1780130, at *3 (W.D. Tenn. Apr. 30, 2010) (App. Br. 45). Moreover, Gefco's "incontrovertible" facts were put forth by Dr. Howitt, the same person that made numerous errors identifying wear impressions in his report (App. Br. 43 n.22) and *controverted himself*, testifying first that the intact "B" ends of the pump drive shafts were not as Cascade represented, only to concede a day later that these ends showed impressions from the pumps at Wheeler Canyon. (*Compare* RP 157, 197, *with* RP 245-46, 262-67)[12]

[12] Cascade accurately noted Dr. Howitt abandoned his testimony regarding the "B" ends of the pump drive shafts; it did not "confuse" his opinions. (*Compare* App. Br. 43-44, *with* Resp. Br. 37 n.28) And contrary to Gefco's assertion, Dr. Howitt inspected the shafts before writing his report and thus had no explanation for why his testimony changed within 24 hours. (*Compare* Resp. Br. 37 n.28, *with* RP 269-70)

Gefco also ignores key aspects of Dr. Howitt's testimony that undermine his assertion Cascade falsified the pump drive shafts. For example, Dr. Howitt stated the failed end of Shaft 3 had a "dramatically curved impression" that "you would not expect" from a Parker brand hydraulic pump, which is consistent with Cascade's assertion it was attached to a Sundstrand pump. (RP 275) Dr. Howitt's testimony also supported Cascade's assertion that it simply mixed up Shafts 2 and 3, as he testified that Shaft 3 (the first failure at the mud pump) "probably saw more than one [hydraulic] pump shaft" (RP 304), as would be expected if the hydraulic pumps – but not the pump drive shaft– was replaced before Wheeler Canyon. (*See also* CP 1469; FF 40, CP 1481; App. Br. 37)

Gefco concedes that despite taking more than a year to review the evidence, the trial court confused the most fundamental "physical fact" of this case – the location of the chamfers that created the disputed impression evidence. The chamfer at issue is on the "male" hydraulic input shafts (*see* App. Br. 21, 47-48; CP 4911, 4913; App. C), not as the trial court found, "in the edge of the opening of the [pump drive] shaft where it fits with the male-end pumps." (FF 13, CP 1476; CP 1466; *see also* Resp. Br. 22 ("The circular end of an *input shaft* has a cut angle called a 'chamfer.'" (emphasis added)) If

the trial court did not understand this foundational point, how could it understand the "physical facts" allegedly flowing from it? The trial court's manifest confusion mandates reversal.

e. The trial court erred in relying on Cascade's voluntarily dismissal of its claims as evidence of fraud.

Gefco ignores the policies and principles underlying our Civil Rules in defending the trial court's reliance on Cascade's decision to dismiss its counterclaims as evidence of a fraud on the court. Ignoring CR 41, Gefco instead compares Cascade's decision to voluntarily dismiss its counterclaims to a criminal suspect's decision to flee a crime scene. (Resp. Br. 44 (citing *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)) But while the criminal law allows such an inference of wrongdoing, the Civil Rules encourage a party to dismiss claims for any number of reasons, or no reason at all, without consequence, including "a consciousness of guilt." *Compare Nichols*, 5 Wn. App. at 660, *with* CR 41.

The trial court erred in discrediting Cascade's reasons for dismissing its counterclaims – the expense, effort, and opportunity cost of fighting Gefco's intransigent discovery tactics, as well as assurances by Gefco's new owners that it would make harder shafts. (Resp. Br. 44; CP 799-800, 2222-23; RP 623-27) The trial court took

Cascade's missed opportunity to buy a competitor at a "fire sale" price – missed because of this litigation – and mistakenly found that it was lost "because of the Wheeler Canyon fiasco" and thus provided "a motive to falsify evidence." (*Compare* CP 1467; FF 21, 51, CP 1477, 1482, *with* CP 2222-23; RP 625)[13] In other words, the trial court turned on its head Cascade's greatest reason for dismissing its counterclaims and found it was motive for fraud. This Court should reject the trial court's decision to punish Cascade for exercising its absolute right to control its claims. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, ¶ 22, 200 P.3d 683 (2009) (no party is deemed prevailing party after voluntary dismissal).

C. The unclean hands doctrine exists precisely to prevent the result in this case – an equitable award to a party guilty of "stunning" misconduct.

In unchallenged findings, the trial court found Gefco acted in bad faith by "conceal[ing] from Cascade essential facts that could have established the very allegations that Cascade was leveling against Gefco until it was too late for Cascade to have done anything about it." (CP 1470; *see also* FF 88, 90-91, CP 1487-88) Those essential facts

---

[13] Gefco makes much of the trial court's finding Mr. Niermeyer was not credible (Resp. Br. 42-43), but it nowhere defends the trial court's mistakes supporting that finding, including that Mr. Niermeyer lost $10 million because he was unable to *sell* Cascade and that Cascade did not complete the well or get paid for the Wheeler Canyon project. (*See* App. Br. 39 n.18)

included that Gefco received "numerous demands for replacement of defective PTOs," that it designed and manufactured harder shafts (and made other design changes), and that it started manufacturing the shafts itself in April 2009. (FF 65, 76-79, 81-84, CP 1484, 1486-87; *see generally* App. Br. 13-18) Gefco not only failed to disclose these facts, it affirmatively misled the trial court and Cascade (as well as other customers) that "there ***may be a possible, but very unlikely*** defect" despite its internal communications acknowledging a defect, falsely stated that it had disclosed "***all*** customers who we found had experienced any pump drive shaft problems," and falsely stated that Hub City made replacement shafts even after Gefco started making them. (CP 450, 477, 561, 3068-70, 3074, 3083, 3088 (emphasis in original); 4/12/12 RP 7, 11; App. Br. 11-13) Gefco's misrepresentations led the trial court to taking the "drastic step of bifurcating claims." (FF 91, CP 1488; *see also* CP 1470 ("Court relied on Gefco's representations . . . . there was little evidence that there was a product liability problem")) In light of its undisputed misconduct or "unclean hands," this Court should reverse Gefco's fee award.

Gefco mistakenly asserts Cascade did not preserve this argument. (Resp. Br. 54) Cascade argued to the trial court "Gefco stands before the court with unclean hands and . . . is not entitled to an

award in equity." (CP 2256-57; *see also* CP 2235, 2250, 2436, 2443) Cascade properly made this argument once it was clear the trial court would grant Gefco's fee request despite its misconduct. Gefco waived its chance to respond, (Sub. No. 391 at 2, Supp. CP ___), and the trial court had eight months to consider the argument before entering judgment. It is preserved. Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.) (preservation rule "is based upon the belief that the trial court should be given the opportunity to correct an error"); *cf. Hubbard v. Scroggin*, 68 Wn. App. 883, 887, 846 P.2d 580 ("A trial court may alter, amend, or reverse its rulings at any point before it enters a final judgment."), *rev. denied*, 122 Wn.2d 1004 (1993).[14]

The doctrine of unclean hands reflects the long-standing principle that a court will not provide equitable relief to a party where that party is itself guilty of inequitable conduct, particularly where it deceives the very court from which it seeks relief. *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) (App. Br. 51); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941) (party seeking equitable relief "must be frank and fair with the court")

---

[14] Even if this Court accepts Gefco's untimeliness argument, it should still review this issue because it "affects [Gefco's] right to maintain" its claim for attorney's fees and because the preservation rule is "ultimately a matter of the reviewing court's discretion." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990); RAP 2.5(a).

(Resp. Br. 56). Thus, the doctrine of unclean hands precludes an award of attorney's fees to a party guilty of misconduct under a court's "inherent equitable power." *See Burt v. Washington State Dep't of Corr.*, 191 Wn. App. 194, 210, ¶¶ 33-34, 361 P.3d 283 (2015) (affirming refusal to award fees for litigation misconduct under "inherent equitable powers" because "[n]either side has clean hands," citing "well settled" rule that "a party with unclean hands cannot recover in equity"); *see also Reeves v. McClain*, 56 Wn. App. 301, 308, 783 P.2d 606 (1989); *Dalo v. Kivitz*, 596 A.2d 35, 40 (D.C. 1991).

Gefco does not challenge any of the findings establishing its unclean hands. (*See* FF 56-91, CP 1483-88; *see also* CP 1470) Under the erroneous belief that "two wrongs make a right," the trial court excused what it characterized as Gefco's "stunn[ing]" misconduct (CP 1472) – committed before anyone believed Cascade had fabricated evidence – reasoning Gefco's misconduct "was understandable if not appropriate" "[i]n light of the litigation strategy and conduct of Cascade." (FF 88, CP 1487; *see also* CL 5, CP 1489 ("under these circumstances they were perhaps necessary defensive tactics")) But the "unclean hands" doctrine adopts a contrary policy – that a party seeking equity must do equity. *Langley v. Devlin*, 95 Wash. 171, 186-87, 163 P. 395 (1917).

Gefco's assertion it should receive a $1.6 million fee award despite its own misconduct also ignores the purpose of an inherent powers sanction, which it concedes is not to compensate parties, but to "protect the integrity of the courts and prevent abuses of the judicial process." (Resp. Br. 64) *See also Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 733 (9th Cir. 1995). That purpose is ill-served by a windfall fee award to a party guilty of repeatedly "withholding critical information from the opposing party and the Court" and falsely insisting that Cascade's attempts at legitimate discovery were a "fishing expedition." (FF 90-91, CP 1487-88) That critical information included a design change that would have clarified the mislabeling of the shafts early in this litigation, which Gefco revealed only *after* it believed it would support its sanctions motion. (CP 2627 (disclosing design change that distinguished Foote Jones and Hub City shafts))

Gefco's assertion its misconduct did not concern "the subject matter or transaction in litigation" is without merit. (Resp. Br. 56 (quoting *Shelton*, 3 Wn.2d at 602)). The doctrine of unclean hands precludes relief where inequitable conduct has "been practi[c]ed with reference to the matter then under consideration in the case at bar," but not when it relates to "unconnected" matters. *J. L. Cooper*, 9

Wn.2d at 72-73. For example, in *J. L. Cooper*, the Court refused to deny an injunction preventing the defendant from impairing good will he sold to the plaintiff based on the plaintiff's violation of defendant's employment agreement, which was an "entirely different transaction."[15] 9 Wn.2d at 75. Here, the "matter" under dispute is the parties' litigation conduct, and the trial court found *both* parties' conduct was marked by bad faith. Gefco's misconduct thus does not concern an "entirely different matter," but the very matter "under consideration in the case at bar."

Gefco's assertion it should retain the $1.6 million fee award because Cascade was not prejudiced by Gefco's misconduct likewise fails. (Resp. Br. 57) The doctrine of unclean hands does not require prejudice; it turns on the simple notion that "he who seeks equity, must do equity." *Langley*, 95 Wash. at 186-87. Moreover, Cascade was obviously prejudiced by Gefco's bad faith – it was denied "essential facts that could have established the very allegations that Cascade was leveling against Gefco." (CP 1470)

---

[15] The other cases cited by Gefco are distinguishable. *McKelvie v. Hackney*, 58 Wn.2d 23, 360 P.2d 746 (1961) and *Langley*, 95 Wash. 171, refused to deny equitable relief based on misconduct towards a third party. *West v. Equifax Credit Info. Servs., Inc.*, 230 Ga. App. 41, 495 S.E.2d 300 (1997), involved a discovery sanction and Gefco fails to note only two judges signed the lead opinion, with two dissenting judges reasoning "the trial court abused its discretion in not meting out sanctions more evenhandedly." 495 S.E.2d at 305 (McMurray, J., dissenting).

Similarly flawed is Gefco's contention the fee award should stand because Cascade was allegedly the "more culpable" party. (Resp. Br. 57) "[C]ourts will not, as a rule, measure equities between wrongdoers." *Langley*, 95 Wash. at 187. The trial court found Gefco guilty of bad faith misconduct, but nonetheless rewarded it with a $1.6 million fee award. That was error.

D. Non-party Bruce Niermeyer should not have been held personally liable for the sanction.

Gefco concedes liability could not be imposed personally on Cascade principal Bruce Niermeyer under any recognized method of piercing the corporate veil, arguing that a corporate officer may be personally liable for corporate wrongdoing as a "responsible corporate officer," even if he was never served or joined in the lawsuit. The fact that a corporate principal directed litigation is both unremarkable and not a basis for individual liability because "[b]y necessity [a corporation] acts through its officers, directors, employees, and other agents." *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 76, ¶ 26, 265 P.3d 956 (2011).

The "responsible corporate officer doctrine" authorizes a court to hold a corporate officer liable only for a corporation's violation of a criminal or civil statute, or for the breach of a personal duty owed directly to an individual dealing with the corporation. *See Grayson*

v. Nordic Const. Co., Inc., 92 Wn.2d 548, 554, 599 P.2d 1271 (1979); *Johnson v. Harrigan–Peach Land Dev. Co.,* 79 Wn.2d 745, 753, 489 P.2d 923 (1971) (Resp. Br. 58). It does not, however, justify entry of a personal judgment for attorney fees against a corporate officer who has not been made a party to the action. *See Haberman v. Washington Public Power Supply System,* 109 Wn.2d 107, 177, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed,* 488 U.S. 805 (1988); *Marriage of Logg*, 74 Wn. App. 781, 784, 875 P.2d 647 (1994) ("Notice without proper service is not enough to confer jurisdiction."). The fact that Mr. Niermeyer, as the corporation's representative, was extensively involved in litigation does not make him a party against whom judgment may be entered.

The trial court's decision is based upon its "inherent authority to impose sanctions when it finds *a party* has litigated in bad faith." (CL 2, CP 1488) (emphasis added) The only "party" was Cascade, not its principal. The trial court erred in imposing liability personally on Mr. Niermeyer.

E. The trial court erred in granting Gefco $1.6 million in fees, including fees for its own discovery abuse.

The trial court flipped the law on its head by imposing on Cascade the burden of refuting the reasonableness of Gefco's fees. *See Berryman v. Metcalf*, 177 Wn. App. 644, 657, ¶ 25, 312 P.3d 745

(2013) ("The burden of demonstrating that a fee is reasonable is upon the fee applicant"), *rev. denied,* 179 Wn.2d 1026 (2014). Gefco fails to address this improper reversal of the burden proof, arguing only that Cascade suffered no prejudice. (Resp. Br. 62)

Cascade was demonstrably prejudiced by this legal error, which resulted in a judgment requiring Cascade to compensate Gefco for hundreds of thousands of dollars in fees related to Gefco's own bad faith discovery abuse. The trial court accepted Gefco's counsel's bare assertion that Gefco had removed from its fee application all fees relating to Gefco's willful suppression of discovery – a representation that was demonstrably untrue. (Fee FF 26, CP 2314; App. Br. 57-58) The trial court penalized Cascade for failing to "comb" Gefco's billing records (Fee FF 12, 25, CP 2306, 2313), ignoring that Cascade challenged *all* of Gefco's inappropriate blocked billing and that – by definition – it was impossible for Cascade to "specify" the redacted items. (CP 2243-47, 2746-2898 (highlighting all instances of block billing))[16] Gefco concedes that it failed to properly remove fees related to its own discovery abuse (Resp. Br. 61-62), yet asserts it should receive those fees because

[16] Gefco erroneously suggests that the trial court's 1/3 reduction of its lead counsel's fees accounts for all the redacted entries, ignoring redacted fee entries for other timekeepers. (*See, e.g.*, CP 2754, 2756, 2760-62, 2783, 2790, 2796, 2798-801, 2804, 2807-08, 2816-17, 2821-22)

"so much of the litigation was about discovery."[17] Gefco is wrong. Shifting fees is the exception, not the rule. *Berryman*, 177 Wn. App. at 656, ¶ 24. The bad faith exception in particular is not a free-ranging excuse for shifting fees, rather "[t]he definition of 'bad faith' is narrow and places a significant burden on the party claiming fees." *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 152 Wn. App. 199, 211, ¶ 29, 215 P.3d 257 (2009)), *rev'd on other grounds* 171 Wn.2d 54, 248 P.3d 83 (2011). Even should this Court affirm the trial court's sanctions against Cascade, it should remand for redetermination of the fee award.

F. The tort judgment interest rate should apply to the trial court's judgment.

Cascade did not waive its right to the correct judgment interest applicable to "tortious conduct" under RCW 4.56.110(3)(b) by raising the issue within ten days of entry of a judgment imposing the erroneous 12% rate. (CP 4166-71) Cascade and Mr. Niermeyer did not "introduce new evidence," or advance a new legal theory by

---

[17] Gefco understates its misconduct by framing the trial court's order to remove fees as directed only to "one particular discovery issue" "regarding problems with other rigs." (Resp. Br. 61-62) The trial court asked Gefco to remove fees "related to discovery issues that included thwarting some of Cascade's discovery demands." (Fee FF 26, CP 2313-14) Those issues included not just Gefco's hiding problems with other rigs, but Gefco's failure to disclose that it changed the design of the pump drive shafts, that it began making the pump drive shafts itself, and that it raised the same allegations made by Cascade in a lawsuit against Hub City. (FF 71, 76-86, 88, CP 1485-87; *see also* App. Br. 11-18, 28-29)

timely seeking compliance with the statutory requirements for interest on the February 27 judgment. (Resp. Br. 63)

Where, as here, a judgment is erroneous, a party cannot waive the right to seek its correction under CR 59(h) even if that party had expressly agreed to its entry. *See Worden v. Smith*, 178 Wn. App. 309, 323-24, ¶¶ 31-34, 314 P.3d 1125 (2013) (trial court erroneously concluded it lacked discretion to amend judgment under CR 59(h) because party seeking amendment agreed to judgment). Even the federal courts, upon which Gefco relies for its "waiver" argument, adopt the sensible policy that correction of patently erroneous judgments should trump procedural technicalities. *See, e.g., Rocky Mountain Tool & Mach. Co. v. Tecon Corp.*, 371 F.2d 589, 597 (10th Cir. 1966) (affirming removal of prejudgment interest despite failure to timely file CR 59 motion because it "involve[d] correction of a palpably erroneous award").

The tort rate governs the trial court's judgment for bad faith litigation conduct. Bad faith litigation conduct is, by definition, "tortious conduct of individuals or other entities" under RCW 4.56.110(3)(b). TORT, Black's Law Dictionary (10th ed. 2014) ("A civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages," including "a culpable or

intentional act resulting in harm"). The tort interest rate of 5.25% in RCW 4.56.110(3)(b), not the 12% catch-all interest rate in RCW 4.56.110(4), governs the instant judgment.

G. Cascade, not Gefco, is entitled to its fees on appeal.

Gefco's fee request on appeal (Resp. Br. 65) relies on inapposite case law, seeking a fee award under the "intransigence" exception that "provides a separate basis for award of fees *in marital dissolution actions*." *In re MacGibbon*, 139 Wn. App. 496, 499, ¶ 2, 161 P.3d 441 (2007) (rejecting fees for intransigence in administrative proceeding) (emphasis added). This is not a marital dissolution action, and even if that exception to the American Rule could apply, Cascade is not "intransigent" by exercising its right to appeal the trial court's sanction. *Katare v. Katare*, 175 Wn.2d 23, 43, ¶ 37, 283 P.3d 546 (2012) (refusing to award fees for intransigence on party that filed three appeals), *cert. denied*, 133 S.Ct. 889 (2013).

Moreover, Gefco contradicts itself by asserting the "compensatory purpose" of the sanction would be undermined if it is not awarded fees on appeal. (Resp. Br. 65) Gefco spent much of its brief arguing the opposite – that the purpose of the sanction was not to compensate, but to "[p]rotect[] the integrity of the courts, [which] is not a matter of personal interest." (Resp. Br. 53) Gefco cannot have it

both ways. Regardless, Gefco was well "compensated" by the trial court's $1.6 million fee award and should not be further rewarded by an award of appellate fees, particularly in light of its own unchallenged misconduct. For the reasons set forth in Cascade's opening brief – chiefly Gefco's unchallenged discovery abuses – this Court should award Cascade its attorney's fees on appeal and remand for a determination and award of Cascade's fees incurred below. (App. Br. 60)

III. CONCLUSION

This Court should reverse the trial court's sanctions award. It should also award Cascade its attorney's fees on appeal and remand for award of Cascade's attorney's fees incurred below.

Dated this 14th day of April, 2016.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

FREY BUCK, P.S.

By: _____
Theron A. Buck
WSBA No.

Attorneys for Appellants

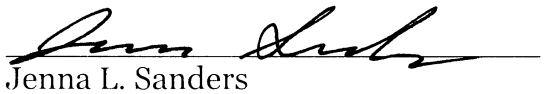
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 14, 2016, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail ____ E-File ✓ Hand-Delivered
Theron A. Buck Frey Buck, P.S. 1200 5th Avenue, Suite 1900 Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail ✓ E-Mail
Michael B. King Jason W. Anderson Carney Badley Spellman, P.S. 701 5th Avenue, Suite 3600 Seattle, WA 98104	____ Facsimile ____ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 14th day of April, 2016.



Jenna L. Sanders

RICHARD D. JOHNSON,
Court Administrator Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

January 22, 2013

Donald Byron Scaramastra
Attorney at Law
2nd & Seneca Bldg 18 Fl
1191 2nd Ave
Seattle, WA, 98101-3438
dbscaram@gsblaw.com

Richard Carl Siefert
Garvey Schubert Barer
1191 2nd Ave Fl 18
Seattle, WA, 98101-2996
rsiefert@gsblaw.com

Jaime Drozd Allen
Attorney at Law
901 5th Ave Ste 3500
Seattle, WA, 98164-2008
jallen@omwlaw.com

Geoffrey Julian Mars Bridgman
Ogden Murphy Wallace, P.L.L.C.
901 5th Ave Ste 3500
Seattle, WA, 98164-2008
gbridgman@omwlaw.com

Tobin E Dale
Office of The Attorney General
800 5th Ave Ste 2000
Seattle, WA, 98104-3188
tobind@atg.wa.gov

Theron A. Buck
Frey Buck PS
1200 5th Ave Ste 1900
Seattle, WA, 98101-3135
tbuck@freybuck.com

Evan Bariault
Frey Buck, P.S.
1200 5th Ave Ste 1900
Seattle, WA, 98101-3135
ebariault@freybuck.com

CASE #: 69627-1-I
George E. Failing Co, Appellant v. Cascade Drilling Inc., Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on January 22, 2013, regarding court's motion to determine appealability:

"Appellant George E. Failing Co. has demonstrated that the trial court orders resolved all claims and counterclaims and there are no remaining claims other than attorney fees. The orders are therefore appealable under RAP 2.2(a). The hearing set on January 25, 2013 at 10:30 a.m. is stricken."

Sincerely,

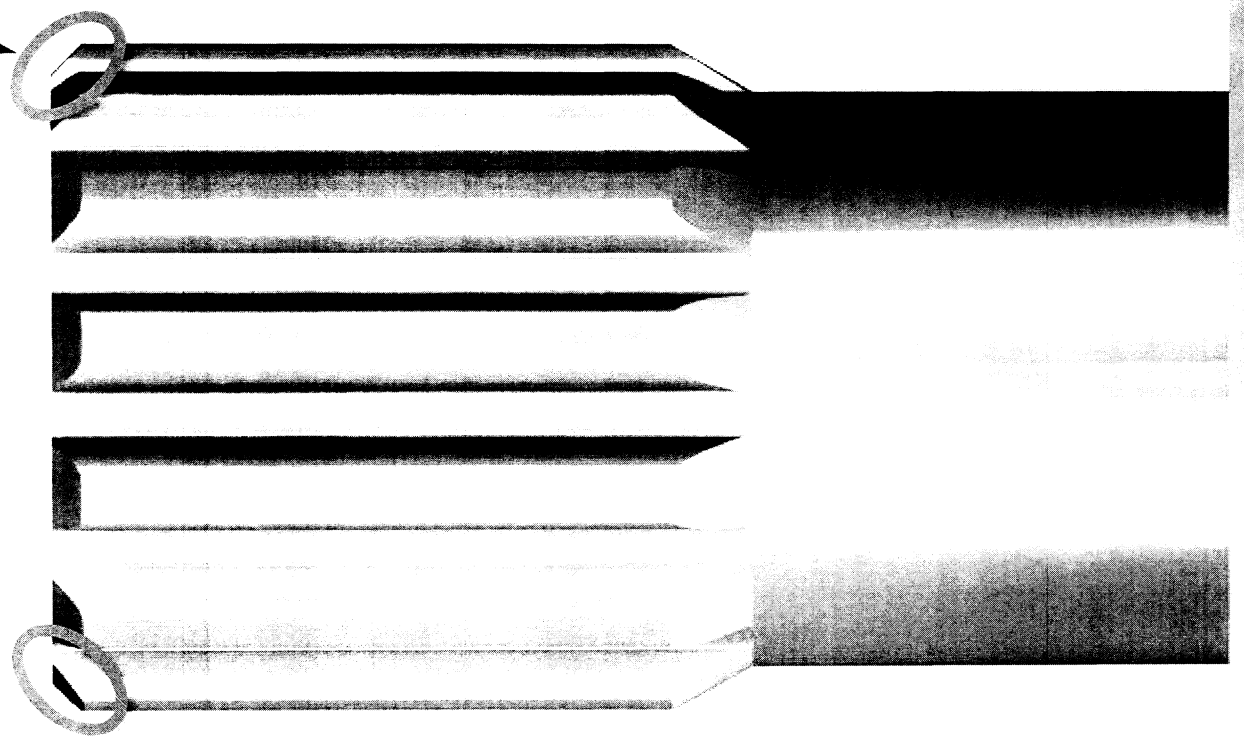
Richard D. Johnson
Court Administrator/Clerk

ssd

Bearings Installed With Incorrect Clearance
Overload raises temperature and can damage drive shaft

Three Pump Shaft Configurations

Large Chamfer
(.08" x 45°)
at end of Parker
pump shaft



1. Parker
SAE D Shaft
Large Chamfer

App. C

CP 4910