No. 94271-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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,

Petitioner,

BRUCE NIERMEYER,

Aggrieved Non-Party/Petitioner.

PETITION FOR REVIEW

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A. Identity of Petitioner and Court of Appeals Decision.

Petitioners Cascade Drilling and its principal Bruce Niermeyer ask this Court to review the Court of Appeals December 27, 2016, decision affirming the trial court's award of $1.6 million in attorney's fees as a sanction for bad faith litigation conduct based on a finding Cascade fabricated evidence. (Appendix A) The Court of Appeals denied petitioners' timely motions for reconsideration and publication on February 13, 2017. (Appendix B)

B. Issues Presented for Review.

1. Must an appellate court review findings that a party fabricated evidence – which must be made under the clear, cogent, and convincing burden of proof – for substantial evidence that is "highly probable," or may the court, as the Court of Appeals did here, "employ the usual standard of review"?

2. Can a party guilty of bad faith litigation misconduct, including "withholding critical information from the opposing party and the Court," receive an equitable award of attorney's fees, or is such an award barred by the doctrine of unclean hands?

3. Does the interest rate in RCW 4.56.110(3), which sets the rate for "judgments founded on ... tortious conduct," govern a judgment for bad faith litigation sanctions?

C. Statement of the Case.

1. After Cascade Drilling experienced repeated failures of the same Gefco machine part in 2008, the parties became embroiled in contentious litigation.

In 2008 Cascade Drilling Inc., founded by Bruce Niermeyer, successfully bid on a job to drill a water well at a housing development in Wheeler Canyon, California. (App. A at 2) Cascade used a 50k drilling rig it purchased from Gefco. (App. A at 2) Between March and June 2008, the pump drive shafts – a critical component of the drilling rig – failed four times. (App. A at 2) After each failure Cascade ordered a replacement pump drive shaft from Gefco. (App. A at 2)

In July 2009, Gefco sued Cascade to collect on an unpaid invoice. (App. A at 2) In response, Cascade counterclaimed alleging the replacement pump drive shafts purchased for the Wheeler Canyon project were defective, that Gefco knew they were defective, and that Gefco concealed the defects from Cascade even when confronted by Cascade about the repeated failures at Wheeler Canyon. (App. A at 2; CP 9-18, 450 (Gefco's Service Manager conceding internally that Gefco's pump drive shafts were "wearing prematurely")) For three years, the parties litigated extensively, with a primary focus on Cascade's counterclaims. (App. A at 2)

In August 2012, Cascade voluntarily dismissed its counterclaims. (App. A at 2) Niermeyer had become convinced he could not justify the expense, effort, and opportunity cost of further litigation. (CP 799-800, 2222-23; RP 623-27) Gefco's intransigent discovery tactics also motivated the decision. (CP 799, 2221-22; RP 624-25) On multiple occasions, the trial court compelled Gefco to produce routine discovery because Cascade had independently learned of problems Gefco failed to disclose, including invoices proving that other customers had repeated problems with Gefco's pump drive shafts. (FF 72-73, CP 1485; 3/22/12 RP 9-15, 19-20, 22-25, 31-32; CP 126-28, 130-31, 193) Gefco *never* disclosed – despite Cascade's discovery requests seeking "precisely this information" – that it had changed the design and manufacturer of the pump drive shafts, and that it had sued its former manufacturer over the repeated failures of the pump drive shafts. (FF 61-88, 90-91, CP 1484-87; CP 472, 2221-22, 2954-55) Cascade learned this information only after it had dismissed its counterclaims. (CP 1470; FF 61, 76-77, 80-86, CP 1484, 1486-87)

2. The trial court found that Cascade fabricated evidence, a finding the Court of Appeals affirmed using "the usual standard of review for factual matters."

After Cascade dismissed its counterclaims, the parties filed cross-motions seeking sanctions. Cascade sought sanctions due to Gefco's repeated discovery violations. (CP 374-97, 403-624) Gefco accused Cascade of fabricating evidence, alleging the pump drive shafts Cascade produced did not come from the rig used at Wheeler Canyon and that Cascade had surreptitiously obtained failed pump drive shafts from another unknown source. (App. A at 2-3; CP 345-72)

The trial court held a four-day hearing from October 29 to November 1, 2012, to address Gefco's allegations that Cascade fabricated the pump drive shafts. Over a year later, the trial court ruled, issuing a letter ruling and Findings of Fact and Conclusions of Law. (CP 1465-90) The trial court found that Gefco had in bad faith "concealed 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; FF 56-91, CP 1483-88) The trial court imposed a $10,000 sanction on Gefco. (CL 6, CP 1489)

Despite finding that Gefco's undisclosed manufacturing and design changes, as well as documents, supported Cascade's theory

of defective pump drive shafts, the trial court also found "that Cascade and Mr. Niermeyer fabricated the evidence upon which Cascade's counterclaims were based," (CL 1, CP 1488), concluding "[b]ad faith on this level exceeds any conduct described in Washington case law." (CL 1, CP 1488; *see also* CP 1472 ("It is invidious")) In particular, the trial court relied on Gefco's discovery of invoices showing Cascade had replaced hydraulic pumps – a machine part distinct from the pump drive shafts – on the drilling rig prior to the Wheeler Canyon job. (CP 1466; FF 15-17, CP 1476; *see also* FF 39, CP 1481)[1] The trial court called this a "bombshell," because they showed "that Wheeler Canyon was not the first time a shaft on the PTO box on this 50k rig had failed," contrary to Cascade's assertion that the pump drive shafts were "original equipment installed by Gefco." (CP 1466-67; FF 16-17, CP 1476; *see also* FF 39, CP 1481) As a sanction, the trial court required Cascade to pay Gefco $1.6 million in attorney's fees, expert witness fees, and costs. (CL 4, CP 1489; CP 2304-15)

The Court of Appeals affirmed in a December 27, 2016, unpublished opinion, and denied reconsideration and publication

[1] The pump drive shafts are located in the rig's "Power Take-Off Box" (PTO) and transfer power from the rig's engine to the hydraulic pumps; the pump drive shafts have "female" ends that interlock with "male" input shafts on the hydraulic pumps. (FF 10, CP 1475; CP 1905-07, 2909, 2922)

on February 13, 2017. (App. A-B) The Court of Appeals rejected Cascade's assertion that the trial court's findings were not supported by the requisite evidence, professing both to "employ the usual standard of review for factual matters," and to"[a]ssum[e] without deciding that the clear, cogent, and convincing standard is applicable to the allegation that Cascade fabricated evidence . . . and that the finding is affirmable under that standard." (App. A at 7, 10) The Court of Appeals also rejected Cascade's argument that Gefco's own "unclean hands" barred it from receiving equitable relief and held that the judgment should bear interest at the catch-all rate in RCW 4.56.110(4) rather than the rate for tort judgments in RCW 4.56.110(3)(b). (App. A at 14-16)

D. Argument Why Review Should Be Granted.

1. The Court of Appeals failed to apply the required "highly probable" standard of review for findings that must be clear, cogent, and convincing.

An appellate court can affirm findings – such as those here – that must be made under the clear, cogent, and convincing burden of proof only if those findings are supported by substantial evidence that is "highly probable." In affirming the trial court's finding that Cascade and Niermeyer fabricated evidence in a scheme to defraud the court, the Court of Appeals failed to acknowledge or apply this

higher standard of review. The Court of Appeals decision conflicts with established precedent and raises an issue of substantial public interest. RAP 13.4(b)(1)-(2), (4).

Under the "American Rule" parties must bear their own attorney's fees. *Berryman v. Metcalf*, 177 Wn. App. 644, 656, ¶ 24, 312 P.3d 745 (2013), *rev. denied,* 179 Wn.2d 1026 (2014). Here, the trial court relied on an exception to the American Rule, adopted from federal case law, which allows a court to award fees under its inherent powers if it finds a party has acted in bad faith. (CL 2, CP 1488-89 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)) "Because of their very potency, inherent powers must be exercised with restraint" and "[t]he definition of 'bad faith' is narrow and places a significant burden on the party claiming fees." *Chambers*, 501 U.S. at 44; *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). "[C]ourts may assess attorney fees as an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass." *State v. Gassman*, 175 Wn.2d 208, 211, ¶ 5, 283 P.3d 1113 (2012)); *see also State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d

1058 (2000) ("A party may demonstrate bad faith by, inter alia, delaying or disrupting litigation.") (both citing *Chambers*).

Federal courts have repeatedly held that the specific bad faith alleged here – fabrication of evidence – is a fraud on the court and must be proven by clear and convincing evidence.[2] *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976) ("A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as ... fabrication of evidence ... and must be supported by clear, unequivocal and convincing evidence."), *cert. denied*, 429 U.S. 1040 (1977); *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). And as this Court has recognized, *any* claim of fraud must be proven by clear and convincing evidence because the interests at stake are "'more substantial than mere loss of money,'" and include the defendant's

[2] Gefco repeatedly alleged Cascade knowingly 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")) In response Cascade argued Gefco's claim had to be proven by "clear, cogent, and convincing evidence." (CP 926-27; 10/31/12 RP 383; 11/1/12 RP 725) The Court of Appeals ignored these arguments in asserting "Cascade did not argue for application of the clear, cogent, and convincing standard for proof of fabrication of evidence until after the court found fabrication." (App. A at 10)

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)); *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).

"[W]here the standard of proof in the trial court is clear, cogent, and convincing evidence," on review "substantial evidence must be 'highly probable.'" *Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 329-30, 937 P.2d 1062 (1997) (citing *Detention of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986); *Douglas Northeast, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992)). "Evidence which is 'substantial' to support a preponderance may not be sufficient to support the clear, cogent, and convincing requirements." *In re Reilly's Estate*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970). The heightened burden of proof and the restraints on inherent powers mean 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 sanction not supported by clear and convincing evidence); *Gassman*, 175 Wn.2d at 213, ¶ 9 (reversing inherent powers fee award);

Greenbank Beach & Boat Club, Inc. v. Bunney, 168 Wn. App. 517, 528, ¶ 32, 280 P.3d 1133, *rev. denied*, 175 Wn.2d 1028 (2012) (same).

The Court of Appeals ignored this precedent requiring review of fraud findings under the "highly probable" standard and limiting inherent powers sanctions, RAP 13.4(b)(1)-(2), instead simply asserting "[n]o Washington case has suggested that the standard of review for a finding of bad faith is more exacting than substantial evidence." (App. A at 10)[3] And though the Court of Appeals professed to hold "the trial court would have made the same finding under th[e clear and convincing] standard and that the finding is affirmable under that standard," its decision does not acknowledge the "highly probable" standard of review, instead professing to "employ the usual standard of review for factual matters." (App. A at 7, 10) Regardless, the court's analysis refutes any pretense it applied the required scrutiny.

Had it done so, the Court of Appeals would have reversed. Instead, the Court of Appeals affirmed despite acknowledging that several of the trial court's findings – entered more than *a year after* the evidentiary hearing – were erroneous on their face. The Court

[3] The Court of Appeals' focus on Washington authority erroneously ignored the federal genesis of Washington's bad faith and inherent powers precedent, which it acknowledged earlier in its opinion. (App. A at 6 ("Washington courts follow the federal cases . . . .))

of Appeals conceded the trial court's "bombshell" finding confused "a shaft on the PTO box," *i.e.*, the pump drive shafts and allegedly fabricated evidence, with the distinct hydraulic pumps, but defended that confusion as "[a]n occasional lack of precision as to terminology." (App. A at 12)[4] When the trial court again confused the "female" pump drive shafts and "male" hydraulic pumps in finding of fact 13, the Court of Appeals again dismissed the confusion, stating "the [trial] court's discussion . . . in findings of fact 33 and 34 sufficiently demonstrates the court's understanding." (App. A at 13-14) But those findings demonstrate no such understanding, and simply summarize the testimony of Gefco's expert. (CP 1479)[5]

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[4] The trial court's confusion was not "occasional." It repeatedly confused the hydraulic pumps with the pump drive shafts, stating the pumps failed at Wheeler Canyon, when in fact the pump drive shafts failed. (CP 1466 ("Cascade alleges in its counter-claim that the **pump** failures"; "The only thing everyone agrees on is that the **pumps** did fail"; "three of the **pumps** that failed"); CP 1471 ("had the second **mud pump** actually been collected from the Wheeler Canyon rig . . ."); *see also* FF 39, CP 1481 ("the mud pump had been replaced before Wheeler Canyon, so it could not have been" an original pump drive shaft) (emphasis added throughout))

[5] These findings concerned the impressions left by the male hydraulic pump input shafts on the female pump drive shafts when the "chamfer" (an angled cut) on the end of the input shafts rubbed against the pump drive shafts. The Court of Appeals quoted Gefco's expert testimony on this point at length, including his statement that Cascade "would never have a second [original] pump" drive shaft. (App. A at 11 (citing RP 159)) But the Court of Appeals never acknowledged that same expert's testimony that Cascade in fact "would have had two of them." (RP 208)

The Court of Appeals' reliance on the trial court's credibility findings confirms it failed to apply the required scrutiny. The Court of Appeals defended the trial court's finding of fabrication by pointing to its determination that Niermeyer and Cascade's mechanic, Chuck Rider, were not credible. (App. A at 7-8) But, "[w]here . . . the standard of proof is clear, cogent, and convincing evidence, it is especially clear that the court's adverse view of [one party's] credibility cannot satisfy [the other party's] burden of production." *In re Melter*, 167 Wn. App. 285, 302, ¶ 39, 273 P.3d 991 (2012).

Worse still, the trial court's reasons for finding Niermeyer not credible were refuted by undisputed evidence and thus were not supported by substantial evidence (highly probable or otherwise). For example, in finding 21, the trial court took Mr. Niermeyer's biggest reason for dismissing the case, a lost opportunity in **2012** ***to buy*** a competitor at a bargain price and turned it into a $10 million loss occurring in **2008** because "he had the opportunity ***to sell*** part of Cascade." (*Compare* FF 21, CP 1477 (emphasis added); CP 1466-67, *with* CP 799; 11/1/12 RP 625, 636) The trial court also wrongly found "Cascade was replaced on the [Wheeler Canyon] job . . . mean[ing] that Cascade was not paid" when in fact Cascade successfully

completed a well that pumped 150 gallons per minute and obtained a judgment for its work at Wheeler Canyon. *(Compare* CP 1466; FF 6, CP 1475, *with* CP 795-96, 2196, 2207-13; 11/1/12 RP 637)

The Court of Appeals underscored its perfunctory review by stating the trial court found one thing, when in fact it found the very opposite. The Court of Appeals stated "the [trial] court did not rely on the so-called abrupt [dismissal] as evidence that Cascade fabricated evidence" (App. A at 14), but the trial court did exactly that, stating "[i]t is apparent that the dismissal occurred when Cascade *realized that it had been found out.*" (CP 1471 (emphasis added)) The Court of Appeals also states "the marking of shafts was altered 'to make the story come out right,'" quoting finding of fact 43. (App. A at 13) But finding of fact 43 says no such thing; it says Cascade came to believe it had mistakenly identified the order in which the shafts failed, not that it changed any markings.[6] (CP 1481)

[6] Cascade did not keep the first failed pump drive shaft, believing it failed due to normal wear, but kept the second, third, and fourth shafts to analyze why they failed so quickly, stamping each with a number. (CP 795, 2341-43; 11/1/12 RP 612) It then identified the shafts in this lawsuit based on those numbers, which never changed. The trial court recognized that Cascade may have simply misidentified nearly identical machine parts years after they failed, as it repeatedly asserted. (CL 3, CP 1489 (Cascade may have "carelessly preserved evidence"); CP 1469 (evidence "at best" showed Cascade "could not accurately identify" shafts); Fee CL 1, CP 2314 (acknowledging evidence could have been "inaccurately identified")) *See also Gassman*, 175 Wn.2d at 213, ¶ 9 ("conduct [that] was careless and not purposeful" could not establish bad faith).

The decision in this case conflicts with Washington case law, RAP 13.4(b)(1)-(2), and is a matter of public interest because it encourages trial courts to impose inherent power sanctions without the requisite evidence of bad faith. RAP 13.4(b)(4).

2. The Court of Appeals erred in holding that Gefco – whose own bad faith violations are undisputed – was entitled to equitable relief.

The Court of Appeals erroneously held that Gefco, who has conceded its own bad faith misconduct, was not barred from equitable relief by the doctrine of unclean hands. This Court should grant review because that holding conflicts with precedent and will encourage inequitable conduct. RAP 13.4(b)(1)-(2), (4).

The doctrine of unclean hands reflects the long-standing principle that a court will not provide equitable relief to a party that 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); *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"). Thus, the doctrine of unclean hands precludes an award under the court's "inherent equitable power" of attorney's fees to a party guilty of misconduct. *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 bad faith litigation 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) (refusing to award attorney's fees on equitable grounds because party lacked "clean hands").

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; FF 88, 90-91, CP 1487-88) Those essential facts 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, 72-73, 76-79, 81-86, CP 1484-87) Gefco concealed these essential facts despite Cascade's discovery requests seeking "precisely this information." (FF 77, CP 1486)

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 and falsely stated

that it had disclosed "***all*** customers who we found had experienced any pump drive shaft problems." (CP 450, 2221-22, 3083-84, 3088 (emphasis in original); 4/12/12 RP 7, 11) 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")) But 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 since the beginning of the suit long ***before*** anyone believed Cascade had fabricated evidence (*e.g.*, FF 77, CP 1486) – reasoning Gefco's misconduct was a "necessary defensive tactic[]" and "understandable if not appropriate" "[i]n light of the litigation strategy and conduct of Cascade." (FF 88, CP 1487; CL 5, CP 1489)

The Court of Appeals erroneously held the trial court's sanction was "a matter of proportionality, not equity or unclean hands." (App. A at 15) The doctrine of unclean hands bars consideration of "proportionality" and instead prohibits *any* relief to a party such as Gefco that is undeniably guilty of bad faith misconduct. *Langley v. Devlin*, 95 Wash. 171, 187, 163 P. 395 (1917) ("courts will not, as a rule, measure equities between wrongdoers"); *J. L. Cooper & Co.*, 9 Wn.2d

at 72 (courts "will not undertake to balance the equities between the parties when they are both in the wrong").

The U.S. Supreme Court's passing statement that a bad faith sanction "transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself" was not a basis for ignoring the doctrine of unclean hands. *Chambers*, 501 U.S. at 46 (cited at App. A at 15). Washington courts have repeatedly recognized that an award of fees for bad faith litigation is equitable relief. *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 169, ¶ 27, 240 P.3d 790 (2010) ("The equitable ground of bad faith may justify attorney fees."); *Burt*, 191 Wn. App. at 204, ¶ 21 ("Equitable exceptions to the American rule include misconduct or bad faith by a party") (quotation omitted); *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 784, ¶ 55, 275 P.3d 339 ("Washington cases mention four recognized equitable grounds for awards of attorney fees: bad faith conduct . . . ."), *rev. denied*, 175 Wn.2d. 1008 (2012).

The Court of Appeals decision conflicts with established precedent and denigrates the adversary system of justice by "withholding critical information from the opposing party and the

Court," as Gefco did here. (FF 91, CP 1488) This Court should grant review. RAP 13.4(b)(1)-(2), (4).

3. The Court of Appeals failed to recognize that judgments founded on bad faith sound in tort.

The Court of Appeals provides no reasoning for its distinction between judgments founded on bad faith that takes place in litigation and in other contexts. RCW 4.56.110(3)(b), which sets the interest rate for "judgments founded on ... tortious conduct of individuals or other entities" should govern the judgment here. The Court of Appeals decision conflicts with its other decisions that hold bad faith judgments are governed by RCW 4.56.110(3)(b). RAP 13.4(b)(2).

Bad faith, regardless of context, is defined by an improper motive. BAD FAITH, Black's Law Dictionary (10th ed. 2014) ("Dishonesty of belief, purpose, or motive"); *Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993) ("bad faith is defined as actual or constructive fraud or a neglect or refusal to fulfill some duty ... prompted ... *by some interested or sinister motive*") (quotation omitted; emphasis added). Action taken with improper motive that harms another is in turn "tortious conduct of individuals or other entities" under RCW 4.56.110(3)(b). TORT, Black's Law Dictionary (10th ed. 2014) ("Tortious conduct is ... a

culpable or intentional act resulting in harm"); *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 606, 564 P.2d 1137 (1977) ("bad faith motive" supported tortious interference claim).

The Court of Appeals has repeatedly recognized that judgments founded on an insurer's bad faith sound in tort and are governed by the interest rate in RCW 4.56.110(3)(b). *See, Miller v. Kenny*, 180 Wn. App. 772, 819-20, ¶ 117, 325 P.3d 278 (2014); *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 173, ¶ 37, 208 P.3d 557 (2009), *rev. denied*, 167 Wn.2d 1008 (2009); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 928, ¶ 36, 250 P.3d 121 (2011). These cases recognize that "[c]laims of insurer bad faith are analyzed applying the same principles as any other tort." *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, ¶ 21, 916, 169 P.3d 1 (2007) (quoted source omitted).

The Court of Appeals offered no principled reason – or any reason at all – for distinguishing between insurance and litigation bad faith. Both are harmful conduct premised on an improper motive. In the insurance context, the improper motive is to place the insurer's interests above those of the insured; in the litigation context, it is to undermine the integrity of the court. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 414, ¶ 21, 229 P.3d

693 (2010) ("an insurer may not put its own interest above that of its insured"); *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (bad faith "[s]anctions may be appropriate if an act affects the integrity of the court") (quoted source omitted). This Court should grant review and hold that 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.[7] RAP 13.4(b)(1).

E. Conclusion.

This Court should grant review, reverse the Court of Appeals, and vacate the trial court's sanctions award.

Dated this 15th day of March, 2017.

SMITH GOODFRIEND, P.S.

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

Attorneys for Petitioners

[7] The tort interest rate would lower the accrued interest by nearly $300,000 assuming the judgment becomes enforceable in October 2017.

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 March 15, 2017, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice PO Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-File
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DATED at Seattle, Washington this 15th day of March 2017.

Patricia Miller

IN THE COURT OF APPEALS 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, and BRUCE NIERMEYER, Appellants, HUB CITY, INC., a Delaware corporation, Third-Party Defendant.	)	No. 73017-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 27, 2016

BECKER, J. — Exercising its inherent power, the trial court imposed sanctions of more than $1.6 million for the appellant's bad faith in using fabricated evidence to carry on three years of litigation. Substantial evidence supports the finding of bad faith, and we conclude the court did not abuse its inherent power.

FACTS

The order of sanctions at issue in this appeal was entered against appellant Cascade Drilling Inc. in favor of respondent George E. Failing Company. The respondent company, also known as Gefco, manufactures and sells large drilling machinery.

The source of their dispute is a project that began in 2008. Cascade was hired to drill a water well at a housing development in Wheeler Canyon, California. Cascade used a 50k drilling rig purchased from Gefco. Between March and June 2008, the pump drive shafts on the drilling rig failed four times. After each failure, Cascade ordered a replacement pump drive shaft from Gefco.

In September 2008, Cascade ordered drilling equipment for an unrelated drilling rig from Gefco but did not pay. In July 2009, Gefco sued to collect. Cascade admitted not paying and asserted counterclaims alleging that Gefco was indebted to Cascade for nonconforming and defective goods, including the replacement pump drive shafts purchased for the Wheeler Canyon project.

For the next three years, the parties litigated extensively. Cascade produced three pump drive shafts, representing them to be the second, third, and fourth pump drive shafts that failed on the Wheeler Canyon job.

In August 2012, Cascade voluntarily dismissed its counterclaims with prejudice and paid Gefco the amount due on the disputed invoice. This resolved the merits of the original claim and counterclaim.

Gefco moved for sanctions against Cascade. Based on information that came to light late in the litigation, Gefco alleged that the three pump drive shafts

produced by Cascade did not come from the rig used on the Wheeler Canyon job and that Cascade had fabricated evidence to the contrary. In October 2012, the court held a hearing on the motion.

Over a year later, on November 27, 2013, the trial court issued a letter ruling, accompanied by findings of fact and conclusions of law, that Cascade engaged in bad faith litigation and fabricated the pump drive shaft evidence. The court ordered Cascade and Bruce Niermeyer, Cascade's president, to pay Gefco's "reasonable" attorney fees and costs.

For the next year, the parties litigated the amount of "reasonable" attorney fees and costs. On December 29, 2014, the trial court issued findings of fact and conclusions of law, ordering Cascade and Niermeyer to pay Gefco attorney fees and costs of $1,394,435 and expert fees of $247,286 in partial reimbursement of the fees and costs incurred in the litigation. On January 26, 2015, Cascade filed a notice of appeal from the order of December 29, 2014.

TIMELINESS OF APPEAL

Cascade assigns error to the order of November 27, 2013, in which the court set forth its decision that sanctions would be ordered, as well as to the order of December 29, 2014, which quantified the amount of the sanctions ordered. Gefco, relying on RAP 2.4(b), contends that because the notice of appeal referred only to the second order, it is timely only as to that order, such that the only issues properly before this court are those related to the amount of the sanction and the interest rate. Gefco is mistaken. The appeal of the second order brings the first order up for review.

We have held that under RAP 2.4(b), an appeal from an award of attorney fees does not bring up for review the merits of the underlying summary judgment decision. Bushong v. Wilsbach, 151 Wn. App. 373, 376, 213 P.3d 42 (2009). A litigant must appeal from the judgment "establishing the legal basis for an attorney fee award" within 30 days of the entry of that judgment. Bushong, 151 Wn. App. at 377. Unlike in Bushong, here the legal basis for the attorney fee award was not established by a judgment on the merits of the underlying case. Gefco was already awarded contractual attorney fees for its debt collection action when the merits of that claim were resolved in 2012. George E. Failing Co. v. Cascade Drilling, Inc., No. 69627-1-I (Wash. Ct. App. Feb. 18, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/696271.pdf (affirming award).

The present appeal concerns an order of attorney fees awarded on a motion for sanctions that was litigated and decided after and separately from the merits of the underlying claims. The order of November 27, 2013, did not inhere in the outcome of the underlying case and was not itself a final judgment. Rather, it was analogous to a preliminary decision on liability. In that sense, it did not become "final" and appealable under RAP 2.2(a)(13) until the court determined the amount for which the defendant was liable. 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"), review denied, 103 Wn.2d 1024 (1985); Zimmerman v. W8LESS Prods., LLC, 160 Wn. App. 678, 691, 248 P.3d 601 (2011) (summary judgment order on liability not

appealable until after determination of damages). Cascade's timely appeal of the December 2014 order setting the amount of sanctions serves as a timely appeal of the November 2013 order holding that sanctions would be awarded.

EVIDENCE OF BAD FAITH

The United States Supreme Court has recognized that "certain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L. Ed. 259 (1812).

In general, a court may resort to its inherent powers only to protect the judicial branch in the performance of its constitutional duties when reasonably necessary for the efficient administration of justice. State v. Wadsworth, 139 Wn.2d 724, 740-41, 991 P.2d 80 (2000); In re Salary of Juvenile Director, 87 Wn.2d 232, 245, 552 P.2d 163 (1976). Inherent powers must be exercised with restraint and discretion because they are "shielded from direct democratic controls," and therefore, the inherent power to assess attorney fees exists only in "narrowly defined circumstances." Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764-65, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). For example, if a court finds "'that fraud has been practiced upon it, or that the very temple of justice has been defiled,'" it may assess attorney fees against the responsible party. Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), quoting Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946). A court may assess attorney fees where a party has

"'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Chambers, 501 U.S. at 45-46, quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).

Washington courts follow the federal cases in holding that a trial court's inherent authority to sanction litigation conduct by assessing attorney fees and costs is properly invoked upon a finding of bad faith. State v. S.H., 102 Wn. App. 468, 475, 8 P.3d 1058 (2000); see also In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 265, 961 P.2d 343 (1998). Generally, a decision to impose sanctions is reviewed for abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Fisons, 122 Wn.2d at 339.

Here, the trial court made an explicit finding that Cascade engaged in bad faith litigation. Finding of Fact 55. While the cases cited above establish that a sanction imposed for bad faith litigation will be reversed absent a finding of bad faith, they provide little guidance on how to review a sanction when the trial court does make a finding of bad faith. Fortunately, in this complex and technical case, the trial court not only made the required finding of bad faith, but also made its reasoning clear in additional findings of fact setting forth the evidence of bad faith.[1]

[1] The additional findings provide a safeguard against the concern that requiring no more than "the talismanic recitation of the phrase 'bad faith'" forecloses meaningful review of sanctions based on inherent authority. Chambers, 501 U.S. at 69 (Kennedy, J., dissenting).

Cascade contends the additional findings are contradictory and show that the court was confused about fundamental facts and relied on abandoned or equivocal expert testimony. To evaluate Cascade's position, we employ the usual standard of review for factual matters. We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. State v. Merrill, 183 Wn. App. 749, 755, 335 P.3d 444 (2014). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Merrill, 183 Wn. App. at 755.

First, the trial court found that Cascade failed to disclose repairs that were made to the drilling rig used at Wheeler Canyon before the Wheeler Canyon job. Finding of Fact 49. The trial court did not credit Niermeyer's explanation for this omission.

Second, the court found that Cascade failed to admit candidly that there was no way to be sure which of the three shafts Cascade produced came from which failure. Finding of Fact 50. This finding is related to the court's observation that Niermeyer and Chuck Rider, Cascade's chief mechanic, presented contradictory accounts of how the shafts come to be labeled and that, in the end, Rider changed his account to align with Niermeyer's. The court did not find Niermeyer to be a credible witness. Finding of Fact 19-22, 51. The court noticed that Rider became visibly uncomfortable on the witness stand when questioned about how and when he was asked to collect maintenance records for the 50k rig. Finding of Fact 26. These findings are supported by substantial

evidence in the record and by the trial court's determinations of witness credibility, to which we defer. The court found that "had Cascade acknowledged that it could not associate specific shafts with related failures, its counterclaims either would never have been filed, would have been dismissed or, at best, would have led to a jury instruction on spoliation." Finding of Fact 52.

Third, the trial court relied on testimony of expert witness Dr. David Howitt to find that the failed shafts presented by Cascade as evidence actually came from rigs other than the 50k rig used at Wheeler Canyon. "Clearly, counsel for Cascade never would have filed the counterclaims had they been aware that the evidence was gathered from other rigs." Finding of Fact 53. This finding, and the inference the court drew from it, is supported by Dr. Howitt's testimony, discussed further below.

Fourth, the trial court found that Cascade, as a matter of litigation strategy, tried to deflect attention from the particular failures at Wheeler Canyon by expanding its lawsuit to include all 50k rigs manufactured by Gefco. "Had the Court permitted Cascade to have done so, Gefco would have faced a great deal of pressure to settle in order to protect its business. Cascade could have prevailed without ever having to establish the cause of the failures at Wheeler Canyon." Finding of Fact 54. While there was no direct evidence of Cascade's litigation strategy, this finding was a reasonable inference from the trial court's long experience with the litigation.

These findings alone constitute substantial evidence supporting the trial court's finding that Cascade engaged in bad faith litigation. To these findings, the trial court added another critical finding that Cascade vigorously contests: that Cascade and Niermeyer "fabricated the evidence upon which Cascade's counterclaims were based." Conclusion of Law 1. Although this is denominated as a conclusion of law, we will review it as a finding. See, e.g., City of Redmond v. Kezner, 10 Wn. App. 332, 343, 517 P.2d 625 (1973) (a statement of fact included within the conclusions of law will be treated as a finding of fact); Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963) ("Since this conclusion of law partakes of the nature of a finding of fact, it may be treated as such.")

Cascade contends that fabrication of evidence must be proven by clear, unequivocal, and convincing evidence because it is tantamount to a fraud on the court. As authority for this argument, Cascade cites In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180 (8th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

> Fraud on the court, though not easily defined, can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense. . . . A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel, . . . and must be supported by clear, unequivocal and convincing evidence.

Antibiotic Antitrust Actions, 538 F.2d at 195 (citations omitted). In that case, the lower court refused to enforce a patent as a sanction for conduct that impeded discovery. The appellate court reversed, concluding that the misconduct, a failure to disclose certain files in discovery, was not egregious misconduct

characterizable as fraud on the court. Antibiotic Antitrust Actions, 538 F.2d at 195. The court accepted the argument that the misconduct was an error.

In the trial court, Cascade did not argue for application of the clear, cogent, and convincing standard for proof of fabrication of evidence until after the court found fabrication. The question before the trial court was whether to find Cascade had acted in bad faith. The sufficiency of that ultimate finding is the question before this court. No Washington case has suggested that the standard of review for a finding of bad faith is more exacting than substantial evidence.

Assuming without deciding that the clear, cogent, and convincing standard is applicable to the allegation that Cascade fabricated evidence, we conclude the trial court would have made the same finding under that standard and that the finding is affirmable under that standard.

Cascade produced three pump drive shafts, which Cascade represented were the second, third, and fourth pump drive shafts to fail at Wheeler Canyon. Cascade represented that two of the shafts failed at the mud pump location and one at the pull-down pump location. But Gefco's expert, Dr. Howitt, opined that all three pump drive shafts produced by Cascade came from a pull-down pump location.

What the trial court found most persuasive was Dr. Howitt's demonstration in court how the three pump drive shafts produced by Cascade fit into the pull-down pump input shaft, and not the mud pump input shaft. During his testimony, Dr. Howitt put the three shafts produced by Cascade into the pull-down pump input shaft and showed how all three pump drive shafts fit. The trial judge

remarked that they fit right in together. Dr. Howitt then demonstrated how none of the shafts produced by Cascade fit into the mud pump input shaft, and the trial judge observed and agreed that it did not fit.[2]

Dr. Howitt testified that he would expect to see "blueing" oxidation on the pump drive shafts if Rider installed them with zero clearance as he said. None of the pump drive shafts produced by Cascade had blueing. Dr. Howitt testified that the chamfer impression or wear evidence on the shafts that Cascade presented as evidence was consistent with the pull-down pump location, not mud pump. He believed the shafts he was given to examine "most likely came from another rig entirely." Finding of Fact 35. He testified, "That was the only Foote Jones spline that was ever provided to Cascade Drilling so that Foote Jones spline had to have come from a different company because Cascade Drilling only ever bought one 50K rig, and therefore they would never have a second Foote Jones pump. So that leads me to believe that this evidence was in fact falsified." Report of Proceedings (Oct. 29, 2015) at 159. He also testified, "You could deduce that straightforwardly that since they lost the original equipment pull-down pump spline at that first repair, they would have no access to another Foote Jones pump, so they must have got it from another PTO box, which means

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[2] Gefco has repeatedly requested that this court recreate Dr. Howitt's demonstration using the trial exhibits. The requests are unfounded, unnecessary, and distracting. Attempting to recreate a physical demonstration that occurred in the trial court would violate the principle that appellate courts do not hear or weigh evidence or find facts. We do not make findings or recreate trial court demonstrations. See, e.g., Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010). All motions and requests by Gefco on this issue are denied.

they got it from some other drilling company. Looks very straightforward to me. This evidence was falsified. . . .This evidence was falsified, clearly falsified." Report of Proceedings (Oct. 30, 2015) at 207.

The trial court found Dr. Howitt "candid" and with "impeccable" academic credentials, findings of fact 29-30, in contrast to other expert witnesses whose testimony the court found less reliable. Dr. Howitt's opinion that the pump drive shafts Cascade submitted into evidence actually came from other rigs provides clear, cogent, and convincing support for the trial court's conclusion that Cascade fabricated evidence.

To undermine the finding of fabrication, Cascade attempts to show that the court's reasoning was confused or illogical. These attacks are not persuasive. To begin, Cascade contends that the trial court inaccurately stated in findings 16 and 17 that a "shaft" on the PTO box had failed before Wheeler Canyon. The record shows that both parties and the court were clear that a pump had been replaced, not a shaft. An occasional lack of precision as to terminology does not demonstrate that the court had a material misunderstanding of the evidence.

Next, Cascade contends that the finding of fabrication was inconsistent with the court's recognition that Niemeyer had no motive to go to the trouble of obtaining shafts from somewhere else. The relevant finding states, "Given Mr. Niermeyer's contention that the shafts failed because they were too soft, where the shafts came from was immaterial to him." Finding of Fact 53. This finding is not inconsistent with the court's perception that other shafts were switched with

the shafts from Wheeler Canyon. An unchallenged finding recounts testimony that the marking of shafts was altered "'to make the story come out right.'" Finding of Fact 43. Niermeyer's motive is the subject of a finding that Niermeyer "appears to have embarked on some sort of vendetta against Gefco and his antipathy toward Gefco gave him a motive to falsify evidence." Finding of Fact 51. This finding is supported by the court's observations of Niermeyer in court and other evidence. See Finding of Fact 19.

Cascade contends the court's reliance on the absence of "blueing" in the shafts is unsupported by the evidence. There was conflicting testimony on this topic. As discussed above, the court accepted Dr. Howitt's opinion that the failed drive shafts would have exhibited blueing if they had been from the 50k rig. Cascade's witnesses disagreed with Dr. Howitt but did not decisively controvert his testimony.

Cascade further contends that the "miniscule differences" in chamfer impressions on the pump drive shafts are not clear and convincing evidence of fraud. As with the blueing issue, there was conflicting testimony on this topic and the court accepted Dr. Howitt's opinion. And the court did not rely solely on this evidence to find that Cascade fabricated evidence, but rather on all the evidence detailed above taken together. Cascade points out that Dr. Howitt had changed his opinion on this issue, but as discussed above, the trial court found him credible, partly because he readily admitted this error. See Finding of Fact 30. Cascade alleges that the court demonstrated a "fundamental misunderstanding" of the chamfer impression evidence in finding of fact 13. But the court's

discussion of the impression evidence in findings of fact 33 and 34 sufficiently demonstrates the court's understanding.

Cascade also claims the evidence is insufficient to support that part of the court's letter ruling where the court states that Cascade dismissed its claims when it realized it had been "found out." The written finding states that Cascade "abruptly" settled, which is not inaccurate. In any event, the court did not rely on the so-called abrupt settlement as evidence that Cascade fabricated evidence.

Taken as a whole, the findings show the court was appalled to learn that Cascade filed a lawsuit alleging the shafts from the 50k rig were defective and carried on litigation for three years without disclosing there was no way to know which shafts were which. According to the letter ruling, the court was "unmoved" by Cascade's defense that its mechanic merely made errors. The court thought it "very likely" that the shafts in evidence had been gathered from other rigs.

We conclude 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.

UNCLEAN HANDS

Cascade argues that the trial court's award of attorney fees to Gefco is barred by the doctrine of unclean hands because the trial court sanctioned Gefco $10,000 for Gefco's own bad faith discovery violations.

Unclean hands is an equitable defense. See, e.g., J.L. Cooper & Co. v. Anchor Sec. Co., 9 Wn.2d 45, 113 P.2d 845 (1941). In Chambers, the Supreme Court stated that imposition of sanctions in instances such as bad faith litigation

"transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself," serving the "dual purpose" of vindicating judicial authority and making the prevailing party whole. Chambers, 501 U.S. at 46.

Cascade objects to what it perceives as unfairness—Cascade received a much larger sanction than Gefco despite what Cascade views as less culpable behavior. But this objection is a matter of proportionality, not equity or unclean hands. The trial court imposed sanctions that were proportional to each party's bad behavior as the court saw it. We reject the argument that the award of attorney fees to Gefco is barred by the doctrine of unclean hands.

INTEREST RATE

Cascade contends that the trial court applied the wrong interest rate to the judgment. The interest rate applicable to a money judgment is governed by RCW 4.56.110. The trial court set the judgment interest rate at 12 percent under subsection (4), the catch-all subsection setting the interest rate for all judgments not covered by subsections 1-3. Cascade argues that the interest rate should instead be 5.25 percent under subsection (3)(b), which sets the interest rate for "judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities."

Cascade points out that insurers have a duty to act in good faith, and their failure to do so sounds in tort, triggering the interest rate for tort cases. Miller v. Kenny, 180 Wn. App. 772, 798, 325 P.3d 278 (2014). But Cascade presents no authority or persuasive argument for analogizing bad faith litigation to the tort of

insurance bad faith. We find no error in the court's decision to apply the judgment interest rate under RCW 4.56.110(4).

PERSONAL LIABILITY

The trial court held Niermeyer, Cascade's president, personally liable for the award of attorney fees, although he was not a party at trial. Niermeyer joined Cascade's appeal as an aggrieved nonparty and argues that the trial court erred in holding him personally liable without finding a piercing of the corporate veil.

If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties. Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 554, 599 P.2d 1271 (1979).

The court found the following regarding Niermeyer:

> 19. Mr. Niermeyer played a central role in this case. By his own admission, Mr. Niermeyer became extremely angry with Gefco because he believed they knew there was a problem with their 50k rigs and they refused to acknowledge or fix it . . . .
> 20. During the sanctions hearing, he was very involved with his attorney's cross-examination of Gefco's metallurgical expert, passing notes and engaging in frequent conferences. On the stand, he appeared to seethe with anger at Gefco and had great difficulty controlling narrative testimony.

Finding of Fact 19-20. The court concluded that the fabrication of the evidence upon which Cascade's counterclaims were based was attributable to Niermeyer as to well as to Cascade. Conclusion of Law 1.

These findings support the conclusion that Niermeyer is personally liable for the sanctions under the test set forth in Grayson.

AMOUNT OF ATTORNEY FEES

The trial court concluded that it was appropriate to sanction Cascade by awarding attorney fees and costs to Gefco, but not in the total amount requested by Gefco. The court asked Gefco to remove from its application for attorney fees the work related to Gefco's own bad faith discovery violations. Cascade objected that Gefco did not fully comply with this request. In response, the trial court entered a finding of fact that "Cascade contends that it is impossible to determine how much time was related to discovery issues that included thwarting some of Cascade's discovery demands. Gefco asserts that it has removed those items, pursuant to the Court's request. Given that much of the litigation in this case was about discovery, the Court finds that it is reasonable to include the items related to discovery on the basis of [Gefco's counsel's] statement that Gefco complied with the Court's request."

The trial court concluded it was appropriate to place on Gefco the burden of establishing the reasonableness of its request for fees and costs. Cascade contends the trial court shifted the burden to Cascade to disprove the reasonableness of Gefco's fees, quoting comments expressing the court's unwillingness to search through the spreadsheets for possible instances of inappropriate billing by Gefco.

The standard of review of an award of attorney fees is abuse of discretion. Pearsall-Stipek, 136 Wn.2d at 265. We find no abuse of discretion.

Affirmed. Each party will bear its own attorney fees and costs for this appeal.

Becker, J.

WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GEORGE E. FAILING COMPANY, dba GEFCO, a division of Blue Tee Corp., a Delaware corporation, Respondent, v. CASCADE DRILLING, INC., a Washington corporation, and BRUCE NIERMEYER, Appellants, HUB CITY, INC., a Delaware corporation, Third-Party Defendant.	No. 73017-7-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

Appellants, Cascade Drilling Inc. and Bruce Niermeyer, have filed a motion for reconsideration of the opinion filed on December 27, 2016, and a motion to publish the opinion. Respondent has not filed an answer to appellants' motions. The court has determined that appellants' motion for reconsideration and appellants' motion to publish should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration of the opinion filed on December 27, 2016, and appellants' motion to publish the opinion are denied.

DATED this 13th day of February, 2017.

FOR THE COURT:

Becker, J.
Judge

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