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NO. 69627-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

CASCADE DRILLING, INC. a Washington corporation,

Respondent.

REPLY OF APPELLANT

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. ARGUMENT..... | 3 |
| A. The Standard of Review Is De Novo, Not Abuse of Discretion. | 3 |
| B. Gefco Is Entitled To Recover Attorney Fees For Defending The Counterclaims Under Its Credit Agreement With Cascade. | 4 |
| C. Gefco Is Entitled To Recover Attorney Fees Under Oklahoma Law. | 7 |
| 1. Gefco Did Not Waive Application Of The Oklahoma Fee Shifting Statutes. | 8 |
| 2. Gefco Timely Asserted The Applicability Of The Oklahoma Fee Shifting Statutes. | 14 |
| 3. The Choice Of Law Provision In Gefco Invoices Applies Oklahoma Law To Cascade’s Counterclaims For Breach Of Express And Implied Warranties..... | 16 |
| III. CONCLUSION..... | 21 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|---|----------------|
| Cases | |
| <i>Atlas Supply</i> , 287 Wash. App. 234 P.3d 606 (2012) | 5 |
| <i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38 (1987)..... | 4, 5, 6 |
| <i>Boyd Rosene and Assoc., Inc. v. Kansas Municipal Gas Agency</i> , 174 F.3d 1115 (10th Cir. 1999) | 20, 21 |
| <i>Carideo v. Dell, Inc.</i> , 706 F. Supp. 2d 1122 (W.D. Wa. 2010)..... | 17 |
| <i>C-C Bottlers, Ltd. v. J. M. Leasing, Inc.</i> , 78 Wn. App. 384, 896 P.2d 1309 (1995) | 4, 5, 6 |
| <i>Doolittle v. Small Tribes of Western Washington, Inc.</i> , 971 P.2d 545 (Wa.App. 1999)..... | 15 |
| <i>Erickson v. Sentry Life Ins. Co.</i> , 43 Wash. App. 651, 719 P.2d 160 (1986) | 9, 10 |
| <i>Hawkins v. Diel</i> , 166 Wn. App. 1, 10, 269 P.3d 1049 (2011) | 4 |
| <i>King. v. Snohomish County</i> , 146 Wash.2d 420, 47 P.3d 563 (2002) | 11 |
| <i>Malone v. Nuber</i> , No. C07-204RSL, 2010 WL 3430418 (W.D. Wa. Aug. 30, 2010) | 11 |
| <i>McKee v. AT & T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845, 851 (2008) | 13 |
| <i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn2d 375, 78 P3d 161 (2003) | 12, 13 |
| <i>Nagrampa v. MailCoups, Inc.</i> , 469 F.3d 1257 (9 th Cir. 2006)..... | 12, 13 |
| <i>North Coast Electric Company v. Martin Selig</i> , 136 Wn. App. 636, 151 P.3d 211 (2007) | 5 |
| <i>Schaeffer v. Shaeffer</i> , 743 P.2d 1038 (Okl.1987) | 4 |
| <i>Singleton v. Frost</i> , 108 Wn.2d 723 P.2d 1224 (1987) | 4 |

| | |
|---|--------|
| <i>Transpower Constructors v. Grand River Dam Authority</i> , 905 F.2d 1413 (10 th Cir. 1990) | 20 |
| <i>Travelers Indemnity Co. v. Hans Lingl Anlagenbau Und Verfahrenstechnik GBMH & Co.</i> , 189 Fed. Appx. 782, 2006 WL 2065069 (10 th Cir. July 26, 2006) | 19, 20 |

Statutes

| | |
|------------------------------------|--------|
| 12 Okla. Stat. Ann. § 939 | passim |
| 12A Okla. Stat. Ann. § 2-313 | 18 |
| RCW 4.84.330 | 4 |

Rules

| | |
|--|----------|
| 10 th Cir. Rule 32.1(C) | 19 |
| CP 155-161 | 16 |
| CP 155-173 | 17, 19 |
| CP 173 | 16 |
| CP 176-205 | 7, 15 |
| CP 213-222 | 17 |
| CP 222 | 16 |
| CP 223-226 | 15 |
| CP 24 | 7, 8, 10 |
| CP 27-37 | 17 |
| CP 29-35 | 6 |
| CP 31 | 6 |
| CP 389-403 | 6 |
| CP 43 | 8, 10 |
| CP 46-49 | 10 |
| CP 65-72 | 17 |
| CP 72 | 16 |
| CP 9-18 | 17 |
| CR 54 | 3, 15 |

| | |
|----------------------------------|-------------|
| CR 54(d) | 2, 7, 15 |
| CR 54(d)(2)..... | 7 |
| CR 9(k) | 2, 8, 9, 10 |
| CR 9(k)(1)..... | 9 |
| Fed. R. App. P. 32.1(a)(i) | 19 |

I. INTRODUCTION

The brief of Respondent Cascade Drilling, Inc. (“Cascade”) admits that Cascade’s product defect and breach of warranty counterclaims against Appellant George E. Failing Company (“Gefco”) were unfounded as a matter of fact, since Cascade could not prove the source of the allegedly defective shafts used in Gefco’s drilling rigs. *See* Cascade Opposition at p. 5. Having voluntarily dismissed its frivolous counterclaims after forcing Gefco to endure years of expensive litigation, Cascade now owes Gefco its reasonable attorney fees under both the credit agreement between Cascade and Gefco *and* under Oklahoma’s fee shifting statute for breach of express warranty claims. This Court should reverse the trial court’s rulings to the contrary.

A close reading of the cited cases, relevant statutes and appellate record shows that Cascade’s arguments are incorrect as a matter of law and fact. First, Appellant George E. Failing Company (“Gefco”) is entitled to an award of reasonable attorney fees for defending Cascade’s counterclaims under the credit agreement between Gefco and Cascade. Under Washington law, where Cascade plead its counterclaims as an affirmative defense, Gefco is entitled to recover fees under the contractual fee provision for defending the counterclaims since litigation of the counterclaims is required for the plaintiff to obtain judgment on his or her

primary claim. The three cases relied upon by Cascade do not involve facts where counterclaims were pled as an affirmative defense as they were here, and are inapplicable.

Second, Gefco is also entitled to attorney fees for defending Cascade's counterclaims under the Oklahoma statute mandating an award of fees to the prevailing party on a breach of express warranty claim, 12 Okla. Stat. Ann. § 939. Gefco did not waive the application of Oklahoma law. Gefco complied with CR 9(k) by alleging in its answer that Oklahoma law governed Cascade's counterclaims. Gefco then properly sought attorney fees through a timely motion for fees and costs under CR 54(d). The trial court's ruling that Gefco should have asserted Oklahoma law in its opening brief on its motion for summary judgment on its main collection claim against Cascade – after Cascade had already voluntarily dismissed its counterclaims – ignores the proper Washington procedure for seeking attorney fees. Cascade is also wrong that the Oklahoma choice of law provision in Gefco's invoices cannot govern because Cascade's tort counterclaims were unrelated to the sales contract. Cascade alleged a counterclaim for breach of express warranty, which plainly "arises out of" the sales contract and is therefore subject to the Oklahoma choice-of-law provision in Gefco's invoices.

Accordingly, Gefco respectfully requests that the Court reverse the trial court's orders denying Gefco its substantial attorney fees incurred in defending Cascade's unfounded product liability counterclaims that Cascade voluntarily dismissed after forcing Gefco to litigate the counterclaims over a period of three years.

II. ARGUMENT

A. The Standard of Review Is De Novo, Not Abuse of Discretion.

Cascade points out that the standard of review of the amount of a fee award is abuse of discretion. That is irrelevant to this appeal. The trial court in this case denied Gefco any award of attorney fees incurred in defending Cascade's counterclaims. The issues on appeal are therefore not about the amount of attorney fees awarded, but (1) whether the trial court erred as a matter of law in concluding that Gefco was not entitled to recover fees under the attorney-fee provision of its credit agreement for defending Cascade's counterclaims; and (2) whether the trial court erred in refusing to consider Gefco's CR 54 motion for attorney fees under Oklahoma law because Gefco failed to raise Oklahoma law in its opening brief in support of its motion for summary judgment on its primary collection claim.

These two purely legal determinations by the trial court that Gefco was not entitled to any award of attorney fees incurred in defending

Cascade's counterclaims are subject to *de novo* review by this Court. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011) (“appellate court “review[s] *de novo* a trial court’s decision that a particular contract, statute, or recognized ground in equity authorizes an attorney fee award.”); *see also Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987) (award of attorney fees under RCW 4.84.330 is mandatory, with no discretion except as to amount”); *Schaeffer v. Shaeffer*, 743 P.2d 1038, 1039-40 (Okl.1987) (holding under Oklahoma law that an award of attorney fees to prevailing party under fee-shifting statute using the word “shall” is mandatory, not discretionary).

B. Gefco Is Entitled To Recover Attorney Fees For Defending The Counterclaims Under Its Credit Agreement With Cascade.

Cascade's discussion of *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987) and *C-C Bottlers, Ltd. v. J. M. Leasing, Inc.*, 78 Wn. App. 384, 896 P.2d 1309 (1995) distorts the holdings of those cases and misstates the law regarding entitlement to attorney fees incurred in defending counterclaims. These cases both teach that the relevant inquiry to determine whether a plaintiff is entitled to fees incurred in defending counterclaims is not simply whether the counterclaims were mandatory or permissive. To the contrary, the issue is whether the plaintiff needs to litigate the counterclaims in order to prevail on his or her initial claim.

The Supreme Court in *Boeing* squarely held that where counterclaims are framed as affirmative defenses, they must necessarily be resolved for the plaintiff to prevail, and fees incurred in defending the counterclaims can be recovered as an essential part of litigating the plaintiff's initial claim. *Boeing*, 108 Wn.2d at 66.

The holding in *C-C Bottlers* is consistent with the Supreme Court's holding in *Boeing*. There, the Court of Appeals held that the plaintiff was not entitled to recover fees incurred in defending the counterclaims only because the defendant did not plead the counterclaims as an affirmative defense. *C-C Bottlers*, 78 Wash. App. at 388, 896 P.2d at 1311. The two other cases cited by Cascade do not change this result, since neither case considers a case where the defendant had incorporated his or her counterclaims into affirmative defenses. *See Atlas Supply*, 287 Wash. App. 234, 287 P.3d 606 (2012); *North Coast Electric Company v. Martin Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007).

In the present case, Gefco is entitled to recover attorney fees incurred in defending Cascade's counterclaims under the credit agreement because Cascade pled its counterclaims as affirmative defenses. The only way for Gefco to defeat Cascade's affirmative defense alleging that Cascade was entitled to setoff amounts owed for defective Gefco products was to defeat Cascade's product liability-related counterclaims. *See CP*

29-35. Accordingly, under *Boeing* and *C-C Bottlers*, Gefco is entitled to an award of its reasonable attorney fees incurred in defending Cascade's counterclaims.

Moreover, even if the Court were to accept Cascade's erroneous premise that Gefco could only recover under the credit agreement if Cascade's counterclaims involved the same Gefco products that were the subject of the collection action, Cascade's counterclaims actually plead that the shafts in *all* drilling rigs it purchased from Gefco were defective. CP 31. Cascade's also asserted in the litigation that *all* Gefco rigs were defective. An exhibit introduced by Cascade at the sanctions hearing in this case was a chronology of alleged failures of both the 30K and 50K models, and final expert report of Cascade's metallurgist. CP 389-403. Since Cascade's counterclaims thus allege that the Gefco rig that was the subject of the original collection action was also defective, Gefco is still entitled to attorney fees even under Cascade's own flawed legal theory.

At the end of the day, based on the law and facts discussed above and in Gefco's opening brief, the trial court erred as a matter of law in its October 5, 2012 Order in ruling that Gefco was not entitled to recover attorney fees incurred in defending Cascade's counterclaims under Gefco's credit agreement. Gefco could not have prevailed on its collection claim without litigating Cascade's affirmative defense, an

affirmative defense incorporating the frivolous counterclaims that Cascade voluntarily dismissed after forcing Gefco to litigate years of expensive discovery disputes. This Court should therefore remand to the trial court with instructions to determine a reasonable fee award to Gefco for its attorney fees incurred defending Cascade's counterclaims.

C. **Gefco Is Entitled To Recover Attorney Fees Under Oklahoma Law.**

Gefco is also entitled to attorney fees for its defense of Cascade's counterclaims under Oklahoma law based on the choice-of-law provision in Gefco's invoices. Cascade's argument that Gefco waived the application of the Oklahoma fee shifting statutes – as applied to Cascade's counterclaims – is legally and factually incorrect. Factually, the record demonstrates that Gefco properly pleaded in its original Reply and Affirmative Defenses to Cascade's counterclaims that Oklahoma law applied. CP 24. Then, having put Cascade on notice that Oklahoma law governed the counterclaims, Gefco timely asserted the applicability of the Oklahoma fee-shifting statutes in its October 1, 2012 motion for an award of attorney fees under CR 54(d)(2). CP 176-205. As a matter of law, based on Gefco's timely assertion that Oklahoma law applied and its appropriate raising of that issue in a motion for fees under CR 54(d), the

trial court erred in failing to conduct a choice-of-law analysis on Gefco's claim for attorney fees incurred in defending Cascade's counterclaims.

Thus, at a minimum, this Court should remand for a choice-of-law analysis to determine whether the Oklahoma statute awarding attorney fees to the prevailing party on a breach of express warranty claim applies based on the choice of law provision in Gefco's invoices. *See* 12 Okla. Stat. Ann. § 939 (awarding attorney fees to prevailing party on claim for breach of express warranty). Alternatively, since the record demonstrates that the Oklahoma choice-of-law clause governs Cascade's breach of warranty counterclaims, this Court may rule that the Oklahoma fee shifting statute governs and remand to the trial court to calculate the amount of reasonable attorney fees Cascade must pay to Gefco.

1. Gefco Did Not Waive Application Of The Oklahoma Fee Shifting Statutes.

Cascade's arguments that Gefco waived the application of Oklahoma law are baseless. First, unacknowledged by Cascade, the record demonstrates that Gefco properly asserted the applicability of Oklahoma law in its Reply and Affirmative Defenses to Cascade's counterclaims. CP 24; 43. While Cascade confusingly treats the application of Oklahoma law as an affirmative defense, the relevant legal guidance is found in CR 9(k). CR 9(k) provides in relevant part: "A party

who intends to raise an issue concerning the law of [another] state . . . shall set forth in his pleading facts which show that the law of another United States jurisdiction may be applicable, or shall state in his pleading or serve other reasonable written notice that the law of another United States jurisdiction may be relied upon.” CR 9(k)(1).

A party may satisfy CR 9(k) in one of three ways: “(1) by alleging sufficient facts in the party's pleading to demonstrate that sister-state law may be relied upon, (2) by making an outright statement in the party's pleading that sister-state law may be relied upon, or (3) by serving other reasonable written notice that the law of another jurisdiction of the United States may be relied upon.” *Erickson v. Sentry Life Ins. Co.*, 43 Wash. App. 651, 655, 719 P.2d 160 (1986) (quoting 3A L. Orland, Wash.Prac., § 5121, at 19 (Supp.1984)).

Here, Gefco satisfied CR 9(k)'s requirements both by alleging facts that demonstrate Oklahoma law might be relied upon and by explicitly giving notice that Oklahoma law might apply. In its Reply and Affirmative Defenses to Cascade's counterclaims, Gefco pled as follows:

“Cascade's and/or Cascade California's claims are barred by the Terms and Conditions of Sale applicable to each of its purchases from GEFCO, which set forth the sole and exclusive remedies of the purchaser of the products manufactured by GEFCO. Pertinent Terms and

Conditions include but are not limited to the following: . . . j. Cascade’s and/or Cascade California’s claims are barred to the extent they are not cognizable under Oklahoma law. CP 24; 43.

Gefco’s initial pleading responding to Cascade’s counterclaims thus gave Cascade notice of the application of Oklahoma law in two ways: (1) it gave Cascade notice that the dispute was governed by the “terms and conditions” set forth in Gefco’s invoices, which include an Oklahoma choice-of-law provision; and (2) it explicitly stated that Oklahoma law may govern the dispute. These allegations satisfy CR 9(k), which is all that the law requires. See *Erickson*, 43 Wash. App. at 655 (finding that party sufficiently raised the application of Minnesota law by explicitly invoking Minnesota law in its pleadings).

Furthermore, contrary to Cascade’s unsupported contentions, Gefco never took a position that Cascade’s counterclaims were governed by Washington law. While the parties conducted substantial discovery – and argued many discovery disputes – over a period of three years, Cascade’s counterclaims were never litigated on the merits. Indeed, Cascade voluntarily withdrew all of its counterclaims against Gefco after years of expensive discovery before Gefco filed any dispositive motions or otherwise seeking any adjudication on the merits of the counterclaims. CP 46-49. Cascade’s baldly counterfactual assertion to the contrary – that

Gefco filed motions relying on substantive Washington law in the context of the counterclaims – is not supported by any record citation (and could not be).

Accordingly, the two cases on which Cascade relies in support of its argument that Gefco waived the application of Oklahoma law to Cascade’s breach of warranty counterclaims are plainly distinguishable. *See King v. Snohomish County*, 146 Wash.2d 420, 47 P.3d 563 (2002); *Malone v. Nuber*, No. C07-204RSL, 2010 WL 3430418 (W.D. Wa. Aug. 30, 2010). In *King*, which did not even involve a choice-of-law issue, the Court merely held that the defendant could not assert an affirmative defense at trial where it omitted the defense from interrogatory responses and failed to raise it in its summary judgment motion. *See King*, 146 Wash.2d at 424-25. Similarly, the court in *Malone* held that the defendants had waived the application of New York law where they had relied exclusively on Washington law in numerous motions, including motions for summary judgment. *See Malone*, 2010 WL 3430418, at *2. Here, Gefco filed no summary judgment motions at all on Cascade’s counterclaims – Cascade simply voluntarily dismissed them. Nothing in Gefco’s pleadings or briefing or discovery responses prior to its motion for an award of attorney fees led Cascade to believe that Gefco had

abandoned its allegation in its answer that Cascade's counterclaims were governed by Oklahoma law. *King* and *Malone*, therefore, do not apply.

Cascade's last waiver argument – that Gefco waived application of Oklahoma law to Cascade's counterclaims by bringing its collections claim in Washington instead of in Oklahoma – is again wrong as a matter of law and fact. While it is true that Gefco likely waived the Oklahoma forum-selection clause in its invoices, Cascade fails to cite a single case holding that waiver of a contractual forum-selection clause also effectively waives a separate choice-of-law-provision – especially where the party's initial responsive pleading asserts the application of the foreign state's law.

Indeed, the two cases cited by Cascade in support of its argument again bear no resemblance to the facts here, and suggest a result opposite to the one Cascade urges. See *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn2d 375, 78 P3d 161 (2003); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1296 (9th Cir. 2006). *Spokane County* had nothing to do with forum-selection or choice-of-law provisions. Instead, the case held that the defendant county had not waived contractual notice requirements in a construction contract merely because it had actual notice of the plaintiff contractor's claims. The Court emphasized that a waiver of a contractual provision requires some affirmative statement or conduct indicating the

party's intent to waive contractual rights. *See Spokane County*, 150 Wn.2d at 390-92. Cascade has not – and could not – identify any such affirmative actions by Gefco indicating an intent to waive the choice-of-law provision. *Nagrampa* is even less applicable, since the holding in that case dealt with the unconscionability of forum selection clauses under California law where the parties' bargaining power is unequal. *See id.*, 469 F.3d at 1287-88. Cascade does not make any unconscionability argument and there are no facts in the record to support such an argument, let alone under California law.

In the absence of any law or facts supporting Cascade's waiver argument, the Court should apply the well-established Washington rule that forum-selection clauses are enforceable unless "the chosen state's law violates a fundamental public policy of Washington [and] if Washington's interest in the determination of the issue materially outweighs the chosen state's interest." *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845, 851 (2008). Cascade makes no argument that the Oklahoma fee shifting statute for breach of express warranty claims violates fundamental public policy, or that Washington's interest in the dispute outweighs the interest of Oklahoma, where Gefco is headquartered. The Court should accordingly reject Cascade's unfounded waiver arguments and enforce the

choice-of-law provision in Gefco's invoices applying Oklahoma law to Cascade's breach of express warranty counterclaim.

2. Gefco Timely Asserted The Applicability Of The Oklahoma Fee Shifting Statutes.

Beyond their unsupported waiver argument, Cascade fails to address Gefco's argument in its opening brief that the court below erred in ruling that Gefco should have raised the application of Oklahoma law in its summary judgment motion that it brought on its primary collection claim against Cascade – after Cascade had already voluntarily dismissed its counterclaims against Gefco. Accordingly, at a minimum, the Court should remand to the trial court with instructions to consider Gefco's October 1, 2012 motion for attorney fees on the merits.

As explained in Gefco's opening brief, Gefco had no obligation to address the issue of its entitlement to attorney fees for its defense of Cascade's counterclaims in Gefco's summary judgment motion on its primary collection claim against Cascade. Indeed, the summary judgment motion was brought after Cascade had already dismissed its counterclaims. Instead, Gefco's claims for attorney fees under the Oklahoma fee shifting statutes for defending Cascade's counterclaims was properly and timely raised in Gefco's Motion for an Award of Reasonable

Attorney Fees and Costs under CR 54(d) filed on October 1, 2012. CP 176-205.

Gefco's filing of a motion to recover fees and costs under Oklahoma law in defending Cascade's counterclaims fully complied with Rule CR 54 – the only rule governing claims for attorney fees. Gefco's CR 54 motion was filed before final judgment was entered in the case on all pending claims, rendering it timely filed. *See Doolittle v. Small Tribes of Western Washington, Inc.*, 971 P.2d 545 (Wa.App. 1999) ("When a party . . . is dismissed on summary judgment while other parties remain in the case, and when the party's dismissal is not made "final" under CR 54, that party can file and serve a cost bill at any time during the time intervening between dismissal of the claim . . . and the entry of final judgment, or wait and do so during the 10 days following entry of final judgment.").

The trial court's ruling in its October 5, 2012 order that Gefco improperly raised the Oklahoma fee shifting statute for the first time in its reply in support of its summary judgment motion on its collection claim against Cascade was inconsistent with CR 54 and *Doolittle*, and was therefore error. CP 223-226.

3. The Choice Of Law Provision In Gefco Invoices Applies Oklahoma Law To Cascade's Counterclaims For Breach Of Express And Implied Warranties.

While the trial court never conducted a choice-of-law analysis because it rejected Gefco's fee motion as a procedural matter, there is sufficient evidence in the record for this Court to determine that the Oklahoma fee shifting statute applicable to claims for breach of express warranty governs Cascade's counterclaims.

First, Gefco's invoices for the products on which Cascade's counterclaims are based all included an Oklahoma choice of law provision. As indicated in the sample sales document submitted by Gefco, that provision provides that all Gefco sales of goods "shall be governed by and construed according to Oklahoma law and it is agreed that if any dispute arises out of this agreement that the proper venue for any legal action shall be Garfield County, Oklahoma." CP 173, 222. An identical choice-of-law provision was in all Gefco invoices governing the products purchased by Cascade, including all products that were the subject of Cascade's breach of warranty counterclaims. CP 72, 155-161.

Second, Cascade once again gets the law wrong when it insists that the Oklahoma choice-of-law provision in Gefco's invoices could not apply to Cascade's counterclaims because Cascade alleged torts that did not arise from the sales contract (e.g., for negligence and fraud). But in

addition to these tort claims, Cascade also alleged claims for breach of implied and express warranty. CP 9-18; 27-37. The very case Cascade relies upon notes that these claims for breach of implied and express warranty are subject to the Oklahoma choice of law provision in Gefco's sales documents. *See Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1126-27 (W.D. Wa. 2010) (holding that choice-of-law provision in Dell invoices encompassed claims for breach of warranty, but not claims for fraudulent concealment and under the CPA). Moreover, because the Gefco sales documents expressly detail the extent of Gefco's express warranties, a breach of warranty claim necessarily "arises out of" the sales contract, and is therefore subject to the Oklahoma choice-of law provision. CP 65-72, 155-173; 213-222.

Once it is established that Oklahoma law governs Cascade's breach of express warranty counterclaim, Oklahoma directs that Gefco is entitled to an award of all its attorney fees incurred in defending Cascade's counterclaims under 12 Okla. Stat. Ann. § 939. First, Cascade's argument that section 939 does not apply because Cascade did not cite the Oklahoma Uniform Commercial Code in its breach of express warranty counterclaim turns the language of the statute on its head. The statute provides: "In any civil action brought to recover damages for breach of an express warranty or to enforce the terms of an express warranty made

under Section 2-313 of Title 12A of the Oklahoma Statutes, against the seller, retailer, manufacturer, manufacturer's representative or distributor, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, which shall be taxed and collected as costs.”

Section 2-313, however, does not – as Cascade contends -- describe or mandate a particular cause of action. Instead, it is the provision of the Oklahoma Uniform Commercial Code stating what kinds of representations constitute an express warranty under Oklahoma law.¹ The express warranty explicitly articulated in Gefco’s sales documents falls within the definition of express warranty in the statute, and the

¹ The full text of 12A Okla. Stat. Ann. § 2-313 provides:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

choice-of-law provision in the contract explicitly provides that the warranty is governed by Oklahoma law. CP 155-173. Thus, as a matter of simple logic, Cascade's claim to enforce Gefco's express warranty in the invoices is by definition an "action to enforce the terms of an express warranty made under Section 2-313 of Title 12A of the Oklahoma statutes," and the fee-shifting provision in 12 Okla. Stat. Ann. § 939 governs.

Oklahoma law is equally clear that Gefco is entitled to recover its attorney fees in defending all of Cascade's counterclaims. Cascade misreads Tenth Circuit Rule 32.1, which clearly states that unpublished Tenth Circuit opinions issued before January 1, 2007 may be cited for persuasive value. See 10th Cir. Rule 32.1(C) ("Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule."). Accordingly, the Tenth Circuit's analysis in *Travelers Indemnity Co. v. Hans Lingl Anlagenbau Und Verfahrenstechnik GBMH & Co.*, 189 Fed. Appx. 782, 2006 WL 2065069 (10th Cir. July 26, 2006) applies fully to the present case. In *Travelers Indemnity*, the Tenth Circuit explained that, under Oklahoma law, where the defendant's defense to express warranty claims was the same as its defense to product liability claims – namely, that the product as

issue was not defective – then the defendant was entitled to recover fees for all attorney time spent on the defense of the matter under 12 Okla. Stat. Ann. § 939. *Id.*, 2006 WL 2065069, at **5-**6; *see also Transpower Constructors v. Grand River Dam Authority*, 905 F.2d 1413, 1423 (10th Cir. 1990) (upholding grant of all defense fees under contract fee provision because defendant’s actions alleged to be breach of contract were same actions underlying negligence claim).

The present case is identical to *Travelers Indemnity*. Gefco’s defense to Cascade’s counterclaims for fraud, negligence and violations of the consumer protection act were the very same as its defense to Cascade’s breach of express warranty claim: that the products it sold to Cascade were not defective and did not cause Cascade’s alleged damages. Where the attorney time spent on the defense of the negligence and other tort counterclaims dealt would have been spent anyway in defending the breach of warranty claims in the same defense, Gefco should be awarded all fees incurred in defense of Cascade’s counterclaims.²

² As a final matter, Cascade’s attempt to distinguish *Boyd Rosene and Assoc., Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1125-26 (10th Cir. 1999) makes no sense. *Boyd Rosene* considered the same question that Cascade raised in its briefing in the trial court: whether the Oklahoma fee shifting statute for express warranty claims is substantive or procedural. The simple fact that *Boyd Rosene* was a diversity case has no impact on its clear, cogent and persuasive analysis of the Oklahoma statute, or its holding that the statute represents a legislative policy choice

III. CONCLUSION

For the foregoing reasons, Gefco asks this court to reverse the order of the trial court denying its fees and costs in the defense of the counterclaim and to remand for determination the amount of fees and costs to be awarded.

As a first alternative, Gefco asks this court to hold that Gefco is entitled to its fees and costs under Oklahoma law and to remand the case to the trial court for the determination of the amount of the fees and costs to be awarded.

As a second alternative, Gefco asks this court to remand the case to the trial court for further proceedings to determine whether Oklahoma law applies to Gefco's request for all its fees and costs and, if so, to determine the amount of fees and costs to be awarded.

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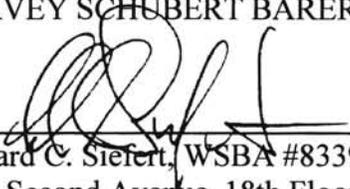
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that firmly makes it substantive, not procedural. In any event, Cascade's brief does not meaningfully make any argument that the Oklahoma fee-shifting statute for express warranty cases is merely procedural or present any logical counterargument to *Boyd Rosene*'s analysis.

Respectfully submitted this 24th day of July, 2013, at Seattle,
Washington.

GARVEY SCHUBERT BARER

By: 
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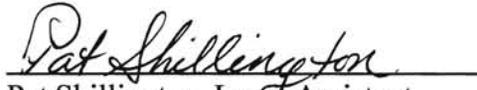
Attorneys for Appellant GEFCO

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington that on the date signed below, she caused a copy of the document to which this certification is attached to be served on the following individuals as described below:

| | |
|---|--|
| <p>Ted Buck, WSBA #22029 Evan Bariault, WSBA #42867 Frey Buck, P.S. 1200 Fifth Avenue, Suite 1900 Seattle, WA 98101 (206) 448-8000 Attorneys for Cascade Drilling tbuck@freybuck.com ebariault@freybuck.com</p> | <p><input type="checkbox"/> United States Mail <input type="checkbox"/> By Fax <input type="checkbox"/> By Email Delivery <input checked="" type="checkbox"/> By Legal Msgr</p> |
| <p>Jaime Drozd Allen Geoff Bridgman Ogden Murphy Wallace 901 Fifth Avenue, Suite 3500 Seattle, WA 98101 Attorneys for Hub City, Inc. jallen@omwlaw.com gbridgman@omwlaw.com</p> | <p><input type="checkbox"/> United States Mail <input type="checkbox"/> By Fax <input type="checkbox"/> By Email Delivery <input checked="" type="checkbox"/> By Legal Msgr</p> |

SIGNED this 24th day of July, 2013 at Seattle, Washington.

A handwritten signature in cursive script, reading "Pat Shillington", is written over a horizontal line.

Pat Shillington, Legal Assistant
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