

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.

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BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Gefco filed a collection action for goods sold to Cascade. CP 1-8. Cascade defended and counterclaimed on the grounds that the goods were defective. CP 27-37.

After three years of litigation, Cascade abandoned its defense and counterclaims. CP 46-49; 50-53. The trial court denied Gefco's request for fees and costs in the defense of the counterclaims, allowing only an award on the collection action. CP 223-225.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in denying Gefco's request for its fees and costs in the defense of the counterclaims under Washington law.

B. The trial court erred in denying Gefco's request for fees and costs in the defense of the counterclaims under applicable Oklahoma law, without considering briefing or argument by Gefco on the issue.

III. STATEMENT OF THE CASE

Gefco manufactures drilling rigs in Oklahoma. CP 1-8. It sold a rig to Cascade, a drilling company in Washington. CP 1-8. Cascade subsequently ordered from Gefco a replacement component for its rig. CP 1-8. Gefco shipped the replacement component from its plant in Oklahoma to Cascade in Washington. CP 7-8.

Cascade failed to pay for the replacement component, and Gefco filed a collection action in Seattle. CP 1-8. Cascade defended on the basis that the replacement component was defective and asserted counterclaims that both the replacement and original equipment manufacturer's ("OEM") components were defective, among other related claims. CP 27-37.

All of the Gefco sale documents specified Oklahoma as the proper jurisdiction, venue, and choice of law. CP 8; 155-171; 213-222. Gefco timely alleged that Oklahoma law applied to the case. CP 1-8. Neither party advanced a full choice of law analysis, and the trial court did not require it.

The case was heavily litigated for nearly three years. Barely over a month before trial, at the outset of a hearing on a motion for sanctions accusing Cascade of discovery misconduct, Cascade filed a Motion for Dismissal with Prejudice of all of its counterclaims against Gefco. CP 46-48. The Court granted the Motion. CP 49.

Gefco then filed a Motion for Summary Judgment on its collection action for the sale of the replacement component and for fees and costs incurred in the collection action. CP 56-61. Before responding to the Motion, Cascade paid in full for the replacement component, including interest due and owing. CP 127. Cascade then filed an Opposition to the Motion for Summary Judgment, arguing that the collection claim was moot and conceding that Gefco was entitled to its fees and costs on the collection action. Supplemental CP.

Cascade's Opposition also argued that Gefco could not recover its fees and costs in defending the counterclaims—an issue *not* raised in Gefco's Motion. Supplemental CP. Gefco

responded in its Reply that it was entitled to fees and costs in defending the counterclaims, including an argument that it was entitled to recover them as a prevailing party under Oklahoma's fee-shifting laws. CP 206-222. Along with its Reply, Gefco simultaneously filed a new Motion to recover its fees and costs on the counterclaims under Washington and Oklahoma law. CP 176-205.

The Court heard the Motion for fees and costs on the collection action before Cascade's Opposition to Gefco's newly filed Motion for fees and costs on the counterclaims was due. RP 10/5/12. In denying Gefco's request for fees and costs on the counterclaims, the trial court had before it only Cascade's argument in its Opposition to the Motion for fees and costs on the collection action and Gefco's Reply discussing the issue under Washington and Oklahoma law. RP 10/5/12.

At the hearing, Gefco suggested that the court allow Cascade to file a response before ruling on Gefco's claim for fees and costs in the defense of the counterclaim under

Oklahoma law. CP 322. The court did not accept the suggestion and denied the claim for fees and costs on the counterclaims under Washington law. CP 334-336. The court did not entertain the argument that Gefco was also entitled to the recovery under Oklahoma law, *solely* on the ground that that argument was raised for the first time in the Reply. CP 335.

Gefco's new Motion under CR 54 for fees and costs on the counterclaims under Washington and Oklahoma law (CP 176-182)—filed with the Reply to the Opposition to the Motion for fees and costs on the collection action—went unanswered and was never heard by the court. Gefco tried to resurrect the CR 54 Motion for fees with a Motion for Reconsideration of the order denying the request for fees and costs on the counterclaims (CP 229-233), but the court denied reconsideration without comment. CP 357-358.

IV. ARGUMENT

A. Gefco is entitled to its fees and costs in defending the counterclaims under Washington law.

Gefco is entitled to recover all of its attorney fees and costs under Washington law, pursuant to its Credit Agreement with Cascade and RCW 4.84.330.¹ CP 163-164.

The trial court erred in adopting Cascade's proposed Order denying fees and costs in defending against the counterclaims, on the ground that the counterclaims were "permissive," and not "compulsory." CP 223-225. Cascade's proposed Order, signed by the trial judge, was erroneous, in that it relied on a finding of fact and law that the counterclaims were "permissive" as the pivotal reason for denying fees and costs on the counterclaims. CP 223-225.

¹ RCW 4.84.330 generally provides for the enforcement of contractual fee-shifting provisions: "In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

The correct analysis is that Gefco is entitled to its fees and costs in defending the counterclaims, because the core allegation—that the components were defective—was asserted by Cascade both as a defense to the collection action and as the basis for the counterclaims. It does not matter whether the counterclaims could be regarded, as a matter of fact, as either permissive or compulsory.

Washington law on this point is settled. The Supreme Court's decision in *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987) is directly on point. *Boeing* requires an award to Gefco of all fees and costs in this case in overcoming the defense to the collection action and in defending against the counterclaims, because Cascade's counterclaims and defenses were all based on the allegation that Gefco supplied defective components.

In *Boeing*, Boeing sued Sierracin for misappropriation of trade secrets. Sierracin asserted various antitrust affirmative defenses and counterclaims. The Supreme Court held that

Boeing could recover its fees and costs in litigating those antitrust theories that were asserted as both affirmative defenses and counterclaims.

Had Sierracin raised the antitrust issue only as a counterclaim, and not as an affirmative defense, Boeing would not recover any of its attorney fees on that antitrust issue. Since Sierracin ***did raise this issue as a defense*** to Boeing's trade secrets claim, Boeing should receive its attorney fees for that part of the antitrust issue that can be fairly related to the affirmative defense.

Id. (emphasis added) Boeing means that because Cascade framed the fundamental allegation that Gefco's components were defective as an affirmative defense *and* as the foundation of its counterclaims, Gefco is entitled to recover all its fees and costs in litigating the issue.

The case of *C-C Bottlers, Ltd. v. J. M. Leasing, Inc.*, 78 Wn. App. 384, 896 P.2d at 1309 (1995) is also instructive. The Court of Appeals in *C-C Bottlers* held that the plaintiff could not recover attorney fees for defending the defendant's counterclaims, because those counterclaims were not pled as an

affirmative defense. The court emphasized that it did not matter that the counterclaims were in fact tried as an affirmative defense; rather, the availability of a fee award depended on whether an affirmative defense had been pled. *Id.*, 78 Wash. App. at 388, 896 P.2d at 1311. In this case, Cascade pled its counterclaims also as an affirmative defense. Cascade's affirmative defense states: "plaintiff is indebted to Defendant for non-conforming and otherwise defective goods sold to Cascade Drilling, Inc. . . . [and] defendant, which debt is in excess of any amounts alleged by Plaintiff to be owing" (CP 11, ¶ 13). As the court in *C-C Bottlers* held, "An affirmative defense cannot be adjudicated separately from the claims to which it applies." *C-C Bottlers*, 78 Wash. App. at 388, 896 P.2d at 1311 (emphasis added). That is, in this case, Gefco could not litigate the collection action without addressing the affirmative defense that the replacement component was defective.

C-C Bottlers also teaches that the trial court erroneously

based its ruling on a finding that the counterclaims asserted by Cascade were “permissive,” not “mandatory” as set forth in the order tendered by Cascade and signed by the judge. CP 224:

The issue presented, however, is not a factual one. It turns on the pleadings rather than the factual basis for those pleadings or the way in which this case was tried.

78 Wash. App. at 388, 896 P.2d at 1311. *C-C Bottlers* required the court to turn away Cascade’s argument that the counterclaims were permissive and instead look to the pleadings to determine whether Cascade’s affirmative defense and the counterclaims raised the same issues. Cascade’s pleadings raised an affirmative defense that was overlapping with its counterclaims, and the court erred in not recognizing its obligation under *Boeing* and *C-C Bottlers* to award Gefco its fees and costs for the whole litigation. CP 27-37.

B. Gefco is entitled to its fees and costs in defending the counterclaims under Oklahoma law.

Gefco is entitled to an award of all of its reasonable attorney fees and costs incurred by Gefco in this action under

12 Okla. Stat. Ann. §§ 936, 939 and 940. According to the terms of Gefco's sale documents, Oklahoma law applies to the parties' dealings. The trial court did not consider this argument or conduct a choice of law analysis.

Under Oklahoma law, Gefco is entitled to statutory attorney fees from Cascade, because it was the prevailing party on a claim involving negligent property damage and express warranty claims. Oklahoma statutes provide that a prevailing party is entitled to recover attorney fees in actions alleging non-payment for the sale of goods, breach of an express warranty, and negligent injury to property. *See* 12 Okla. Stat. Ann. §§ 936 (sale of goods), 939 (express warranty), and 940 (negligence).

Gefco is entitled to recover all attorney fees and costs expended in this litigation under these Oklahoma statutes. Gefco's original collection claim to recover amounts owed for the sale of goods falls squarely within the claims described in Section 936. Cascade's counterclaims for negligence and

breach of express fall within Sections 940 and 939, respectively. Because Cascade paid Gefco's original claim in full and voluntarily dismissed its counterclaims with prejudice, Gefco is the prevailing party and is entitled to its attorney fees. *See Western Stud Welding, Inc. v. Omark Industries, Inc.*, 43 Wash. App. 293, 296, 716 P.2d 959, 961 (1986), *abrogated on other grounds*, *Burns v. McClinton*, 135 Wash. App. 285, 310, 143 P.3d 630 (2006).

Because Cascade's counterclaims all involve overlapping factual issues, Gefco is entitled to fees for its defense of all of the counterclaims, not just the negligence and warranty claims. *See Travelers Indemnity Co. v. Hans Lingl Anlagenbau Und Verfahrenstechnik, GMBH & Co.*, 189 Fed. Appx. 782, 2006 WL 2065069, *5-***6 (10th Cir. July 26, 2006) (applying Oklahoma law); *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, 932 P.2d 1091, 1098 (Okla. 1996). This case is directly analogous to the *Travelers* case. There, the Tenth Circuit applied Oklahoma law to uphold the trial court's award

of the defendant's attorney fees incurred in successfully defending the plaintiff's negligence, breach of warranty, and related product liability claims. The Court reasoned that "it is apparent that the time defendants' attorneys devoted to the products-liability claims was necessarily incurred in defending the other claims." *Travelers*, 2006 WL 2065069, at **6.

Just as in *Travelers*, Gefco's defense of Cascade's breach of express warranty and negligence claims involved the identical core factual issue as Cascade's other counterclaims; that is, whether the components sold by Gefco to Cascade were defective. Gefco's defense of the counterclaims not enumerated by the statute were inextricably intertwined with its defense of Cascade's express warranty and negligence claims, and as a result, Gefco is entitled to recover all of its reasonable attorney fees and costs incurred in this litigation, in an amount to be determined by the trial court.

Cascade's Opposition to Gefco's Motion for an Award of Reasonable Attorney Fees overlooked Gefco's original

invocation of Oklahoma law in its pleadings, misstated the law regarding when Gefco had to specifically raise the Oklahoma fee-shifting statutes, and misread the cases holding that the Oklahoma loser-pays fee-shifting statutes are properly considered substantive, not procedural. The Oklahoma fee-shifting statutes do not require proof of entitlement to fees as an element of damages – they simply provide that reasonable fees *shall* be automatically awarded to the prevailing party on claims for breach of express warranty or negligent injury to property. *See* 12 Okla. Ann. Stat. §§ 939 & 940.

In a case on point, the Tenth Circuit held that Oklahoma's loser-pays fee-shifting statutes embody a substantive legislative policy choice. *See Boyd Rosene and Assoc., Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1125-26 (10th Cir. 1999). The Tenth Circuit reasoned that loser-pays fee-shifting statutes reflect a legislative decision to take the issue of a fee award out of the court's discretionary powers, and "reflect a conscious policy choice by a legislature

to depart from the American rule and codify the English rule." *Id.* at 1126. The Court noted that fees under Section 936 are not awarded for bad faith litigation, but "they are instead simply awarded to the prevailing party." *Id.*

For the reasons addressed in *Boyd Rosene*, the Oklahoma warranty and negligence loser-pays fee-shifting statutes are substantive and applicable here. By requiring a non-discretionary award of reasonable attorney fees to the prevailing party, the Oklahoma statutes reflect a conscious legislative policy choice regarding the distribution of risk in warranty and negligence claims.

Putting aside Gefco's entitlement to an attorney fee award under Oklahoma law, the trial court's refusal to even consider Gefco's arguments on Oklahoma law was procedural error. The trial court did not consider Gefco's entitlement to fees under Oklahoma law, because it ruled that the issue had been improperly raised for the first time in its Reply in support of its Motion for Summary Judgment on its original collections

claim against Cascade. CP 223-225.

This ruling was erroneous. Gefco's Motion for Summary Judgment did not brief Gefco's entitlement to recover reasonable costs and attorney fees for its defense of Cascade's counterclaims dismissed on August 17, 2012. Instead, the issue was properly and timely raised in Gefco's Motion for an Award of Reasonable Attorney Fees and Costs under CR 54 filed on October 1. CR 54 generally provides that claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion and that such fee motion must be filed no later than 10 days after entry of judgment. CR 54(d)(2).

In this case, Gefco's Motion for an Award of Reasonable Attorney Fees and Costs under Oklahoma law in defending Cascade's counterclaims fully complied with Rule CR 54. The filing deadline called for by CR 54(d) was 10 days after final judgment was entered in the action below. Final judgment was not entered until Gefco's third-party claims were dismissed on October 15, 2012. CP 238-241. Gefco's Motion for fees under

the Oklahoma fee-shifting statutes on October 1, 2012 was therefore timely. *See Doolittle v. Small Tribes of Western Washington, Inc.*, 94 Wash. App. 126, 971 P.2d 545 (Wn.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.").

Because Gefco filed a timely motion under CR 54(d) to recover fees incurred in defending Cascade's counterclaims, it was entitled to a ruling addressing the Oklahoma fee-shifting statutes, independent of Washington counterclaim analysis as briefed in the breach of contract summary judgment motion on the collection action. The trial court's October 5, 2012 Order resolving Gefco's Summary Judgment Motion should not have addressed the issue of entitlement to fees in defending

Cascade's counterclaims, because that issue is properly raised in a CR 54(d) motion, not a summary judgment motion. Gefco accordingly did not improperly raise the Oklahoma statutes for the first time in a Reply brief, but properly asserted them in its CR 54(d) motion filed October 1. Thus, to the extent the Court's October 5 order ruled that Gefco cannot recover fees under the Oklahoma fee-shifting statutes merely because the statutes were raised for the first time in Gefco's reply brief, it was in error.

V. 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 the case for the 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.

Respectfully submitted this 10th day of May, 2013, at Seattle, Washington.

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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:

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