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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.

BRIEF OF RESPONDENT

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I. INTRODUCTION

George E. Failing Co. (“Gefco”) sued Cascade Drilling, Inc. (“Cascade”) below in a collection on a power take-off (PTO) box Cascade had ordered for one of its smaller, 30K drilling rigs. Cascade counterclaimed for offset claiming not that the PTO box for the 30K rig was defective, but that other equipment Gefco sold Cascade – drive shafts for a larger, 50K rig – were defective and had caused Cascade substantial damage. After the claims were resolved, Gefco moved for an award of attorney fees “herein.” Cascade pointed out in response that Gefco was entitled to fees only on its collection action, not Cascade’s permissive counterclaims. In reply, Gefco raised new arguments (for the first time after three years of litigation and after the claims between Gefco and Cascade had been resolved) in an effort to tie its collection action to Cascade’s permissive counterclaims to allow Gefco to obtain fees that were not part of its bargain with Cascade.

To bolster its new arguments from the reply brief, at oral argument on its summary judgment motion requesting fees, counsel for Gefco tried to argue that Cascade had claimed that both the drive shafts for the larger 50K rig and the PTO box for the smaller 30K rig (the only part subject to Gefco’s collection action) were defective. That claim was blatantly false; the trial court recognized it and rejected Gefco’s argument. Under the

accurate facts the trial court ruled that Gefco was only entitled to attorney fees incurred in its collection action. The trial court also struck the new evidence and argument Gefco introduced for the first time in its reply to summary judgment.

Before this Court, Gefco, in a significant demonstration of lack of candor toward the tribunal, makes the same factual assertions rejected by the trial court. Gefco has demonstrated no error by the trial court that supports overturning its ruling regarding attorney fees and this Court should be wary of Gefco's dubious trial court tactics at play in this appeal.

II. COUNTER-STATEMENT OF THE CASE

On July 7, 2009, Gefco filed a complaint against Cascade for breach of contract and quantum meruit. CP 1-8. The complaint alleged that Cascade failed to pay for a PTO box that Cascade had ordered as a replacement for a 30K drilling rig owned by Cascade.¹ CP 2. Cascade disputed not the price of the 30K rig, but rather sought an offset to that amount because Gefco had previously supplied Cascade defective parts for an entirely different drill rig, Cascade's 50K rig. Gefco chose to file its complaint in King County, Washington. CP 1-8. Absent from its complaint was any language regarding jurisdiction or venue. CP 1-8.

¹ 30K and 50K are capacity designations, a 50K drill rig is a larger, heavier drilling rig than a 30K rig.

On July 28, 2009, Cascade filed its Answer, Affirmative Defenses and Counterclaims alleging multiple tort claims. CP 9-18. Cascade's counterclaims were based solely upon damages Cascade had sustained as a result of Gefco's earlier provision of faulty drive shafts for the 50K rig. Cascade did not claim the PTO box it purchased for the 30K rig, the component at issue in Gefco's complaint, was defective.² .

In its "Statement of the Case" to this Court, Gefco claims that "Cascade defended on the basis that the replacement component was defective[.]" ; that claim was knowingly false, the same claim the trial court rejected.³ No evidence in the record before this Court supports Gefco's claim. In fact, the record shows that Cascade merely pled an affirmative defense of setoff based upon Gefco's earlier act of knowingly supplying deficient drive shafts to Cascade for its 50K rig. Cascade's answer included the following language:

Plaintiffs is indebted to Defendant for non-conforming and otherwise defective goods sold to Cascade Drilling, Inc. – California, a California corporation that was merged into Defendant effective January 1, 2009, which debt is in excess of any amounts alleged by Plaintiff to be owing in connection with the Gearbox [PTO box].

² Indeed, the 30k rig PTO box functioned throughout the entirety of the lawsuit – having never failed, Cascade could not have claimed it was defective if it wanted to.

³ Gefco made this same factual assertion to the trial court at a hearing on October 5, 2012. Cascade informed the trial court that this was untrue. The trial court agreed and utilized the correct facts in reaching its decision on attorney fees.

CP 10. Cascade's counterclaims related to the previously provided defective shafts on the 50K rig, supporting its setoff claim, and unrelated to the 30K rig PTO box collection action. CP 11-16. In short, neither Cascade's set-off defense nor its counterclaims were related to the PTO box that was the only basis for Gefco's lawsuit against Cascade. At no time did Cascade allege that the PTO box, the subject of Gefco's lawsuit, was defective. Gefco's failure to produce any evidence to support its claim that either the defense or the counterclaims were related to the PTO box confirms its tawdry effort to mislead.

Gefco filed its Reply and Affirmative Defenses to Counterclaims on September 9, 2009. CP 38-45. Within its affirmative defenses, 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 43. Gefco further alleged "Cascade's and/or Cascade California claims are frivolous and are being advanced without reasonable cause, and thus, defendants should be allowed to recover their attorney's fees

pursuant to RCW 4.84.185.” CP 44. Gefco’s sole claim for attorney fees was this reference to Washington law.

On June 14, 2010, Cascade filed an Amended Answer, Affirmative Defenses, and Counterclaims. Gefco filed its Reply and Affirmative Defenses to Amended Counterclaims on July 6, 2010, again alleging the same affirmative defenses outlined above. The case was heavily litigated for over three years, involving numerous sets of discovery, multiple discovery motions and a considerable number of depositions.

In 2012 Cascade discovered a flaw in its chain of custody on the defective shafts from the 50K rig that were the subject of its counterclaims. Due to its inability to accurately identify the 50K rig drive shafts in question, on August 17, 2012, Cascade was forced to dismiss its counterclaims against Gefco. CP 46-49. On September 10, 2012, Gefco filed a Motion for Summary Judgment (“summary judgment motion”) on its collection action. CP 56-61. The motion included a request for “Plaintiff’s attorney’s fees and costs incurred herein.” CP 60. The only law asserted in support of the motion was Washington law. Cascade filed its Opposition to Gefco’s Summary Judgment Motion (“Cascade’s opposition”) on September 24, 2012. CP 369-383. Cascade’s opposition informed the Court that it had paid Gefco in full for the 30K PTO box, the basis of Gefco’s collection action. The only question raised by Gefco’s

summary judgment motion and, the only remaining issue to be addressed, was an award of attorney fees for Gefco's efforts to collect on the 30K rig PTO box. Because Gefco had never asserted any claim for attorney fees under Oklahoma law, never contended Washington did not have jurisdiction over the action, and had not contended venue was improper in King County, Washington, Cascade followed Gefco's lead and applied Washington law in its response to summary judgment. Cascade pointed out Gefco was only entitled to attorney fees on the collection action because Cascade's counterclaims were permissive, not compulsory. The counterclaims related to different parts for a different drill rig and not to Gefco's suit for failure to pay for the unrelated 30K PTO box.

Gefco filed two documents in reply to Cascade's response, a reply to summary judgment and a new motion for attorney fees. Both raised for the first time new grounds for attorney fees that were not mentioned in Gefco's summary judgment motion and had never been previously raised in the litigation: RCW 4.84.330 and 12 Okla. Stat. Ann. §§ 936, 939 and 940. CP 206-211; CP 176-183 (Motion for Reasonable Attorney Fees and Costs ("attorney fees motion")). Although couched as an original motion, Gefco's attorney fees motion was nothing more than a reply to Cascade's opposition to Gefco's summary judgment motion, as evidenced by the fact that it cites directly to Cascade's opposition when addressing its argument

for attorney fees. CP 180-182. Gefco raised these new claims after it reviewed Cascade's opposition and realized that it was not entitled to attorney fees outside of its collection action under Washington law. Indeed, Gefco's counsel, on October 5, 2012, at oral argument on the summary judgment motion admitted that Gefco never intended to apply Oklahoma law until it realized it had a losing argument to collect attorney fees under Washington law: "We actually didn't realize we had the argument [regarding Oklahoma law] until we were doing the reply." RP 10/5/12.

At the summary judgment hearing on October 5, 2012, the trial court rejected Gefco's argument for attorney fees on Cascade's counterclaims and limited attorney fees to Gefco's collection action. CP 223-225. The court applied Washington law and denied Gefco's request to apply Oklahoma law as it was first raised in reply. In its Order, the court held, "because Cascade's counterclaims were permissive to the collection action, Gefco is not entitled to attorney's fees and costs for defending against Cascade's counterclaims. Gefco is only entitled to reasonable fees and costs for its collection action." CP 224-225.

Cascade then opposed Gefco's "new" attorney fees motion arguing, among other things, that the trial court had already ruled on that fee issue on Gefco's summary judgment motion and noting that Gefco had

waived application of Oklahoma law. CP 337-347; CP 242-336. To date, the trial court has never ruled on Gefco's "new" attorney fees motion, however, it did deny Gefco's request to reconsider the order on summary judgment that limited Gefco's attorney's fees to the collection action.

III. ARGUMENT

The amount of an attorney fee award is discretionary and "[i]n order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987)). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. An exercise of discretion is based on untenable grounds where a trial court applies an incorrect legal analysis or commits an error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

1. The trial court did not commit error in denying Gefco's request for attorney fees and costs in defending against Cascade's permissive counterclaims under Washington law.

On the recoverability of fees, Washington follows the American rule. The court may only award attorney's fees to a prevailing party when authorized to do so by contract, statute, or a recognized ground in equity.

Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Under well established law, in this collection action where there is a contractual provision for attorney fees for “collection efforts,” Gefco may only seek fees incurred on the collection claim, and not fees incurred defending against Cascade’s permissive counterclaims. *See C-C Bottlers, Ltd v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 389-90, 896 P.2d 1309 (1995). The trial court did not err in establishing that Cascade’s counterclaims were “permissive” and not “compulsory,” resulting in the denial of Gefco’s request for attorney’s fees. Gefco’s assertion that the character of the claims is irrelevant is erroneous and unsupported by the law.

C-C Bottlers is the controlling case on the issue and the basis of the trial court’s decision. There the appellate court held that a party was not entitled to attorney’s fees and costs for successfully defending against the opponent’s permissive counterclaims in a collection action with a routine attorney fee clause. 78 Wn. App. at 390. *C-C Bottlers* (“CCB”) brought a collection action against J.M. Leasing (“JML”) to collect on two delinquent promissory notes. *Id.* at 386. The notes contained a “garden variety attorney fees clause” that provided: “In the event suit is brought herein, or Holder [CCB] employs an attorney or incurs expenses to compel payment of the Note...Maker [JML] promises to pay all attorney’s fees,

costs, and expenses incurred by Holder.” *Id.* JML counterclaimed, alleging security fraud. *Id.* CCB brought summary judgment on the notes, but delayed entry of the judgment until JML’s counterclaims were tried. *Id.* Following a bench trial, the court entered judgment on the notes in favor of CCB and dismissed JML’s counterclaims. *Id.* The trial court awarded CCB its fees and costs for the entire litigation after finding that JML’s fraud counterclaims were “substantially interwoven and inseparable” from CCB’s collection on the notes. *Id.* at 387.

The appellate court disagreed. It found JML’s securities fraud counterclaims to be “independent and unrelated claims asserted permissively,” and noted that the fraud claims did not affect and would not affect the outcome of the note collection action. It explained:

CCB argues that the attorney fees clause in these notes reflects the intent of these parties to include claims (in this case counterclaims) which, while not directly related to recovery of the notes, must necessarily be defended in order to recover on the notes. The trial court agreed. It found that although JML designated its securities fraud claims as counterclaims, they were actually tried as affirmative defenses, which CCB had to overcome to obtain judgment on the promissory notes. We disagree. These counterclaims do not affect, nor are they affected by, the outcome of the promissory notes claims.

Id. (emphasis added). The appellate court found:

JML’s securities fraud claims are permissive counterclaims. Their objective was the equitable remedy of setoff, in the event CCB recovered on the notes. They did

not avoid the obligation represented by the notes and therefore are not defenses; they are independent and unrelated claims asserted permissively. An affirmative defense cannot be adjudicated separately from the claims to which it applies; a counterclaim can. Permissive counterclaims provide complete relief to the parties, conserve judicial resources and avoid multiple lawsuits.

Id. at 388 (citations omitted) (emphasis added).

In reversing the trial court, the appellate court held that the “garden variety attorney fees clause” in the notes “limits recovery of costs and fees to collection of the notes.” *Id.* at 389 (citing *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 129-30 (1993) (language authorizing fees for “any litigation” involving rights under the contract establishes only a right to fees incurred in litigation of contract-related claims)). The appellate court explained the limitations:

[T]he prevailing party should be awarded attorney fees only for the legal work completed on the portion of the claim permitting such an award, because while collateral claims may well be related to the contract claim and therefore conveniently tried together, they need not be resolved in order to decide a primary claim. Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit.

Id. at 389 (citation omitted) (quoting *King County v. Squire Inv. Co.*, 59 Wn. App. 888, 897, 801 P.2d 1022 (1990), *review denied*, 116 Wn.2d 1021 (1991)). Accordingly, the appellate court found that *C-C Bottler's* “attorney fees provision authorized recovery only for all legal expenses

incurred in compelling payment of those notes,” and therefore did not extend to defending fraud counterclaims:

While CCB was forced to defend against the counterclaims before obtaining final judgment on the notes, the legal theories raised and defended in the counterclaim action were different from those presented in the action on the notes.

Id. at 390 (citation omitted).

Finally, in reversing the trial court’s attorney fee award for the total litigation, the appellate court remanded the case with instructions to segregate those fees and costs incurred prosecuting the contractual claims from those incurred in defending the fraud counterclaims. *Id.* at 390. Cascade’s offset claims are identical in relation to Gefco’s contractual collection claims as the defendant’s fraud claims were to the plaintiff’s collection action in *C-C Bottlers*.

Conversely, a plaintiff is entitled to attorney’s fees and costs in such circumstances for the entire litigation only where the counterclaims were compulsory. In *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 240, 287 P.3d 606 (2012), this Court held that a party in a collection action was entitled to attorney’s fees incurred in defending counterclaims because they were “compulsory” (i.e., arising from the same transaction). Importantly, this court (citing *C-C Bottlers*) noted that fees and costs are not recoverable where the claims were “permissive.” *Id.* at 238.

In *Atlas*, Atlas sold construction products to Realm, subject to a credit application wherein Realm agreed “to pay the costs of collection, including reasonable attorney fees...[.]” *Id.* at 236. When those same products failed, Realm refused to pay. *Id.* Atlas brought a collection action; Realm counterclaimed for breach of contract, breach of warranty, and negligent misrepresentation for the failed product. *Id.* The trial court awarded attorney’s fees only on the collection action. *Id.* In reversing the decision, the *Atlas* court explained the difference between “compulsory” and “permissive” counterclaims:

A compulsory counterclaim is one that ‘arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.’ Under CR 13(a), a party must assert its compulsory counterclaims or those claims are forever barred. By contrast, a permissive counterclaim is any claim against an opposing party not arising out of the same transaction or occurrence that is the subject matter of the opposing party’s claim. Permissive counterclaims do not affect, nor are they affected by the outcome of the original claim.

Id. at 237-238 (citations omitted). The court then found Realm’s counterclaims to be “compulsory”:

They arose out of the same purchase transaction that led to Atlas’s original debt collection action. If successful, they would have defeated Atlas’s claim on the debt. Thus, they had to be resolved for Atlas to prevail on its collection action.

Id. at 240 (emphasis added). Accordingly, Atlas was entitled to fees for the case.

Here, like *C-C Bottlers* and unlike *Atlas*, Cascade's counterclaims were permissive. They were independent and unrelated claims, associated with different transactions, unnecessary to the collection action and asserted permissively.⁴ In this case, GEFCO brought a collection action to recover payment for the sale of a PTO box for a 30K GEFCO rig. Cascade asserted independent counterclaims for (1) four failed pump drive shafts in its GEFCO 50K rig, and (2) a failed "intermediate shaft" in its GEFCO 30K rig. The counterclaims for these product failures did not occur or arise out of the 30K PTO Box Cascade purchase. The failed "intermediate shaft" was in a different Gefco 30K rig that had no relationship with the PTO Box for the 30K rig that was the basis for Gefco's collection action. The counterclaims were independent of and unrelated to the non-payment of the 30K PTO box that founded Gefco's lawsuit. The counterclaims did not affect, nor were they affected by, the debt collection for the 30K PTO Box. Accordingly, they were permissive.

That Cascade may have been entitled to a setoff for the unpaid invoice if it had prevailed on its counterclaims, or that it had asserted as an affirmative defense this setoff, does not change the permissive characterization of the claims. That issue was addressed and resolved in

⁴ A permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." CR 13(b). Permissive counterclaims "do not affect, nor are they affected by, the outcome of the original claim." *C-C Bottlers*, 78 Wn. App. at 387.

C-C Bottlers. There the court noted that counterclaims “did not avoid the obligation represented by the notes and therefore are not defenses; they are independent and unrelated claims asserted permissively”:

The trial court...found that although JML designated securities fraud claims as counterclaims, they were actually tried as affirmative defenses, which [CCB] had to overcome to obtain judgment on the promissory notes. We disagree. These counterclaims do not affect, nor are they affected by, the outcome of the promissory notes claims.

JML’s securities fraud claims are permissive counterclaims. Their objective [for the fraud counterclaims] was the equitable remedy of setoff, in the event [CCB] recovered on the notes. They did not avoid the obligation represented by the notes and therefore are not defenses; they are independent and unrelated claims asserted permissively.

C-C Bottlers, 78 Wn. App. at 388. Likewise, Cascade’s affirmative defense (setoff) and counterclaims on unrelated product failures did not avoid its obligation for payment on the PTO Box for the 30K rig. Cascade’s claims were permissively asserted.

Similarly, in relying on *C-C Bottlers*, this Court in *North Coast Electric Company v. Martin Selig, et al.*, 136 Wn. App. 636, 649, 151 P.3d 211 (2007), held that a plaintiff is not entitled to an award of attorney’s fees for defending permissive counterclaims. In *Selig*, a light fixture supplier sued Selig (the property owner) for the unpaid purchase price of fixtures. *Id.* at 641. It also sought a lien. *Id.* Selig counterclaimed, alleging

wrongful lien, disparagement of title, and intentional interference with contractual relationships. *Id.* The supplier moved for summary judgment on its collection action, and requested attorney's fees under the credit application. *Id.* In response, Selig conceded the amount due, but contested the attorney's fees. *Id.* The trial court awarded the supplier its attorney's fees for the entire litigation, including for defending the counterclaims. *Id.* at 642. Selig then voluntarily dismissed its counterclaims under CR 41, and challenged the attorney's fee award on appeal. *Id.* This Court found Selig's counterclaims "were independent and unrelated claims asserted permissively, not a defense against [the supplier's] contract claim [for non-payment]." *Id.* at 649. It reversed the trial court's fee award for the entire litigation: "We hold that the award of attorney fees relating to Selig's counterclaims pursuant to the credit application is not sustainable in light of the decision in *C-C Bottlers*." *Id.*

Finally, here the attorney's fee provision applies specifically only to "collection efforts." As in *Atlas* and *C-C Bottlers*, Gefco had a "garden variety attorney fees clause" in its contractual language. The Commercial Credit Application fee clause reads: "3. To pay attorney's fees in the event that collection efforts become necessary." Allowing recovery of attorney fees and costs beyond the collection efforts is not authorized by law and

would give Gefco an “unfair and unbargained for benefit.” See *C-C Bottlers*, 78 Wn. App. at 389.

Not only does *C-C Bottlers* support the trial court’s ruling on fees, but it demonstrates Gefco’s error in relying on *Boeing v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987). *Boeing* is easily distinguishable from the factual circumstances here as it did not involve a collection action, or a contract that contained a provision for attorney’s fees for “collection efforts.” Instead, it involved a suit for misappropriation of trade secrets. After Boeing sued Sierracin for misappropriation of trade secrets involving airplane window design, Sierracin responded by asserting an antitrust affirmative defense and six counterclaims. *Id.* at 43-44. At trial, a jury found on behalf of Boeing on its claims and for Sierracin on its counterclaims. *Id.* at 44. The trial court awarded fees and costs to Sierracin under RCW 19.86.090 and to Boeing under RCW 19.108.040. *Id.*

On appeal, Boeing requested its attorney fees in defending against Sierracin’s antitrust counterclaims. The Supreme Court denied the request, holding that “when a number of actions are argued and only some of those allow for recovery of attorney fees, it would give the prevailing party an unfair benefit to award attorney fees for the entire case. Rather, attorney fees should be awarded only for those services related to the

causes of action which allow for fees. *Id.* at 67 (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987)).

Relying on *Boeing*, GEFCO claims “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”; that claim is erroneous. In *Boeing*, unlike in the present case or *C-C Bottlers*, had the affirmative defense raised by Sierracin been successful it would have defeated Boeing’s claims. For that reason, Boeing was entitled to certain fees. Here, as in *C-C Bottlers*, the affirmative defense (setoff), even if successful, could not have defeated the claims brought in Gefco’s collection action. Importantly, *C-C Bottlers* cites *Boeing* for the following holding: “Allowing recovery of fees for actions which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit.” 78 Wn. App. at 389 (citing *Boeing*, 108 Wn.2d at 66). Here, Gefco is not entitled to any fees beyond its “collection efforts.”

2. The trial court did not commit error in denying Gefco's request for attorney fees under Oklahoma law because Washington law applies.

Gefco is not entitled to attorney fees under Oklahoma law because Gefco failed to raise the issue in a timely manner and Oklahoma law does not apply to Cascade's tortious counterclaims.

Gefco contends that "[a]ccording to the terms of Gefco's sale documents, Oklahoma law applies to the parties' dealings." Appellant's Brief, p.11. First and foremost, Gefco never provided the trial court, nor does it provide this Court with the sale documents associated with the defective shafts at issue in Cascade's counterclaims. The sale documents Gefco references in its brief include an invoice for a PTO box purchased in September 2008 along with documents associated with the sale of a Gefco Model 50K-CH Drilling Rig in February 2004. CP 7-8; CP 216-222. The sale documents related to the purchase of the defective shafts at issue in Cascade's counterclaims are nowhere to be found in the record.

Even assuming Gefco had provided evidence to support its sale document claims, presumably the sale documents would have included the same or similar language as that associated with Gefco's collection action. Such a choice-of-law provision would still not apply to Cascade's counterclaims because under Washington law, "a choice of law provision in a contract does not govern tort claims arising out of the contract."

Haberman v. Wash. Power Pub. Supply Sys., 109 Wn.2d 107, 159, 744 P.2d 1032 (1987). To determine whether the parties intended to have the choice-of-law provision cover tort claims, the Court must focus on the objective manifestations of the parties' agreement, i.e., "the actual words used," rather than on the claimed, but unexpressed subjective intent of a particular party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). Where tort claims are not specifically mentioned in the language of a contract, a choice-of-law provision will not be applied to those claims. *See Carideo v. Dell, Inc.*, 706 F.Supp.2d 1122, 1126-28 (W.D. Wash. 2010).

Here, the applicable language regarding the sales documents for the collection action 30K PTO box reads:

Any such order and all other transactions between GEFCO and purchaser of its products shall be governed by the laws of the state of Oklahoma, subject to preempting federal law. It is agreed that exclusive jurisdiction and venue for any legal action between the parties arising out of or relating to this order shall be in the District Court for Garfield County, Oklahoma, or, in cases where federal diversity jurisdiction is available, in the United States District Court for the Western District of Oklahoma, situated in Oklahoma City, Oklahoma.

CP 8. Similarly, the language contained in the sale documents for the Gefco drilling rig reads:

This order 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 222. Neither contractual provision actually in the record demonstrates any intent by the parties that Oklahoma law would govern any tort claims between the parties. Accordingly, there is not even a suggestion that the missing sale documents Gefco alleges apply to Cascade's counterclaims would have specifically covered tort claims arising out of or in connection with the sales. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, 115 S.Ct. 1212, 131 L. Ed. 2d 76 (1995); *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162 (11th Cir. 2009) ("A choice of law provision that relates only to the agreement will not encompass related tort claims."). Therefore, the Court should reject Gefco's argument that the Oklahoma choice-of-law provision encompasses Cascade's counterclaims.

Further, under Washington's choice of law rules, the court must utilize the most significant relationship test to determine which law governs Cascade's counterclaims. *Williams v. State*, 76 Wn. App. 237, 241, 885 P.2d 845 (1994); *Haberman*, 109 Wn.2d at 134. Importantly,

An actual conflict between the law of Washington and the law of another state must be shown to exist before Washington courts will engage in a conflict of law analysis...Absent such a showing, the forum may apply its own law.

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 103-04, 864 P.2d 937 (1994) (internal citations omitted); *see also Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App. 24, 30, 104 P.3d 1 (2004). At no time before the trial court or this Court has Gefco ever alleged a conflict between the law of Washington and the law of Oklahoma. To the contrary, Gefco alleges it is entitled to attorney fees under the laws of both jurisdictions. Even if an actual conflict exists, Washington has the most significant contacts, and its law would apply. Gefco cannot dispute that fact – if it thought Oklahoma law should apply it would have invoked its own contract's exclusive jurisdiction and venue provisions, which put both specifically in Oklahoma. CP 8; CP 222.

In determining the most significant relationship, courts may take into account the following contacts:

The place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship, if any, between the parties is centered.

Carideo, 706 F. Supp. 2d at 1128 (citing Restatement (Second) Conflict of Laws § 145(2)). Cascade is a Washington company while Gefco is a Delaware company. The parties' relationship is centered in Washington as evidenced by Gefco's decision to file its original complaint in Washington; a decision that demonstrates Gefco's awareness that

Washington has significant contacts with the litigation. The events that led to Cascade's injuries occurred in California and Washington. The case has been litigated in Washington for over three years and Washington has a manifest interest in protecting its citizens, enforcing its consumer protection laws, and deterring future wrongful conduct. *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007). The only relevant contact with Oklahoma is that the defective 50K rig shafts associated with Cascade's counterclaims shipped from a plant in Oklahoma. If both Washington and Oklahoma have "significant contacts with the transaction, . . . public policy favors the application of Washington law." *Ito Intern. Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290, 921 P.2d 566 (1996). Washington law, accordingly, would win even if the contacts between Washington and Oklahoma were similar. Here, however, Washington's contacts are more significant. Consequently, Washington law must be applied to Cascade's counterclaims.

In addition, Gefco never raised Oklahoma law until after Cascade dismissed its counterclaims. Up to that point, the parties assumed Washington law governed all of the claims. Accordingly, the trial court applied Washington law to the claims. *Cf. Carideo*, 706 F. Supp. 2d at 1127 (assuming choice-of-law provision extended to claims as to which parties did not dispute its application). For over three years Gefco had no

intention of utilizing Oklahoma law,⁵ and it was not until Cascade's counterclaims had been dismissed and Cascade responded to Gefco's summary judgment pleadings that Gefco realized it might have an argument under Oklahoma law, raising the issue for the first time in reply.⁶ Even then, however, Gefco did not request a choice-of-law analysis or suggest a conflict existed between Washington and Oklahoma law. To retroactively apply a foreign jurisdiction's law where neither party relied upon it for three years of litigation would patently result in unacceptable prejudice. Based on the foregoing, the trial court properly applied Washington law and appropriately disregarded Gefco's untimely request to apply Oklahoma law.

a. Gefco waived its request to apply Oklahoma law.

Gefco's behavior throughout the litigation waived any application of Oklahoma law. The waiver doctrine is designed to prevent a party from ambushing the other party during litigation either through delay in

⁵ This assertion is demonstrated through comments made by Gefco's counsel at the summary judgment hearing that Gefco did not even realize they had an argument under Oklahoma law until drafting their reply to summary judgment. RP 10/5/12.

⁶ The trial court did not commit procedural error when it properly refused to apply new arguments made by Gefco in reply that raised Oklahoma law. It is well established that a moving party may not lie in wait and spring new arguments on a non-moving party in a reply brief. See e.g., *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raise and argued for the first time in a reply brief is too late to warrant consideration."). "[A]ny reply material which is not in strict reply, will not be considered by the court except upon the imposition of appropriate terms[.]" LCR 7(G) (emphasis added).

asserting a claim or defense or misdirecting the party away from a defense for tactical advantage. *See, e.g., King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Courts have concluded that a defendant waives an affirmative defense if “(1) assertion of the defense is inconsistent with defendant’s prior behavior or (2) the defendant has been dilatory in asserting the defense.” *Id.* at 424; *see also Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000).

In *King*, plaintiffs filed a complaint against Snohomish County. 146 Wn.2d at 423. In response, the County answered and raised 11 affirmative defenses including “claim filing.” *Id.* Thereafter, the parties engaged in 45 months of litigation and discovery, including summary judgment motions, mediation, and numerous depositions. *Id.* The case went to trial and a verdict was returned for plaintiffs. *Id.* The County appealed and the Court of Appeals reversed and dismissed the complaint for failure to file a claim prior to suit as required by Snohomish County Code. *Id.* The Supreme Court reversed, finding that the County’s behavior was inconsistent with its affirmative defense of “claim filing.” *Id.* at 427. The County, “[a]fter listing its original defenses in the answer, ... did not raise claim filing again or seek dismissal on that basis until three days before the trial, nearly four years after [plaintiffs’] complaint was filed.

This behavior is inconsistent with the County's claim filing defense." *Id.* at 425.

Gefco's conduct is very similar to that of the county in *King*, though Gefco's claimed notice on Oklahoma law is in reality even more remote. Here, Gefco asserted an affirmative defense claiming Cascade's counterclaims were barred to the extent they *were not cognizable* under Oklahoma law – it made no specific reference to contract or attorney fees whatsoever. Thereafter, the parties litigated the case for over three years. Significant discovery was conducted and numerous depositions were taken in Washington and California. Cascade dismissed its counterclaims and almost two months later Gefco raised its argument that Oklahoma law entitled it to attorney fees on the counterclaims. Gefco's behavior, if anything, presents an even stronger basis for waiver than the county in *King*; it was entirely inconsistent with its affirmative defense and provided no notice to Cascade of its intent. Accordingly, as in *King*, this Court should hold that Gefco waived application of Oklahoma law.

Other courts have similarly recognized that failure to raise an issue in a timely manner results in waiver of that issue. *See, e.g., Malone v. Nuber*, 2010 U.S. Dist. LEXIS 89408 (W.D. Wash. Aug. 30, 2010). In *Malone*, after the parties had been litigating a case for nearly three years, numerous motions had been filed relying on Washington law and

defendants had filed a motion for summary judgment. *Id.* at *4-6. In reply in support of their motion for summary judgment, defendants argued, for the first time that based on a contractual choice of law provision New York law applied. *Id.* at *4. The court held that invocation of New York law was untimely, determining that “defendants waited until the last possible moment to raise the issue” and “plaintiffs would be prejudiced and significant resources would be wasted if the Court were to determine, at this late, date, that New York law applies.” *Id.* at *5.

The facts in *Malone* are remarkably similar to those presented here: (1) the parties had been litigating the case for a number of years, (2) the parties had been applying Washington law throughout the case, and (3) Gefco did not raise application of foreign law until its reply to summary judgment. No different than the defendants in *Malone*, Gefco waited until the last possible moment to address application of foreign law and its application would be prejudicial to Cascade and waste significant judicial resources. Again, Gefco’s position is even less compelling than the defendants in *Malone* – here Gefco cannot credibly claim prejudice because it admittedly did not even consider the application of Oklahoma law until preparing its reply on summary judgment, after Cascade’s counterclaims had already been dismissed. As the court did in *Malone*, this Court should find that Gefco’s failure to raise the issue in a timely

manner resulted in its waiver. *See Burnside*, 123 Wn.2d at 104 (explaining that because Washington is the forum state, its law applies unless a party, in a timely manner, invokes foreign law.)

Gefco's waiver of Oklahoma law is further evidenced by the language of the sale documents it claims entitles it to the application of Oklahoma law. According to the sale documents quoted previously, not only would Oklahoma law govern, Oklahoma law would also provide exclusive jurisdiction and exclusive venue in Garfield County, Oklahoma over any legal action between the parties. Assuming the missing sale documents had the same language, Gefco plainly opted not to follow and affirmatively waived these provisions by bringing its action in Washington. As noted, it also argued Washington law throughout the case and relied upon Washington law in its summary judgment motion. Moreover, it chose to defend Cascade's counterclaims in Washington. "A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct." *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003); *See, e.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1296 (9th Cir. 2006) (parties waived franchise agreement's Massachusetts choice of law provision by arguing their respective causes on the basis of California law). If ever a party waived its right in this arena, it was Gefco. It (1)

filed its complaint in Washington, (2) argued Washington law in direct contravention to the sale documents it contends require the application of Oklahoma law and (3) did not even realize it had an argument under Oklahoma law until Cascade's counterclaims were dismissed and it was preparing its reply to summary judgment. Through its behavior, Gefco waived any argument to apply Oklahoma law.

b. The cases cited by Gefco in support of its argument for attorney fees under Oklahoma law are inapplicable.

Even if Gefco had not waived its claims under Oklahoma law, it would not be entitled to an award of reasonable attorney fees or costs incurred in this action under 12 Okla. Stat. Ann. §§ 936, 939 and 940 because no claims were ever brought pursuant to Oklahoma law. Cascade brought its claims in Washington, under Washington law. For example, Cascade's counterclaims did not allege that Gefco breached an express warranty made under Section 2-313 of Title 12A of the Oklahoma statutes. *See* 12 Okla. Stat. Ann. § 939. Nor did Cascade bring a claim for breach of contract for labor or services rendered. *See* 12 Okla. Stat. Ann. § 936.

The cases cited by Gefco in support of the Oklahoma statutes are inapplicable. The *Travelers Indemnity Co. v. Hans Lingl Anlagenbau Und Verfahrenstechnik GMBH & Co. Kg.*, 189 Fed. Appx. 782, 2006 WL 2065069 (10th Cir. July 26, 2006), is an unpublished opinion. Under GR

14.1, “[a] party may cite as an authority an opinion designated ‘unpublished,’ ... by any court from a jurisdiction other than Washington state, *only* if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” According to 10th Cir. R. 32.1, unpublished opinions are not precedential and may not be cited prior to January 1, 2007. Accordingly, the *Travelers* case is not precedent and inapplicable.

Furthermore, Gefco’s interpretation of *Boyd Rosene and Assoc., Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1125-26 (10th Cir. 1999) is flawed. Gefco contends *Boyd* holds the Oklahoma statutes are substantive. However, in *Boyd*, the Tenth Circuit found that attorney fees were substantive in one context – diversity – but noted that they were not necessarily substantive in a different context – under Oklahoma choice-of-law rules. 174 F.3d at 1118. Here, the trial court was (obviously) not sitting in diversity and *Boyd* provides no guidance on and does not establish that the fees under the Oklahoma statutes are substantive in the present context.

Gefco has repeatedly failed to demonstrate the applicability of Oklahoma law in this litigation and the trial court did not commit error in denying Gefco its request for attorney fees under Oklahoma law.

IV. CONCLUSION

Based upon the foregoing, Gefco cannot establish any error. Cascade requests this Court dismiss Gefco's appeal and affirm the trial court's ruling limiting Gefco's attorney fees to the collection action.

DATED at Seattle, Washington this 24th day of June, 2013.

FREY BUCK, P.S.

By:



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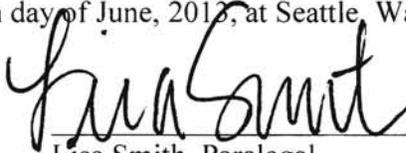
CERTIFICATE OF SERVICE

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 via legal messenger:

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