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No. 73017-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

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

Respondent,

v.

CASCADE DRILLING, INC., a Washington corporation,

Appellant,

BRUCE NIERMEYER,

Aggrieved Non-Party/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Susan Craighead

BRIEF OF RESPONDENT

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Respondent

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I. INTRODUCTION

This appeal challenges the decision of a trial court to levy sanctions for grievous misconduct. And that decision is supported by evidence about which the Appellants say nothing in their opening brief.

Challenging the facts found by the trial court, Cascade and Niermeyer focus on gaps seen on photographs and the results of calculations based on measurements made through a microscope. But they ignore an in-court demonstration of physical facts conclusively establishing that Appellant Cascade's counterclaim was based on fabricated evidence.

Three "pump drive shafts" were the evidentiary cornerstone of Cascade's counterclaim. Cascade represented that the shafts came from a Gefco "Speedstar 50K" drilling rig, and that the shafts failed during drilling on Cascade's "Wheeler Canyon" job in 2008. Cascade further represented that two of the drive shafts failed when attached to a "mud pump" "input" shaft. But Dr. David Howitt showed that the wear patterns on all three of the drive shafts were caused by a "pull-down pump" input shaft, and not by a mud pump input shaft. At the trial court's request, Dr. Howitt inserted the pull-down input shaft, then the mud pump input shaft, into the end pieces of the drive shafts that Cascade and Niermeyer claimed had been attached to the 50K's mud-pump. The result: as the trial court

observed, the pull-down input shaft "fit right in together," while the mud pump input shaft "d[id]n't fit anything." RP (10/30/12) 297, 300.

These physical facts established that the two drive shafts that Cascade and Niermeyer identified as having failed when attached to the 50K's mud-pump ***were never attached to a mud-pump at all***. Arguments about gaps on photographs, or calculations from measurements derived from looking through a microscope, must yield to these incontrovertible *physical facts* -- facts this Court can confirm for itself by replicating the demonstration that Dr. Howitt performed for Judge Craighead.[1] Cascade and Niermeyer have never denied that, if the drive shafts identified as having failed when attached to the 50K mud pump were never attached to a mud pump, it necessarily follows that Cascade and Niermeyer fabricated evidence. The physical facts are conclusive on this point, and they condemn Cascade and Niermeyer. And as Gefco will show, Niermeyer had *ample* motive to falsify evidence.

King County Superior Court Judge Susan Craighead presided over this case from the beginning, and exercised a degree of attention to it well beyond what any superior court judge typically gives to a civil damages

[1] The drive shaft end pieces and the two input shafts used by Dr. Howitt during his demonstration were introduced into evidence during the sanctions hearing. Gefco has designated them as part of the record on appeal, and they are being held by the Superior Court subject to call by this Court.

case. Judge Craighead witnessed disclosures and revelations culminating in the evidentiary hearing from which the findings and conclusions flowed that Cascade and Niermeyer now challenge on appeal.

The proper response to grievous misconduct in litigation is entrusted to the discretion of the trial court, and the exercise of that discretion should not be set aside by a reviewing court absent a clear abuse of that discretion. None has been shown here. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

1. Late Notice of Appeal. Whether Cascade and Niermeyer's challenge to the trial court's finding of bad faith litigation is barred as untimely, given (1) Cascade and Niermeyer failed to appeal within 30 days of the entry of the trial court's written determination that Cascade and Niermeyer had engaged in bad faith litigation, and would be sanctioned by having to pay Gefco a portion of the attorney's fees and costs Gefco incurred in defending against Cascade's counterclaim, and (2) under this Court's decision in *Bushong v. Wilsbach*, 151 Wn. App. 373, 213 P.3d 42 (2009), Cascade and Niermeyer's notice of appeal filed after the 30 day time period had passed is too late to allow a challenge to the trial court's bad faith litigation determinations.

2. Bad Faith Litigation Based on Fabrication of Evidence. The trial court found that Cascade and Niermeyer engaged in bad faith litigation by fabricating evidence. Should that finding be affirmed where: (1) the physical facts demonstrated by Dr. Howitt conclusively establish that Cascade and Niermeyer attempted to pass off, as the failed drive shafts from the Gefco 50K rig, shafts that actually came from some other rig, and (2) bluing present on the actual shafts gave Niermeyer a motive to try and pass off shafts from other rigs as the failed shafts from the 50K?

3. Standard of Proof. Where a trial court, exercising its inherent authority to ensure its position as a fair tribunal, confronts bad faith litigation by a party, must that bad faith be shown by clear and convincing evidence before the court may impose sanctions against the party guilty of that bad faith? Washington has never adopted such a

standard, and the rationale for its adoption by the federal courts is based on the lack of democratic accountability of judges appointed for life which has no application to Washington's elected judiciary.

4. Unclean Hands. Gefco was separately sanctioned for failure to fully disclose documents. Should that fact disqualify Gefco from an award of monetary sanctions covering its fees and costs incurred in defending against far more serious misconduct?

5. Corporate Officer Liability. Whether Bruce Niermeyer is jointly and severally liable with Cascade for the sanctions awarded to Gefco under the responsible corporate officer doctrine of *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 599 P.2d 1271 (1979), and related authority.

6. Sanctions Amount. Did the trial court abuse its discretion in setting the amount of attorney's fees and costs to be awarded to Gefco as a sanction for Cascade and Niermeyer's bad faith litigation misconduct?

7. Interest Rate. Whether the trial court applied the correct post-judgment interest rate under this Court's decision in *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165, 208 P.3d 557 (2009).

III. COUNTERSTATEMENT OF THE CASE

A. The Gefco "Speedstar" 50K drilling rig.

Gefco is a manufacturer and seller of portable drilling rigs. One of its products is the "Speedstar 50K." *See* CP 2991.[2]

The 50K is designed primarily for air rotary drilling, in which cuttings are removed from the bore hole with compressed air. RP (10/29/12) 13. The 50K also is capable of mud rotary drilling, in which cuttings are removed with fluids pressurized by a hydraulic mud pump,

[2] The "50K" designation refers to the 50,000-pound capacity of the rig's "top-head hoist."

but the mud pump on the 50K is effective only down to 800 feet without auxiliary equipment. RP (10/29/12) 12-15, 30, 122, 124.

The 50K has a "power take-off" (PTO) gear box that transfers power from a truck's drive train to four hydraulic pumps mounted on the sides of the PTO. CP 1475 (FOF 5). The pumps are powered by two *drive shafts* inside the PTO: one turns the "pull-down" and "winch" pumps, the other turns the "mud" and "rotary" pumps. CP 1475 (FOF 5). As a color illustration displayed during the evidentiary hearing (and reproduced at Appendix A) shows, the pull-down and winch pumps are across from each other with a drive shaft in between, and the mud and rotary pumps are across from each other, also with a drive shaft in between. Each pump has a protruding "male" *input shaft* that inserts into the "female" end of a drive shaft. Each drive shaft end has internal "splines" (grooves) that interlock with corresponding splines on the input shaft; torque thus is transferred to operate the associated pump.

B. In 2008 Cascade took on the "Wheeler Canyon" drilling project. The project went poorly, including the fact that the pump drive shafts on a Gefco Speedstar 50K failed four times. When installing replacement drive shafts following the initial two failures, Cascade failed to allow any clearance for heat expansion.

Bruce Niermeyer founded Cascade in 1992, focusing on small-diameter wells for environmental remediation. RP (10/29/12) 117; RP (10/31/12) 516-17. By 2007, Niermeyer wanted to move Cascade into

larger-diameter and deeper wells and undertook the company's deepest well yet, drilling an 1,800-foot water well near Bishop, California. RP (10/29/12) 117; RP (10/31/12) 522; RP (11/1/12) 556-57. In 2008, Cascade secured a contract to drill a 1,200-foot water well for a residential development at Wheeler Canyon near Santa Paula, California. RP (10/29/2012) 118. Devon Ayres, the hydrogeologist in charge for the developer, had worked with Cascade on remediation projects and wanted to work with them again. RP (10/29/12) 117.

"It is safe to say that the job did not go well." CP 1475 (FOF 6).[3] Cascade had bought a Speedstar 50K from Gefco in 2004, *see* CP 4449-56, and used it at Wheeler Canyon. After drilling passed the 800 foot mark, debris began collecting in the hole rather than being cleared out by drilling fluids. RP (10/29/12) 30, 122, 124. The drilling equipment got stuck repeatedly, and the drillers had to put tremendous strain on the hydraulic system to get it unstuck. RP (10/29/12) 34-35, 125. CP 4857-58. The internal splines of the 50K's pump drive shafts and the associated hydraulic pump input shafts failed (were "stripped out") four times, twice each at the pull-down and mud pump locations. CP 323, 4237. The first drive shaft failure occurred at the pull-down location and the second at the

[3] Ayres, who had been involved with over 300 well-drilling projects, called it "the worst drilling operation I've ever seen for this type of well." RP (10/29/12) 117, 123.

mud-pump location. CP 1475 (FOF 7-8). The third failure occurred at the mud-pump location, after the replacement drive shaft had been in use only 90 hours. RP (10/29/12) 43, 48; RP (10/31/12) 512; CP 1475 (FOF 8). The fourth failure occurred at the pull-down pump location, after that replacement drive shaft had been in use only 600 hours. RP (10/29/12) 50; CP 1475 (FOF 8).[4]

Cascade ordered the replacement drive shafts from Gefco, and Gefco shipped the part to Cascade's chief mechanic, Charles "Chuck" Rider. CP 861-64. Rider had no training on repairing a PTO. CP 4864-65. He did not consult with anyone or refer to any manuals before replacing the drive shafts on the 50K. CP 4865. Gefco technical bulletins specified that pump drive shafts must be installed with 10,000 to 12,000ths of an inch clearance ("end play") to allow for heat expansion. RP (10/29/12) 105-06, 166. But according to Rider, he installed the replacement drive shafts at Wheeler Canyon ***with zero end play***:

> Q. What was the proper end play?
>
> A. Based on my knowledge and previous repairs and stuff, most applications have a certain amount of end play, and ***I checked it for zero end play***.

[4] Cascade eventually abandoned the first hole it had begun and drilled a second. RP (10/29/12) 126-27. Cascade was fired after failing to develop the second hole into a working well. CP 4305-13. The project became the butt of jokes in the industry. RP (10/29/12) 127. Cascade and Niermeyer now try to rehabilitate this performance, *see* Appellants' Brief at 39 n.18; the conflict in the evidence was for the trial court to resolve.

Q. That was zero end play?

A. Yeah.

CP 4865 (emphasis added); *see also* CP 4871; (10/29/12) 24-25.

C. In 2009 Gefco sued Cascade to collect on an unpaid invoice for equipment unrelated to the 50K. Cascade counterclaimed, alleging the replacement drive shafts supplied for the 50K were defective. Gefco then filed a third-party complaint against Hub City, the replacement shaft manufacturer.

In September 2008, Cascade ordered a replacement PTO gear box and pump drive from Gefco for a different rig than the 50K, then did not pay the $39,718.22 invoice. CP 7. In July 2009, Gefco sued to collect. CP 1-3. Cascade answered, admitting it had not paid but alleging that the amount owed was more than offset by damages sustained by Cascade at Wheeler Canyon. CP 3382. Cascade alleged the replacement drive shafts supplied by Gefco failed prematurely, asserting Gefco "changed or accepted or permitted a change in the alloy composition, hardness, or other properties of the pump shafts [sic] from those of the pump shafts [sic] originally installed in the PTO box manufactured by it or otherwise was providing a replacement pump shaft that was different from the one originally installed in the PTO box, but never advised Cascade...of the change." CP 13, ¶ 27.[5] Cascade's counterclaims included claims for

[5] The Court will note the repeated use by Cascade of the phrase "pump shaft" to describe the failure of a "drive shaft." Cascade thus inaugurated what became (as Gefco will describe more fully in Section V.B.1(e)), the routine practice by all parties and their

(Footnote continued next page)

breach of express and implied warranties and violation of the Consumer Protection Act. CP 13-17, 3384-87.

Hub City, Inc., manufactured the replacement drive shafts. CP 4260-61. In August 2010, Gefco and Cascade stipulated to an order allowing Gefco to file and serve a third-party complaint for indemnity against Hub City. CP 28-29.

D. Cascade's president and majority owner, Bruce Niermeyer, identified drive shafts produced by Cascade in discovery as three of the four shafts that failed at Wheeler Canyon. Cascade and Niermeyer also represented that Cascade had made no significant repairs to the 50K before Wheeler Canyon.

Charles Rider did not retain the first drive shaft that failed at Wheeler Canyon. CP 1475 (FOF 9). At Niermeyer's direction, Rider retained the second, third, and fourth drive shafts that failed, but none of the associated bearings or pump input shafts. CP 1475 (FOF 10); *see also* CP 4897-98; RP (10/31/12) 376.[6] Rider kept the three drive shafts in a box in his office. CP 4897-98. Cascade and Niermeyer have never alleged that these drive shafts became intermingled with other drive shafts.

Rider transferred custody of the three drive shafts to Niermeyer after the litigation got underway. CP 4877. Testifying as Cascade's CR

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counsel of using the terms "shafts" and "pump shafts" to describe both "drive shafts" and pump "input shafts."

[6] The bearings were left at a machine shop. Exh. 23 at 99, 111. The input shafts were given to Western Hydrostatics. CP 1475 (FOF 10); Exh. 23 at 103; RP (10/31/12) 376.

30(b)(6) representative at a March 2011 deposition, Niermeyer produced and then identified three shafts he represented were the ones that failed at Wheeler Canyon, and in the supposed order of their failure. CP 1475 (FOF 12), *see also* CP 4226-27, 4232-37, 4896. The parties' experts then proceeded to examine, test, and analyze the shafts to determine the cause of failure. *See* CP 4351-59; RP (10/30/12) 331.

Throughout the litigation, Gefco and Hub City requested all maintenance records for the 50K. CP 1476 (FOF 14).[7] Cascade represented that it had produced all the maintenance records it could find. CP 1476 (FOF 14); CP 1466 (Letter Ruling); *see also* CP 339-43; RP (3/22/12) 53. The maintenance records initially produced by Cascade disclosed no pre-Wheeler Canyon pump replacements. RP (10/31/12) 507. At a deposition in September 2011, Rider testified that he had made no repairs to the 50K before the Wheeler Canyon job, other than replacing one blown-out seal. CP 4279-80.[8] At a deposition in February 2012, Niermeyer testified that he was not aware that any of the pump input shafts on the 50K had ever been replaced before Wheeler Canyon. CP

[7] As Cascade's experts acknowledged, to conduct a proper failure analysis it was important to know the maintenance and repair history of the 50K, and particularly if any work was done on the PTO before the shaft failures at Wheeler Canyon (such as any replacement of any of the hydraulic pumps and the associated pump input shafts that mated with the drive shafts at issue). CP 1467 (Letter Ruling); *see also* CP 332-33, 335-37, 2611; *compare* RP (10/31/12) 413-15 (Cascade expert Paul Diehl).

[8] Rider further testified that he was the only person who would have replaced parts on the 50K. CP 4301.

4894.[9] Both Rider and Niermeyer testified that Cascade had no significant problems with the 50K before Wheeler Canyon. CP 3434, 4862.

E. Cascade tried to use its Consumer Protection Act claim to threaten damage to Gefco's reputation, and thereby leverage a settlement without having to go to trial. The trial court responded by bifurcating the proceedings, ruling that the CPA claim would be tried only if Cascade first prevailed on its primary failure allegations and until then barring Cascade from contacting Gefco's customers.

In March 2012, attempting to manage a high level of conflict and get the case on track for trial, Judge Craighead set twice-monthly hearings to address discovery matters. RP (3/16/12) 70-71. She instituted a procedure by which the parties would meet in the jury room to work out as many issues as possible before a hearing where the parties could raise any unresolved issues without the necessity of a formal motion. RP (3/16/12) 70.

One of the issues dealt with in these hearings was Cascade's attempt to obtain a list of all purchasers of Gefco 50K rigs. *See* RP (3/16/12) 71. Niermeyer first attempted to obtain information from Gefco customers informally. In late 2011, Niermeyer rented a booth at a National Ground Water Association annual meeting and trade show in Las Vegas, Nevada. CP 3080; RP (3/16/12) 22; RP (10/31/12) 539. He

[9] At Wheeler Canyon, Rider replaced the hydraulic pumps at the failure locations using after-market rebuilt pumps he obtained from a supplier called Western Hydrostatics. *See* RP (11/1/12) 637-38.

prominently displayed a large poster containing photographs of damaged shafts, above which appeared the following text: "HAVE YOU HAD PROBLEMS LIKE THIS ON YOUR RIG? TELL US ABOUT IT & GET A CHANCE TO WIN THIS TV." CP 4384-85. Niermeyer admitted he had offered a chance to win a television as an "inducement for people to tell me about problems they've had with PTOs." CP 4893.

In the spring of 2012, after Gefco had produced all invoices for replacement drive shafts it sold going back to 2002, CP 55, 3058, Cascade pursued discovery of a list of all 75 purchasers of Gefco 50K rigs, ostensibly seeking evidence to support the public interest element of its Consumer Protection Act claim. *See* RP (4/13/12) 15-20. Cascade presumably intended to call all 75 customers, inform them of the lawsuit, ask them if they had replaced any drive shafts, and ask them to inspect their rigs for signs of drive-shaft wear. The negative effects of such a campaign on Gefco's reputation could have cost Gefco millions of dollars in future sales. *See* RP (4/13/12) 32-34.

The trial court ordered production of the customer list (for "attorney's eyes only") but also bifurcated the proceedings and barred Cascade from contacting Gefco customers pending the outcome of phase one of trial, which would determine whether the replacement drive shafts supplied by Gefco were defective. CP 3100-02; *see also* RP (3/22/12) 25;

RP (4/13/12) 27, 47-49; RP (5/4/12) 6, 7, 23-24. The trial court was concerned that Cascade was "trying to destroy GEFCO" and that "Cascade's discovery requests [were] forcing [Gefco] to 'bet the company' before it ever has the chance to challenge Cascade's claim that the drill rigs were defective." RP (5/4/12) 7; CP 3101. A bifurcated trial would "obviate the financial pressure on GEFCO to settle to avoid damaging its business by allowing contact with its customers[,]." CP 3101, because Cascade would have to prevail on its defective drive shaft claim before it would be allowed to contact Gefco customers.

F. In June 2012, Gefco uncovered what the trial court later called a "bombshell": *Cascade had replaced two pumps before Wheeler Canyon, a fact Cascade had concealed in its discovery responses.* Gefco and Hub City now sought to re-open the deposition of Cascade's chief mechanic, Charles Rider, and to obtain Cascade records relating to the pre-Wheeler Canyon pump replacements.

In August 2011, Cascade asserted a new damages theory: the majority ownership interest in Cascade was sold and its business operation transferred to a new entity in 2009, and Cascade now claimed that the sale price was diminished by over $1.5 million because of the Wheeler Canyon debacle, which Cascade blamed on Gefco's allegedly defective replacement drive shafts. CP 3749-50, 3783. Cascade first identified this "enterprise claim" in a settlement demand. CP 3746, 3749-50, 3783; RP (6/29/12) 9. Gefco promptly served discovery requests seeking the

production of Cascade's entire file regarding the 2009 sale transaction. *See* CP 3919-23, 4064-65. In April 2012, having produced only limited information regarding the sale, Cascade informed Gefco and Hub City that further documents from the sale file were unavailable, claiming they were lost when Cascade's computer server crashed four months earlier. CP 3643-44.

One of the few documents Cascade did produce was an e-mail that Niermeyer had sent to the prospective buyer and brokers in September 2009. CP 4939 (copy of e-mail). In that e-mail, Niermeyer admitted that Cascade had incurred "large project losses" at Wheeler Canyon, and before that at a project called "Bishop," because of Cascade's inexperience with large projects. *Id.* Niermeyer specifically acknowledged that Cascade experienced "unusually high repair [and]...maintenance costs" on the two projects, including "higher than average tooling and repair costs." *Id.* Conspicuously absent was any suggestion that a third party (*e.g.*, Gefco) was responsible for the Wheeler Canyon losses.

The production of Niermeyer's September 2009 e-mail message in discovery was the first time Cascade disclosed that it had suffered substantial losses prior to Wheeler Canyon, including substantial tooling and repair costs. Suspecting that Cascade had used the 50K at Bishop,

Gefco now determined to investigate whether Cascade had made significant repairs on the 50K before Wheeler Canyon. RP (7/13/12) 22-23; RP (8/2/12) 26-27. Gefco's investigation led it to Cascade's after-market pump supplier, Western Hydrostatics. RP (10/29/12) 31-31, 69-75.

Gefco deposed Starke Scott, the owner of Western Hydrostatics, in late June 2012. CP 1803, 1893. To obtain a discount on replacement hydraulic pumps, Cascade had given Western Hydrostatics the hydraulic pumps that Cascade had removed from the 50K following the failures at Wheeler Canyon. CP 4293-94; Exh. 23 at 103. Scott testified that he had recorded the serial numbers of the broken pumps removed from the 50K, and that the numbers on the first of these pumps showed they had been manufactured in 2005 and 2007 -- ***after Cascade bought the 50K from Gefco***. CP 4868-69; *see also* CP 1896-1902, 1904-07. This meant that pumps had been replaced by Cascade ***before Wheeler Canyon*** -- contrary to Niermeyer's and Rider's deposition testimony that no such replacements had taken place.

This revelation was later described by the trial court as a "bombshell." CP 1466 (Letter Ruling). Gefco had expressly disclaimed *any* warranty obligation -- express or implied -- for "products upon which *repairs or alterations* have been made, unless such was authorized in

writing by the SELLER." CP 4455. And the replacement of these pumps obviously had not been authorized by Gefco. Meanwhile, a CR 34 inspection of the 50K revealed that, *after* the Wheeler Canyon job, Cascade had replaced at least one still-functioning drive shaft in the PTO box with a shaft not manufactured by Hub City or otherwise supplied by Gefco. RP (7/23/12) 43-44. And although this replacement shaft had reportedly been made to specifications that Cascade asserted were properly hardened, the internal splines of this shaft turned out to be worn, and its failure appeared imminent. RP (7/23/12) 43-44.

Gefco and Hub City now requested a CR 30(b)(6) deposition of a witness knowledgeable about shaft replacements. RP (7/23/12) 46-47, 49. In response, Cascade identified its chief mechanic, Charles Rider. RP (7/23/12) 49, 59. Gefco and Hub City requested to depose Rider regarding the recently discovered drive shaft replacement that occurred after the Wheeler Canyon job, and also regarding the recently discovered pump replacements that occurred before the Wheeler Canyon job. RP (7/23/12) 43-47, 56-57. The latter raised the possibility that these replacements had been necessitated by difficulties on the Bishop project -- the deep drilling project just before Wheeler Canyon, on which Niermeyer had admitted to the investment bankers that Cascade had also suffered substantial losses due to its inexperience with such projects. RP (7/13/12) 22-23; RP

(8/2/12) 26-27; *see* CP 4349 (e-mail admission by Niermeyer to investment banker).

Cascade resisted allowing questioning about pre-Wheeler Canyon matters, representing to the trial court that the 50K had not been used on the Bishop project. RP (7/13/12) 27. The trial court authorized the deposition, but limited its scope to the *post*-Wheeler Canyon events. RP (7/23/12) 59-60. On July 31, 2012, Gefco filed a motion to reconsider the court's limitation of the scope of Rider's deposition. CP 3731-34. Gefco supported that motion with Cascade records showing that the 50K had been used at Bishop. CP 5000, 5014-48; *see also* RP (10/31/12) 522, 524. Gefco also asked the court to compel Cascade to produce all related documents. CP 3733.

G. In August 2012, Gefco and Hub City disclosed that their experts had concluded it was *physically impossible* that the drive shafts produced by Cascade were the ones that had failed at Wheeler Canyon. The trial court now directed that Rider answer questions about the pre-Wheeler Canyon repairs and that Cascade produce all records pertaining to those repairs. Rider then *recanted* his prior testimony and admitted that Cascade *had* replaced two pumps before Wheeler Canyon -- an admission confirmed by Cascade's records.

Gefco and Hub City produced their expert reports on August 1, 2012. As will be explained more fully later in this brief (Counterstatement of the Case, Section L), the experts concluded it was ***physically impossible*** that the drive shafts produced by Cascade and Niermeyer were the drive

shafts that had failed at Wheeler Canyon. At a hearing the next day (August 2), Gefco and Hub City referenced their expert reports as additional justification for granting Gefco's motion for reconsideration. RP (8/2/12) 5-6. To give Cascade's attorneys time to digest the new materials and respond, the court set a telephone conference for August 6, 2012. CP 3753. During that conference, the trial court expanded the scope of the deposition to include pre-Wheeler Canyon shaft replacements, and directed Cascade to supplement its production of maintenance records on the 50K in sufficient time to permit Gefco and Hub City to use the documents when questioning Rider.[10]

On the eve of Rider's deposition, Cascade produced for the first time (1) invoices from Western Hydrostatics for pumps purchased for the 50K in March 2006 (rotation pump) and October 2007 (mud pump) and (2) Rider's mechanic daily timesheets from the dates in March 2006 and October 2007 when he replaced the pumps. CP 4192, 4283-88.[11] Rider

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[10] Because no audio record was made of the August 6 telephonic hearing, Gefco moved for approval of a narrative report of the proceedings. CP 4476-83. Cascade opposed Gefco's proposed narrative, claiming that the trial court ultimately allowed Rider to be questioned about pre-Wheeler Canyon repairs and to search for and produce any records pertaining to those repairs that had not previously been produced only after Cascade had *voluntarily agreed* to the additional questions and document production. CP 4808. Gefco rebutted these claims in a reply supporting its proposed narrative. CP 4837-41. The trial court rejected the narrative report proposed by Cascade and approved one proposed by Gefco. CP 4993-96.

[11] Niermeyer later claimed during the sanctions hearing that he had been searching for these records all along and that the timing of their disclosure was coincidental. RP (11/1/12) 620-23. Niermeyer blamed Rider for failing to keep a complete maintenance

(Footnote continued next page)

now recanted his prior testimony, confirming that he *did* replace both the rotation and mud pumps before 2008. CP 4875-76.[12] Rider testified that Niermeyer had asked him for documents related to the 50K at the start of the litigation and once or twice since then, but denied specific recollection of the requests. CP 4875-76. Gefco played a video clip of this testimony during the sanctions hearing: Judge Craighead later stated in her findings that Rider appeared "visibly uncomfortable" in the deposition video when asked about the circumstances surrounding the requests directed to him to collect records during the litigation. CP 1478 (FOF 26); *see also* CP 4875-76.[13]

Rider was also questioned about how he handled the drive shafts that failed at Wheeler Canyon. Rider testified that he collected the drive shafts from the second, third, and fourth failures in a box in his shop, which he later shipped to Niermeyer's office in Washington. CP 4876, 4897-98. Rider testified that he did not mark or tag the shafts and had no way to identify which shaft was from which failure. *Id.* Rider testified that he did not tell Niermeyer or anyone else which shaft was from which

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file on the 50K, and blamed Cascade's accounting department for the delay in locating invoices. RP (11/1/12) 620-23.

[12] Rider testified that Niermeyer had recently showed him the timesheets and invoices. CP 4873. Rider testified that, had he been shown the documents during his previous deposition, he would have been able to recall replacing the pumps. CP 4874.

[13] Gefco has provided this Court with a full set of all of the video deposition excerpts played during the sanctions hearing, on a thumb drive filed with this brief. The excerpt in question is number 8.

failure. CP 4877. Rider testified that he had no role in determining which shafts were labeled as "2," "3," and "4" in the litigation, and he had no knowledge of how Niermeyer had assigned the numbers. *Id.*

H. Cascade abruptly dismissed its counterclaims, settled with Hub City, and paid Gefco's invoice.

In the meantime, Gefco and Hub City had filed motions to dismiss the enterprise claim as a sanction for dilatory and obstructionist discovery tactics. CP 3601-17, 3739-44. At the scheduled hearing on that motion, counsel for Hub City announced a CR 2A agreement between it and Cascade: Hub City would withdraw its motion for sanctions and Cascade would dismiss its counterclaims against Gefco. RP (8/17/2012) 3; CP 4197-99. *Id.* Cascade then paid Gefco's invoice while Gefco's motion for summary judgment on that claim was pending. CP 264.[14]

I. After an evidentiary hearing, the trial court found that Cascade and Niermeyer had fabricated the drive shaft evidence upon which Cascade's counterclaims were based. The court ruled that Cascade and Niermeyer would be sanctioned for bad faith litigation, and ordered them to reimburse Gefco for the attorney's fees and costs reasonably incurred to defend against Cascade's falsified counterclaims.

Gefco and Cascade filed cross-motions for sanctions. Gefco sought sanctions based on Cascade's fabrication of the drive shaft

[14] Under a contractual fee provision the trial court awarded Gefco the attorney's fees and costs it incurred in collecting on its invoice, but denied fees and costs incurred in defeating Cascade's counterclaims. This Court affirmed in an unpublished opinion. *See George E. Failing Co. v. Cascade Drilling, Inc.*, 179 Wn. App. 1032, 2014 WL 64516 (2014).

evidence and of the 50K's repair history. CP 345-73. Cascade alleged that Gefco wrongfully withheld facts pertinent to Gefco's counterclaim, showing Gefco was aware that other customers had complained about Gefco's drive shafts. CP 374-402. The trial court held an evidentiary hearing, which lasted from October 29 through November 1, 2012.

1. Gefco presented expert testimony, including a demonstration of key physical facts, to establish that the drive shafts Cascade had produced were not the ones that failed at Wheeler Canyon.

The key witness at the hearing was David Howitt, Ph.D., a materials science professor at University of California, Davis. Dr. Howitt concluded that the drive shafts represented by Cascade as the shafts that failed at Wheeler Canyon were, in fact, not those shafts.[15] He cited three primary reasons for this conclusion.

(a) Two of the drive shaft failures at Wheeler Canyon involved shafts that failed while mated to the 50K's mud pump. Dr. Howitt showed that none of the drive shafts produced by Cascade had been mated to a mud pump.

Cascade had represented that two of the three shafts it produced had failed at the mud-pump location. But according to Dr. Howitt, the wear pattern on the splines of the failed ends of *all three* shafts produced

[15] Dr. Howitt also concluded that relative hardness was not a factor in the failure of the drive shafts and that the shafts from the 50K met all applicable specifications, including hardness. CP 4971-72, 4977. Ultimately, the trial court concluded that it need not resolve the design defect dispute in order to determine whether Cascade and Niermeyer had falsified the drive shaft evidence. CP 1466 (Letter Ruling).

by Cascade were consistent with being mated with a Parker pull-down pump input shaft (the kind of pull-down pump used at the pull-down location on the 50K), and not with a Sundstrand mud pump input shaft (the kind of mud pump used at the mud pump location on the 50K). CP 4972-75.[16]

Pump input shafts from different manufacturers leave distinct wear impressions on the internal splines of the drive shafts to which they are "mated," through a wear process called "fretting." RP (10/29/12) 156-62. The circular end of an input shaft has a cut angle called a "chamfer."[17] RP (10/29/12) 159-60; RP (10/30/12) 249-50. The chamfer on the end of a Parker input shaft is pronounced, while the chamfer on the end of a Sundstrand input shaft is slight. *Compare* Exh. 6 (Parker input shaft) with Exh. 7 (Sundstrand input shaft); *see also* RP (10/29/12) 157, 159-60. The profile of the chamfer is reflected in the fretting wear pattern left on the "splines" inside the end of the drive shaft. By examining the wear patterns, one can identify whether a drive shaft was mated with a Parker or Sundstrand input shaft. RP (10/29/12) 156-61; *see also* CP 4961-65.

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[16] A second expert, registered professional engineer Andrew Milburn, shared Dr. Howitt's opinion. Exh. 17 at 6-10.

[17] A "chamfer" is a specific type of "beveled" edge. For a discussion of the use of the term "chamfer" in mechanical and manufacturing engineering, *see* https://en.wikipedia.org/wiki/Chamfer. The term derives from Middle French *chanfreint,* and specifically from *chanfraindre*: (1) *chant* edge, and (2) *fraindre* to break. *See* http://www.merriam-webster.com/dictionary/chamfer.

At the trial court's request, Howitt demonstrated these facts by using the drive shafts and input shafts in evidence, and showing to the trial court how the Parker pull-down input shaft fit into the wear impressions in the drive shafts, and how the Sundstrand mud pump input shaft did not. RP (10/30/12) 288-300. The trial court remarked, during the demonstration using the Parker pull down input shaft, how that shaft and the drive shafts "fit right in together." RP (10/30/12) 297. The trial court remarked, during the demonstration using the Sundstrand mud pump input shaft, how that shaft "doesn't fit anything." RP (10/30/12) 300.[18]

(b) The drive shaft represented by Cascade as having been the first to fail at the mud-pump location was not original equipment on the 50K, which it had to be for Cascade's claim to be true.

The second reason the shafts produced by Cascade could not have been from the Wheeler Canyon failures was that the drive shaft represented as being the first drive shaft ever to fail at the mud-pump location was determined not to have been original equipment on the 50K. The original equipment shafts on the 50K were manufactured by a company called Foote Jones. CP 4260-61; RP (11/1/12) 669. Foote Jones drive shafts were never supplied as replacement parts, which were made instead by Hub City. CP 1480 (FOF 37), 4260-61. The drive shaft

[18] The exhibits used during the demonstration by Dr. Howitt have been designated as part of the record, and are being held by the Superior Court subject to call by this Court.

represented by Cascade as the first drive shaft to fail at the mud pump location was shown to have been manufactured by Hub City,[19] so it could not have been the shaft that first failed at the mud pump location. RP (10/29/12) 158; RP (11/1/12) 666-68; CP 4261.

At the sanctions hearing, Cascade claimed that this anomaly could be explained away by a supposed mistake in labeling the drive shafts involved in failures two and three, the two failures at the mud pump location. Niermeyer now asserted that a mistake had been made in identifying the shafts prior to their production at his deposition, and that the drive shaft represented as the first mud pump failure was actually the second, and vice versa. CP 795; RP (11/1/12) 615. Niermeyer testified that the sequential numbers stamped by Cascade into the drive shafts were never meant to indicate the order of failure and that the shaft stamped "3" was actually from the second failure. CP 795; RP (11/1/12) 612, 615.[20]

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[19] Oscar Schlenker, who retired after a 42-year career as Hub City's chief engineer, testified that the shaft manufacturer was reliably identified by the chamfer on the edge of the female drive shaft opening. RP (11/1/12) 661; *see also* CP 4260-61.

[20] On the last day of the hearing, Cascade submitted a declaration from Charles Rider in which he recanted his August 2012 deposition testimony about not labeling the shafts and having nothing to do with matching shafts to individual failures, claiming his recollection had been "refreshed" by Niermeyer. RP (11/1/12) 615; CP 1372-82.

(c) The supposed replacement drive shafts produced by Cascade did not exhibit "bluing," which they should have if they had come from the 50K.

The third reason the shafts produced by Cascade could not have come from the Wheeler Canyon failures was the absence of any oxidation -- "bluing" -- on those shafts, and particularly on the two replacement shafts which had failed so quickly. It was undisputed that there was no bluing on the shafts in evidence. *See* RP (10/31/12) 487. Dr. Howitt testified that the need for greater than zero end play "makes perfect sense when one takes into account thermal expansion." RP (10/29/12) 167. According to Dr. Howitt, the friction caused by Rider installing the drive shafts with zero end play "would cause severe heating ... and you would expect to see bluing." RP (10/29/12) 166. He testified that the shafts in evidence probably did not fail within a matter of weeks because, if that were the case, they would have bluing. RP (10/30/12) 317. Accordingly, those shafts could not be the shafts that failed so quickly at Wheeler Canyon.

2. The trial court found that Niermeyer was not credible, rejecting his claim of a "mix-up" regarding which drive shaft failed first and his explanation for the late disclosure of key Cascade maintenance records.

The trial court found that Niermeyer was not credible. CP 1477 (FOF 22). The court observed that Niermeyer "appeared to seethe with anger at Gefco" and "to have embarked on some sort of vendetta against

Gefco[.]" CP 1477 (FOF 20), 1482 (FOF 51). The court found that Niermeyer's "antipathy toward Gefco gave him a motive to falsify evidence." CP 1482 (FOF 51).

The trial court rejected Niermeyer's mud-pump location drive shaft "mix-up" story. The court noted that one of Cascade's experts, "Mr. Diehl testified, tellingly, that Cascade's attorney had explained this to him a few days before the hearing and that 'to make the story come out right they have to be reversed.'" CP 1481 (FOF 43); *see* RP (10/31/12) 420. The trial court also disbelieved Niermeyer's testimony that he had coincidentally stumbled upon additional maintenance records after Gefco discovered the fact that pumps had been replaced before Wheeler Canyon. CP 1477 (FOF 18), 1482 (FOF 49).[21] The trial court observed that, "[a]t about the same time that these critical maintenance records were discovered, expert reports were produced by Gefco and Hub City that determined that the shafts that the experts had examined were not the shafts that failed at Wheeler Canyon." CP 1478 (FOF 27). The trial court further observed that Cascade then "abruptly settled" with Gefco,

[21] Cascade and Niermeyer assert that Judge Craighead found that the *drive* shaft at the mud pump location had been replaced before Wheeler Canyon, and argue that this error alone impeaches her findings. The unreasonableness of this reading of Judge Craighead's findings will be addressed in Section V.B.1(e) of this brief.

dismissing its counterclaims with prejudice and paying the bill it owed to Gefco in full. CP 1478 (FOF 28).

3. The trial court found that Cascade and Niermeyer had fabricated the evidence supporting Cascade's counterclaim. As a sanction for that misconduct, the court ordered Cascade and Niermeyer to pay Gefco's reasonable fees and costs incurred in defending against the counterclaim.

The trial court ultimately determined that "Cascade and Mr. Niermeyer fabricated the evidence upon which Cascade's counterclaims were based." CP 1488 (COL 1). The trial court expressly relied on Dr. Howitt's testimony in reaching this conclusion, finding that his "academic credentials are impeccable" and he "came across to the Court as candid." CP 1479 (FOF 29, 30). The court accepted Dr. Howitt's "theory that the shafts came from rigs other than the 50K rig used at Wheeler Canyon." CP 1483 (FOF 53). Emphasizing the seriousness of Cascade's misconduct, the court observed that "[b]ad faith on this level exceeds any conduct described in Washington case law." CP 1488 (COL 1).

The court ruled that Cascade and Niermeyer would be jointly and severally liable for sanctions to be imposed. CP 1489 (COL 4). The court ruled that Cascade and Niermeyer should compensate Gefco for the attorney's fees and costs it reasonably incurred in defending against Cascade's counterclaims. *Id.* The court directed Gefco to submit an application setting forth those fees and costs, and stated it would then

make a determination as to how much of those fees and costs it would order Cascade and Niermeyer to reimburse. *Id.* (COL 4 & Order).

4. The trial court also imposed a sanction against Gefco for discovery violations, but found that Cascade suffered no prejudice due to those violations.

The trial court found that Gefco had failed to produce certain documents that were responsive to discovery requests, including a complaint for declaratory judgment that Gefco had filed against Hub City in Oklahoma and evidence that Gefco had changed its specifications for drive shafts during the litigation. CP 1484-87. But the court found it "difficult to conclude that Gefco's transgressions prejudice[d] Cascade's case[,]" given that Cascade's counterclaims would have been fatally undermined had it been candid about the actual provenance of the drive shafts it produced. CP 1487 (FOF 89). The court ordered Gefco to pay $10,000 to the Jon and Bobbe Bridge Drop-in Child Care Center at the Maleng Regional Justice Center. CP 1489 (COL 6). Gefco has paid that sanction. CP 4997-99.

J. In a subsequent proceeding, the trial court ordered Cascade and Niermeyer to pay Gefco $1.6 million of the attorney's fees and costs incurred by Gefco in defending against Cascade's counterclaims. Only then did Cascade and Niermeyer appeal *any* of the court's sanctions determinations.

The trial court's findings were set forth in formal written findings and conclusions entered on November 27, 2013. *See* CP 1473-90

(findings and conclusions); *see also* CP 1464-72 (accompanying letter ruling). Gefco's initial fee application sought $2,993,674 in fees and costs. CP 1598. The court ordered Gefco to pare down its request by excluding fees billed by certain attorneys other than Gefco's lead counsel and fees spent fighting Cascade's discovery requests on problems with other rigs. CP 2304-05 (FOF 2-3). Gefco then submitted an amended fee application requesting $2,698,247 in fees and costs. CP 2014. After performing a detailed analysis, Judge Craighead entered findings of fact and conclusions of law on December 29, 2014, awarding Gefco a total of $1,641,721 in fees and costs. CP 2315.

Cascade moved for reconsideration. CP 2435-46. Meanwhile, Gefco moved to amend the judgment to state that Niermeyer was personally liable, consistent with the November 2013 findings of fact and conclusions of law, and to confirm that the applicable interest rate was 12 percent under RCW 4.56.110(4). CP 4159-62. Cascade did not respond directly to Gefco's motion, instead rearguing whether it was appropriate to impose sanctions at all. CP 2318-29. Cascade did not address the interest rate issue.

Cascade filed a notice of appeal from the December 2014 decision fees and costs decision. CP 2457-58. Subsequently, the trial court granted Gefco's motion to amend, entering a formal judgment on February 27,

2015. CP 2472-73. On the same day, the trial court denied Cascade's motion for reconsideration. CP 2474. Cascade and Niermeyer then moved under CR 59(h) to amend the judgment to change the stated interest rate from 12 to 5.25 percent, and to specify that interest would accrue from February 27, 2015, and not December 29, 2014. CP 4166-68. The court granted the motion as to the date, but did not modify the interest rate. CP 3281-82.

Cascade, now joined by Niermeyer, filed an amended notice of appeal, seeking review of the February 2015 judgment, the December 2014 findings of fact and conclusions of law, and -- *for the first time* -- the November 2013 findings of fact and conclusions of law. CP 2475-76.

IV. STANDARD OF REVIEW

"Sanctions decisions are reviewed for abuse of discretion." *State v. Gassman*, 175 Wn.2d 208, 209, 283 P.3d 113 (2012), citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

"There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." *State v. Merrill*, 183 Wn. App 749, 755, 335 P.3d 444 (2014) (applying standard to findings of bad faith conduct sufficient to support imposition of sanctions), citing *Fisher*

Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

"[C]redibility determinations are solely for the trier of fact." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). "Credibility determinations cannot be reviewed on appeal." *Id.*, citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

V. ARGUMENT

A. Cascade and Niermeyer's appeal of the primary sanctions determinations is time barred.

In *Bushong v. Wilsbach*, this Court held that an "appeal from an award of attorney fees is not timely when filed more than 30 days after the trial court awarded attorney fees even though the trial court has not yet set the amount of those fees." 151 Wn. App. 373, 375, 213 P.3d 42 (2009). *Bushong* held that the appellant who "failed to appeal from the award of the fees itself within 30 days after the order awarding fees" was "barred from contesting the imposition of those fees." *Id.*; *see also Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007) (holding that RAP 2.4(b) makes clear that an appeal from an attorney fees decision does not bring up for review the judgment on the merits unless timely notice of appeal was filed on that decision).

Here, the trial court entered findings of fact and conclusion of law on November 27, 2013, ordering that Cascade and Niermeyer reimburse

Gefco for its reasonable attorney's fees and costs as a sanction for Cascade and Niermeyer's bad faith litigation conduct. No notice of appeal from that decision was filed within 30 days.[22] Under *Bushong*, the failure to appeal within 30 days from the entry of the November 2013 determinations bars Cascade and Niermeyer from contesting any of those determinations, leaving only their challenge to the amount of the sanction, and to the interest rate applied to the resulting judgment.

B. The trial court's bad faith litigation findings are amply supported by substantial evidence.

1. Substantial evidence established that Cascade and Niermeyer fabricated the drive shaft evidence.

(a) The physical facts demonstrated by Dr. Howitt in open court conclusively establish that none of the drive shafts produced by Cascade had been mated with a mud pump.

Dr. Howitt proposed a demonstration using the drive shafts and input shafts that had been brought to the hearing:

> [DR. HOWITT]: We don't have to look at photographs of them. We don't have to look at cherry picked visuals. Why don't we just take the shafts, look at them, put the Parker [input] shaft into those three [drive] shafts. ***It's obvious where they belong.***

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[22] On December 18, 2013, Cascade filed an opposition to Gefco's fees and costs submission that focused on why the court supposedly erred in imposing sanctions in the first place. CP 1869-87. This was 21 days after the entry of the trial court's findings and conclusions, and therefore too late to act as a motion for reconsideration that could be deemed to have reset the 30 days period for appealing from those determinations. *See Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (a motion for reconsideration not brought within the 10-day period is void and of no effect).

> ***They fit like a glove.*** I mean it's not subtle. Just look at them and then take a Sundstrand pump [input] shaft and stick it in and you'll see, it doesn't fit. This thing [a Parker input shaft] goes in, it's like a jigsaw puzzle, it fits.

RP (10/30/12) 281-82 (emphasis added). Judge Craighead requested that Dr. Howitt be allowed to perform his demonstration:

> THE COURT: I have a question for the lawyers. It's a little frustrating for me to try to follow all this testimony from pictures when we actually have all of the items here. Is there a reason at this stage of the case that we can't make those [shafts] exhibits and allow the professor to show me looking at the actual exhibit, the actual items, but keeping in mind that once you make them exhibits they're going to go up to the appellate court if there is an appeal?

RP (10/30/12) 288-89. Gefco agreed, Cascade did not object, and Dr. Howitt obliged.

All the relevant parts were laid out on the bar. *See* RP (10/31/12) 301. The ends of the drive shafts that allegedly had been mated either with the mud pump or the pull-down pump had been cut off and been marked "2A" (mud pump), "3A" (mud pump), and "4A" (pull-down) RP (10/31/12) 296. They were now admitted into evidence as Exhibits 3, 4, and 5, respectively. *Id.*[23] An exemplar Parker input shaft, the same as the input shaft that would have been on the 50K's pull-down pump, was admitted as Exhibit 6. *Id.* An exemplar Sundstrand input shaft, the same

[23] The ends from the opposite ends of the drive shafts had similarly been cut off and marked as 2B, 3B, and 4B; these were admitted as Exhibits 8, 9, and 10. RP (10/31/12) 301-02.

as the shaft that would have been on the 50K's mud pump, was admitted as Exhibit 7. *Id.*[24]

Dr. Howitt took the Parker input shaft (Exhibit 6) and inserted it into each of the drive shaft ends that supposedly had been mated to the mud pump (Exhibits 3 and 4) and the pull-down pump (Exhibit 5). RP (10/30/12) 297. Judge Craighead observed how the wear patterns in those splines matched up with the Parker shaft:

> [DR. HOWITT]: If you look at all these, if we take -- this is actually a worn Parker shaft, you can see.... If you slide it in, it matches the shaft, and see how the edges --
>
> THE COURT: ***They fit right in together***. Okay.
>
> [DR. HOWITT:] And the same goes for that one.
>
> THE COURT: Uh-huh, okay.
>
> THE WITNESS: The same for that one.

RP (10/30/12) 297 (emphasis added). Dr. Howitt then took the Sundstrand input shaft (Exhibit 7), noting how its slight chamfer differed from the pronounced chamfer of the Parker input shaft. RP (10/30/12) 298. After Dr. Howitt inserted the Sundstrand input shaft into the same drive shaft pieces into which he had inserted the Parker input shaft (Exhibits 3, 4, and 5), RP (10/30/12) 298-99, Judge Craighead observed, ***"[T]his one doesn't fit anything[.]"*** RP (10/30/12) 300 (emphasis added).

[24] As stated, Rider did not save the original input shafts, but instead gave them to Western Hydrostatics. CP 1475 (FOF 10); Exh. 23 at 103; RP (10/31/12) 376.

Dr. Howitt then summarized his conclusions based on the results of the demonstration:

> This Parker pump [input shaft] is the one that's on the pull-down pump, and so the fact that these are Parker pump wear impressions on all of these [drive shaft splines] makes us conclude that these [drive shaft splines] have to [have] be[en mated with] pull-down pumps because there isn't a Parker [pump] anywhere else [on the 50K].

RP (10/30/12) 300; *see also* CP 4973-74; Exh. 17 at 6-10.

The fit of the Parker input shaft into the drive shaft ends, combined with the lack of fit of the Sundstrand input shaft, are ***physical facts*** that prove conclusively that none of the A-end splines in evidence had been mated with Sundstrand input shafts, and thus none of them could have been the shafts that failed at the mud pump location on the 50K. "When 'physical facts are uncontroverted, and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ.'" *Bennett v. McCready*, 57 Wn.2d 317, 319, 356 P.2d 712 (1960), quoting *Mouso v. Bellingham & N. R. Co.*, 106 Wash. 299, 303, 179 P. 848 (1919); *see also Weden v. San Juan County*, 135 Wn.2d 678, 714, 958 P.2d 273 (1998).

Cascade did not controvert these facts. Randy Kent, whose testimony Cascade and Niermeyer cites on appeal, testified that he measured the wear patterns in the drive shaft splines by looking through a microscope, and then used those measurements to calculate whether the

wear patterns were more likely made by the Parker or Sundstrand chamfer. RP (10/31/12) 449-66.[25] Based on his calculations, Kent asserted that the wear patterns on shafts 2A and 3A (Exhibits 3 and 4) were consistent with being mated with a Sundstrand pump. RP (10/31/12) 481-82. But Kent nowhere addressed how he could explain his findings, in light of the physical facts demonstrated by Dr. Howitt.[26]

Cascade and Niermeyer also point to a "gap" between the Parker input shaft chamfer and the drive shaft in a photograph from Gefco's other expert's report, claiming that the gap demonstrates that the Parker chamfer and the drive shaft wear pattern do not match. Appellants' Opening Brief at 45-46. But this argument from a photograph serves only to illustrate

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[25] Kent examined the drive shaft splines under a microscope. RP (10/31/12) 496, 499-500. He then took the measurements he reported from that examination to generate numbers he used for a kind of "triangulation" calculation, to come up with his ultimate opinion. It is a reasonable inference, in light of the physical facts demonstrated by Dr. Howitt, that Dr. Kent botched the taking of the measurements.

[26] Cascade's other expert, Paul Diehl, who has not been cited on appeal, also did not controvert the facts demonstrated by Dr. Howitt. Instead, Diehl did a demonstration with what Cascade claimed was another Sundstrand input shaft (introduced into evidence as Exhibit 12), which involved sticking that shaft *backwards* (!?) into one of the drive shaft end pieces. *See* RP (10/31/12) 395-400, 410-11. Before the demonstration, however, Niermeyer admitted that he could not say if this supposed Sundstrand input shaft was actually a Sundstrand shaft, or -- if it was a Sundstrand shaft -- whether it was an input shaft for a mud pump. RP (10/31/12) 369-72. Niermeyer also admitted that the chamfer on the shaft that Diehl would use in his demonstration *was larger than the chamfer on the Sundstrand input shafts used in the Sundstrand mud pump model -- a "Series 90"-- that was on the 50K.* RP (10/31/12) 372-74. In telling contrast, Exhibit 7, the Sundstrand input shaft used by Dr. Howitt during his demonstration, *is* a Series 90 input shaft. RP (10/30/12) 296, 377. Ultimately, the trial court admitted Exhibit 12 into evidence *only* so that the Court of Appeals would have the opportunity to see what the trial court had seen. RP (10/31/12) 379 (admitting the shaft while questioning, "*if it's not a series 90 pump, **why would we look at it**?*" (emphasis added)).

why Dr. Howitt became frustrated by assertions based on photographs. One need only do what Dr. Howitt did, and push the Parker input shaft up against the A-ends of the drive shafts, to see and feel the actual match described by Dr. Howitt and personally observed by Judge Craighead. The gap in the photograph about which Cascade and Niermeyer make so much *goes away.*[27]

Based on her observation of Dr. Howitt's demonstration of the *actual fit* between the Parker shaft and the drive shafts, and the *lack of actual fit* between the Sundstrand shaft and the drive shafts, Judge Craighead found that the wear patterns on the splines of the A-ends of the drive shafts matched the profile of a Parker input shaft, and none matched the profile of a Sundstrand.[28] This kind of physical fact evidence should

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[27] Gefco urges this Court to replicate Dr. Howitt's demonstration, using the drive shaft ends (Exhibits 3, 4, and 5) and the two input shafts (Exhibits 6 and 7) that Dr. Howitt used. In that way this Court will be able to see what Judge Craighead saw. As previously noted, these drive shaft ends and input shafts have been designated as part of the record on appeal, and are being held by the Superior Court subject to call by this Court.

[28] Attempting to challenge Judge Craighead's reliance on Dr. Howitt, Cascade and Niermeyer assert that Dr. Howitt "largely abandoned" the opinions stated in his report. Appellants' Brief at 48. Cascade and Niermeyer are confusing Dr. Howitt's opinions regarding whether the wear patterns of the A-ends of the drive shafts fit conformed to the profile of a Sundstrand input shaft, and whether the wear patterns of the B-ends of drive shafts 2 and 4 conformed to the profile of a Sundstrand shaft. Dr. Howitt did change his opinion regarding the B-ends, after he had a chance to inspect the actual splints, after writing his report. RP (10/30/12) 253-54, 262-63. He did not change his opinions about the A-ends, which are also the relevant ends for determining whether Cascade fabricated its drive shaft evidence because those are the ends that would have been mated to the 50K's mud pump.

have compelled any reasonable trial judge to come to the same conclusion, and Judge Craighead was plainly well within her discretion to rely on it.

(b) The failed drive shafts from the 50K would have exhibited bluing. The drive shafts produced by Cascade did not.

Attempting to support their assertion that "[n]o evidence supported Gefco's 'blueing' theory[,]" Appellants' Brief at 40, Cascade and Niermeyer point to photographs taken by Western Hydrostatics of two of the broken pumps Cascade dropped off there in 2008, in exchange for the refund of a deposit it paid when it bought replacement pumps. Appellant's Brief at 41, citing CP 1904-07.[29] But photographs of pumps are immaterial because no one testified that the *pumps themselves* would have had bluing from improper installation of the *drive shafts*.

Cascade and Niermeyer also assert that "the maintenance records from Wheeler Canyon do not mention bearing failure or damage to the PTO's case, which Gefco's experts acknowledged would happen if overheating sufficient to cause blueing occurred." Appellants' Brief at 41. The expert in question is Larry Rottman, and he never testified that

[29] These photographs were never submitted to the trial court during the sanctions hearing or at any other time before the trial court entered its findings, conclusions, and order announcing its decision to impose sanctions on November 27, 2013. Cascade submitted them for the first time in support of its response to Gefco's submission on the amount of its fees and costs, *see* CP 1869-87, and that response was filed on December 18, 2013 -- several days too late to be treated as a motion for reconsideration under CR 59.

damage to the PTO case "would happen," only that it "possibly" or "might have" happened. RP (10/29/12) 26, 93. And while Rottman allowed that he had seen no reference to bearing failure in any maintenance records produced by Cascade, Rottman disputed that Cascade had produced the complete records, testifying there were "many missing gaps." RP (10/29/12) 9-10, 22; RP (10/31/12) 513-15.

In fact, no maintenance records were submitted to the trial court that identified *any* specific problem with any part of the 50K or its PTO. In cross-examining Rottman, Cascade's attorney emphasized that Rider's mechanic daily time sheets from Wheeler Canyon did not mention bearing failure. RP (10/31/12) 513. But the only daily time sheets in the record (filled out by Rider on three days in March 2006 and October 2007 -- before Wheeler Canyon) neither itemized all the parts that failed, nor said anything about how or why parts failed. Instead, they described only the *tasks* Rider had performed, *e.g.*, "check and test pump," "remove hydraulic mud pump," "remove drive shaft cover," "remove pumps," "install pumps and fittings and hoses," and "run and test." CP 4286-88.

Cascade and Niermeyer further assert that a 2012 inspection "revealed a nearly completely failed pump drive shaft that was installed in the same purportedly improper manner as those that failed at Wheeler Canyon, yet neither it nor its bearings showed any evidence of blueing."

Appellants' Brief at 41, n.20. They cite RP (10/30/12) 284, Dr. Howitt's testimony that he recalled Rottman having testified earlier in the hearing that Rottman had inspected the "Weber" shaft in 2012 and seen no bluing on the shaft or on its bearings. But Cascade and Niermeyer overlook that Dr. Howitt then pointed out that, unlike the replacement shafts that failed at Wheeler Canyon, the failure of the Weber shaft was not a "short-term failure," which, as Dr. Howitt had explained, is material as to whether a shaft would show bluing. RP (10/30/12) 285, 317, 332-33.

Furthermore, although Rottman did say that Rider had testified in deposition that he installed drive shafts with zero end play even after Wheeler Canyon, RP (10/29/12) 26, the portions of Rider's video-recorded deposition where he addressed end play were played for the trial court, and in them Rider did not address how he set the end play after Wheeler Canyon. CP 4865. The trial court was entitled to infer, from the fact the Weber shaft did not fail as quickly and lacked bluing, that Rider had (*finally*) figured out he should install with greater than zero end play.[30]

[30] This inference was particularly reasonable given Cascade's failure to produce any testimony from Rider in which he said that he had continued to set for zero end play after the four Wheeler Canyon failures. Especially given that Cascade *did* submit a declaration from Rider in which he recanted his August 2012 deposition testimony about not marking the drive shafts (after his recollection had supposedly been "refreshed" by Niermeyer), CP 1372-82, it can reasonably be inferred from the lack of a declaration from Rider saying he had continued to set for zero end play after Wheeler Canyon that he had stopped doing that after the Wheeler Canyon failures.

(c) Niermeyer's motive to fabricate evidence was clear: the actual drive shafts would have had bluing, a strong indication of improper installation by Cascade and therefore highly damaging to the ultimate viability of Cascade's counterclaims.

The trial court found that Niermeyer "became extremely angry with Gefco because he believed they knew there was a problem with their 50K rigs[,]" that he "appeared to seethe with anger at Gefco" on the witness stand, and that he seemed "to have embarked on some sort of vendetta against Gefco[.]" CP 1477 (FOF 19-20), 1482 (FOF 51). These findings provide an ample motive for fabrication of evidence.

Consider the drive shaft evidence. Rider testified that he installed the replacement shafts on the 50K -- the shafts that replaced the first failed shafts at the pull-down and mud pump locations -- with zero end play. CP 4865; *see also* CP 4871; RP (10/29/12) 24-25. Dr. Howitt testified that the resulting friction would cause severe overheating, which in turn would cause bluing, and that overheating and bluing were consistent with the quick failure of the two replacement shafts at Wheeler Canyon. RP (10/29/12) 166; RP (10/30/12) 317. And the replacement shafts installed by Rider at the mud pump and pull-down locations failed after just 90 and 600 hours, respectively. RP (10/29/12) 50; RP (10/31/12) 512.

Niemeyer believed Gefco was a substantial cause of his financial losses at Wheeler Canyon, because Gefco's replacement shafts

(supposedly) were too soft. But the visible bluing on those shafts was strong evidence that Cascade had mishandled them, giving Gefco a strong defense to Cascade's counterclaim. So alternate shafts were produced in lieu of the true shafts, and Niermeyer told Gefco and Hub City that the alternate shafts were the true shafts. If Gefco had been forced to settle to avoid damage to its reputation, the switch would not have been discovered. But Niermeyer was barred from pursuing Gefco's customers until his failure claim was resolved. Gefco did not settle, and the switch was discovered.

On appeal, Cascade repeats its story, first developed in response to Gefco's motion for sanctions, that it "simply mixed up Shafts 2 and 3." Appellants' Brief at 37. The trial court, however, rejected Cascade's story of an innocent mix-up. The trial court found that Cascade was aware that it needed to change its initial designation of which shaft failed when, in order for its *ultimate* story to come out right. CP 1481 (FOF 43). The trial court further found that it was Niermeyer who had made the original designation of which shaft failed when, even though he had no personal knowledge. CP 1482 (FOF 50). Niermeyer thus was the source of the mix-up claim, and the trial court expressly found that Niermeyer was not credible. CP 1477 (FOF 22), 1482 (FOF 51). And given that credibility is a matter left to the trier of fact on appeal, *Morse v. Antonellis*, 149 Wn.2d

at 574, Cascade's attempt to revive its "innocent mix-up" defense on appeal must fail.

That defense, moreover, begs the ultimate question -- whether either of the two shafts that supposedly failed at the mud pump location were ever attached to a mud pump. For the innocent mix-up story to have even been *relevant* to resolving the ultimate issue of whether Cascade and Niermeyer fabricated evidence, the wear patterns for the two supposedly mixed-up shafts still needed to fit the Sundstrand mud pump input shaft. And as the physical evidence established, *neither* of them did, which meant *neither* was from a failure at the mud pump location.[31]

(d) The trial court was entitled to consider Cascade's abrupt dismissal of its counterclaims after being "found out" as one of the facts indicating bad faith litigation.

The trial court found that, soon after it was uncovered that Cascade had replaced the mud pump before Wheeler Canyon and that the shafts produced by Cascade were not the ones that failed at Wheeler Canyon, Cascade "abruptly settled, dismissing its claims...with prejudice and

[31] This case thus is not at all similar to *Rogerson v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999), where the Court of Appeals reversed a sanctions award that was based merely on a finding that the corporate principal was not credible. Here, the trial court did not impose sanctions based merely on a finding that Niermeyer and his mix-up story were not credible. The Court found that Niermeyer deliberately falsified evidence as part of a scheme to shake down Gefco and force it to pay a huge settlement. CP 1483 (FOF 54), 1488-89 (COL 1, 3). And Niermeyer's motives for doing so turned out to be two of the oldest in the proverbial book: revenge and money.

paying the bill it owed Gefco in full." CP 1478 (FOF 28). Cascade and Niermeyer assign error to the word "abruptly." Appellants' Brief at Appendix B, CP 1478 (FOF 28).

In the letter ruling that accompanied the findings and conclusions, Judge Craighead explained: "The Court does not find credible Cascade's assertion in its pleadings that it only dismissed its counterclaims at the 11th hour because the litigation had become too expensive. It is apparent that the dismissal occurred when Cascade realized that it had been found out." CP 1471. As the trier of fact, the court was entitled to disbelieve the reasons offered by Niermeyer for why Cascade had dismissed the counterclaims. Moreover, it was entitled to consider the dismissal and its timing as one facts indicating that the drive shaft evidence was fabricated. *See* CP 1471. One's actions in response to being caught can be strong indicia of consciousness of guilt. *Cf. State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971).[32]

[32] The court also did not deprive Cascade of the right to control its claims or deem Gefco to be the prevailing party on those claims. The court found that Cascade prosecuted them in bad faith. Nor did the court reach contradictory conclusions on whether Cascade's claims had been frivolous or potentially meritorious. The trial court properly characterized Cascade's claims as frivolous and pursued in bad faith in that they were premised on fabricated evidence, regardless of whether Cascade's underlying theory that the shafts were too soft may have been correct.

(e) The trial court's findings show no confusion or error about basic facts.

The trial court was familiar with the technical aspects of the case, having been involved with it more than three years and having presided over more than a dozen hearings in 2012 alone, *in addition* to the four-day evidentiary hearing. Judge Craighead actively participated in those hearings, asking insightful questions of counsel and of the witnesses during the evidentiary hearing. Judge Craighead examined the drive shaft splines and input shafts during the evidentiary hearing, and paid close attention to Dr. Howitt's demonstration and his wear pattern analysis. *See, e.g.,* RP (10/30/12) 293-305. Describing her efforts in drafting her findings, she stated that she reviewed "all of the testimony (using the rough real-time transcripts), the exhibits, the reports and all of my notes," emphasizing, "I know how important these issues are to everyone and I did not want to make a mistake." CP 1465 (Letter Ruling).

Cascade and Niermeyer attempt to take advantage of what was a *general* lack of precision in the use of terminology, by *all* participants in this case, to conjure up a series of supposed errors by the trial court which ostensibly show her misunderstanding of basic facts. Throughout the litigation, the parties, attorneys, and experts referred to the pumps and drive shafts of the 50K with varying levels of precision. During the evidentiary hearing, Cascade's attorneys and Niermeyer himself used the

term "pump shaft" to describe *either* drive shafts[33] *or* input shafts.[34] Yet questions and answers were clarified when it was deemed necessary. *See, e.g.,* RP (10/29/12) 104. A review of the full hearing record will confirm that it was clear to everyone what was meant at the time, even if the exact words did not match was actually being referenced.

The interpretation or construction of findings of fact and conclusions of law presents a question of law for the court. *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970). If the findings are ambiguous, the reviewing court will seek to ascertain the trial court's intention by applying the rules of construction that apply to statutes, contracts, and other writings. *Id.* at 448-49. The instrument is construed as a whole to give effect to every word and part, if possible, and seemingly inconsistent provisions will be harmonized. *Id.* at 449. "[W]hen the language of findings is equivocal and susceptible of...another construction, the findings will be given that meaning which sustains the judgment, rather than one which would defeat it." *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983), quoting *Shockley v. Travelers Ins.*

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[33] Counsel: *See, e.g.,* RP (10/29/12) 91, 95, 96-98, 104, 105, 197; RP (10/31/12) 354-55, 358-59, 374, 402, 427, 439, 466, 481, 501; RP (11/1/12) 571, 618. Niermeyer: *See, e.g.,* RP (10/31/12) 376.

[34] Counsel: *See, e.g.*, RP (10/29/12) 183, 187, 191, 198; RP (10/30/12) 234-35, 258, 278-79; RP (11/1/12) 627. Niermeyer: *See, e.g.,* RP (10/31/12) 532; RP (11/1/12) 566. One of Cascade's attorneys, Ted Buck, mistakenly called an input shaft a "pump drive shaft." RP (10/30/12) 279.

Co., 17 Wn.2d 736, 743, 137 P.2d 117 (1943). As Gefco will now show, every finding singled out by Cascade and Niermeyer is susceptible to a construction other than the ones Cascade and Niermeyer have given to them, and under which the judgment will be sustained rather than defeated.

Judge Craighead did not misunderstand the revelation she termed a "bombshell": the eleventh hour discovery that Cascade had carried out major repairs on the 50K rig before Wheeler Canyon. Regarding the content of the documents uncovered in the summer of 2012, Judge Craighead found:

> 16. These documents established that Wheeler Canyon was not the first time ***a shaft*** on the PTO box on this 50K rig had failed. Importantly, the ***mud pump*** had been replaced before.

CP 1476 (FOF 16) (emphasis added). This was exactly correct. The mud pump had been replaced before Wheeler Canyon, in October 2007, and this involved replacement of "a shaft" -- the pump's *input* shaft. In the context of this case, the material components of the pumps were their input shafts. Indeed, all of the input shafts viewed by Judge Craighead in the courtroom were divorced from the pumps from which they had originated. *Compare* CP 1905, 1907 *with* Exhs. 6 & 7. There is no good reason to read Judge Craighead's reference to "a shaft" in Finding of Fact

16 as other than a reference to the *input* shaft that would have been replaced along with the pump to which the input shaft was attached.

Similarly, when Judge Craighead went on to find that the replacement of the mud pump before Wheeler Canyon meant that "the shaft" that failed at the mud pump location at Wheeler Canyon was not original equipment installed by Gefco (FOF 17), and that Cascade's late-produced maintenance records confirmed this fact (FOF 18), these statements, when read in context, should also be understood as references to the mud pump's *input* shaft. That Judge Craighead chose to use the word "shaft" in Findings 16 through 18, instead of the phrase "input shaft," does not compel the conclusion that she thought drive shafts had been replaced before Wheeler Canyon.

Nor is this contextual reading of Findings 16 through 18 at odds with Finding 39. To begin, Finding 39 must be read together with Findings 37 and 38, and when one does that it becomes apparent that Judge Craighead is summarizing Dr. Howitt's analysis of the Foote-Jones issue which Dr. Howitt had developed ***in the context of Cascade's original identification of that shaft as the second shaft that failed at the mud pump location***. Moreover, when one gets to the "Moreover..." clause of Finding 39, it becomes apparent that Judge Craighead simply inadvertently omitted the word "at" immediately before the phrase

"Wheeler Canyon." This conclusion is supported by the fact that Judge Craighead is summarizing Dr. Howitt's second point, which was that the second drive shaft replaced at the mud pump site could not have been a Foote Jones, as the Foote Jones would already have been replaced following the first mud pump site failure ***at*** Wheeler Canyon. *See* RP (10/29/12) 172-73.

Cascade later changed its story, and at the hearing claimed it had made a mistake and mixed up the two shafts that supposedly failed at the mud pump location. But while this change of story (if accepted) may have mooted Dr. Howitt's second point, that is no reason to take Judge Craighead's finding out of context, and ignore that what Judge Craighead obviously intended to say was inadvertently obscured by a scrivener's error. Nor does it make sense to treat the phrase "mud pump" as the intended antecedent of the word "it," rather than the term "shaft" that appears in the immediately preceding finding -- although doing so would only mean finding Judge Craighead guilty of using the term "pump" for "drive shaft," just as others did during the evidentiary hearing (including Cascade's lead counsel, Mr. Buck, *see, e.g.*, RP (10/30/12) 246). Finding 39 should be read consistent with the testimony it was intended to summarize -- that the second drive shaft to fail at the mud pump location could not have been a Foote Jones shaft because the Foote Jones shaft at

that location had already been replaced at Wheeler Canyon by a Hub City shaft. *See* RP (10/29/12) 172-73.[35]

In sum, none of the readings that Cascade and Niermeyer have given to any of these findings is conclusive. All these findings are subject to a different reading, taking into account the context of this case, and particularly the penchant of all the participants to employ shorthand and to call a "pump" a "shaft" and vice versa. Accordingly, these findings should be given the reading that sustains and does not defeat the judgment. And at most, concern about these findings would only call for a limited remand to ask the trial court to clarify its intended meaning.

2. Bad faith litigation conduct need only be proven by a preponderance of the evidence, not by clear and convincing evidence. Appellants' argument to the contrary was not preserved in the trial court, and is wrong on the merits.

Cascade and Niermeyer did not argue during the sanctions hearing that bad faith litigation conduct had to be proven by clear and convincing evidence. Cascade did characterize Gefco's motion for sanctions as a common-law fraud claim, and argued that Gefco thus was required to

[35] Judge Craighead also did not misunderstand the relationship between splines and drive shafts. In the context of this case, the splines were the significant part of the drive shafts because that is where the wear patterns occurred. Indeed, the splines in evidence had been cut off from the drive shafts, to allow for a clearer focus on what mattered. *See* Exhs. 3-5, 8-10. That Judge Craighead referred at times to a "spline" instead of using the phrase "the drive shaft spline" only means she has employed a shorthand used by others during the course of the evidentiary hearing (including by Cascade's lead counsel, Mr. Buck, *see* RP (10/30/12) 243).

prove the nine elements of fraud under the heightened standard applicable to such claims. CP 926; *see also* RP (10/31/12) 383; RP (11/1/12) 725 (arguing for heightened standard to apply to fraud claim). Gefco's contention, however, was not that Cascade committed common law fraud, but that the Court should impose sanctions on Cascade under its inherent power to sanction bad faith litigation conduct. And Cascade acknowledged that the court need only "reach a finding that Cascade acted in bad faith in order to award Gefco's requests." CP 928 (underscore in original). It was not until after the court entered its findings and conclusions, and *also* after the strict 10-day deadline for any motion for reconsideration under CR 59 had passed, that Cascade first argued that bad faith litigation conduct had to be proven by clear and convincing evidence. CP 2320-21.[36] Cascade and Niermeyer therefore failed to preserve their standard of proof issue.

Even if this Court decides to reach the merits, it should decline to subject the exercise of a court's inherent power to sanction to a heightened standard of proof. Cascade and Niermeyer are correct that, "[w]hen findings that must be established by clear and convincing evidence are

[36] The issue was raised in Cascade's response to Gefco's fees and costs submission. Assuming one treats this response as a motion for reconsideration of the underlying bad faith litigation determinations, the fact the response was filed more than ten days after the entry of the findings and conclusions embodying those determinations makes it void and of no effect. *Schaefco, Inc.*, 121 Wn.2d at 367-68.

appealed, they will be affirmed only if there is substantial evidence to support them 'in light of the 'highly probable' test.'" Appellants' Brief at 32-33, quoting *Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Yet no Washington appellate court in an inherent power sanctions case has ever reviewed a court's findings under the "highly probable" test. *See, e.g., State v. Merrill*, 183 Wn. App. at 755 (applying substantial evidence review to finding of bad faith and affirming sanctions under the trial court's inherent authority); *Gassman*, 175 Wn.2d at 213 (reviewing the record for evidence sufficient to support the imposition of sanctions under the trial court's inherent power); *State v. S.H.*, 102 Wn. App. 468, 475-76, 8 P.3d 1058 (2000) (remanding for a determination of whether the sanctioned party acted in bad faith). This Court should refuse to adopt a standard that would make it harder for trial courts to exercise their inherent power to protect the integrity of the courts and prevent abuses of the judicial process. *See, e.g., Gassman*, 175 Wn.2d at 209 ("A trial court must have the authority to manage the parties and proceedings before it.").[37]

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[37] Although the federal courts have imposed such a burden on themselves, that decision is a reflection of long-standing concerns about the exercise of inherent powers by judges appointed for life -- concerns that should be of no moment to our state's elected judiciary. *See, e.g., Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (reversing sanction where trial court employed a preponderance of the evidence standard) ("As the Supreme Court has explained, '[b]ecause inherent powers [of the federal courts] are shielded from direct democratic controls, they must be exercised with restraint and

(Footnote continued next page)

Under Washington law, the heightened clear and convincing standard of proof has been reserved for matters where "the individual interests at stake are 'more substantial than mere loss of money.'" *Nguyen v. State*, 144 Wn.2d 516, 527-28, 29 P.3d 689 (2001), quoting *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The heightened standard has been applied to claims involving allegations of fraud or some other quasi-criminal wrongdoing, or to claims that are disfavored such as equitable estoppel. *Nguyen*, 144 Wn.2d at 527 (citation and quotation omitted); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994) (equitable estoppel). The ability of courts to respond to litigation misconduct should not be similarly disfavored. Protecting the integrity of the courts is not a matter of personal interest. Rather, it is central to our concept of fair and neutral proceedings. The need for judicial restraint and discretion in exercising inherent powers is fully protected by the requirement that a trial court make a finding of bad faith before imposing such sanctions, and the trial court made such findings here. CP 1482-83 (FOF 49-55), 1488 (COL 1).[38]

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discretion.'"), citing and quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 488 (1980).

[38] Should this Court nevertheless decide to adopt the higher standard urged by Cascade and Niermeyer, the result should not be a reversal. The question for substantial evidence review merely becomes whether a reasonable judge could have found it highly

(Footnote continued next page)

C. The doctrine of unclean hands does not bar the exercise of a court's inherent power to sanction a party for bad faith litigation conduct.

Cascade and Niermeyer seek to limit trial court authority to impose sanctions for bad faith litigation conduct from another angle, arguing that the court may not do so where the victim of such conduct has "unclean hands." Appellants' Brief at 50-54. As with their standard of proof argument, Cascade and Niermeyer failed to preserve the unclean hands issue because they did not raise it until after the sanctions hearing and after the mandatory ten-day period for reconsideration of the trial court's findings and conclusions had passed.[39]

Even if this Court decides to reach the merits, it should reject the contention that the unclean hands doctrine bars a sanctions award to Gefco. That award was made under the court's inherent power to sanction, which exists even absent a violation of a specific rule or court order. *Gassman*, 175 Wn.2d at 210-11. That power arises from "the control necessarily vested in courts to manage their own affairs so as to

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probable that Cascade and Niermeyer engaged in bad faith litigation conduct. Particularly in light of the physical facts, this Court could affirm on the basis that the record supports finding a high probability of bad faith litigation conduct. And if this Court is not prepared to make that determination, the appropriate course is a remand to Judge Craighead directing her to re-evaluate her determinations in light of the imposition of the clear and convincing standard.

[39] The first reference to the unclean hands issue appeared in Cascade's Response to Gefco's Amended Application for Fees and Costs filed in June 2014, six months after the time for raising the issue had passed. CP 2256-57.

achieve the orderly and expeditious disposition of cases." *S.H.*, 102 Wn. App. at 475, quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Although the inherent power to sanction is sometimes characterized as one of a court's "inherent *equitable* powers," it does not follow that courts are restricted in exercising these powers by the unclean hands doctrine. In fact, the inherent power to sanction "*transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself*[.]" 501 U.S. at 46 (emphasis added).[40] The role of equity in this situation should be confined to determining the nature of the sanction to be imposed.

Thus, any limitations that may otherwise exist on the court's "equitable power concerning relations between the parties," such as the unclean hands doctrine, are not applicable in this context. A court is not deprived of its inherent power to ensure its integrity simply because more than one party has committed sanctionable conduct. Such a proposition would improperly enable a culpable party to avoid sanctions simply by pointing out that the opposing party was also in some way culpable, thus

[40] Cascade and Niermeyer themselves recognize that "an inherent powers sanction is meant to do something very different than provide a substantive remedy to an aggrieved party. An inherent powers sanction is meant to 'vindicat[e] judicial authority.'" Appellants' Brief at 54, quoting *Mark Indus. Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 733 (9th Cir. 1995), quoting *Chambers*, 501 U.S. at 55.

ensuring that misconduct would go unpunished. *See West v. Equifax Credit Info. Servs., Inc.*, 230 Ga. App. 41, 495 S.E.2d 300, 303-04 (1997) (holding that "the nature of the moving party's actions in responding to discovery requests does not preclude sanctions in its favor"). This is a particularly absurd result in the inherent powers context, where the court serves as a protector of the entire system.

And even assuming the unclean hands doctrine could apply in this manner, its own principles dictate that it would not apply to bar the sanction ordered here. Under the doctrine, a court sitting in equity will deny relief to a party that has acted in bad faith "in connection with the subject matter or transaction in litigation." *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940); *see also Langley v. Devlin*, 95 Wash. 171, 187, 163 P. 395 (1917) (the unclean hands doctrine applies where the party seeking relief has "defrauded his adversary…in the subject-matter of the action"). Discovery violations do not go to the subject matter of the action. *See West*, 495 S.E.2d at 303. Moreover, the doctrine "does not repel a sinner from courts of equity, nor does it disqualify any claimant from obtaining relief there who has not dealt unjustly *in the very transaction concerning which he complains*." *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (quoting *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 74, 113 P.2d 45 (1941))

(emphasis the court's). Here, the transgression that the trial court found Gefco committed had nothing to do with the "transaction concerning which" Gefco complained: Cascade's fabrication of the central evidence produced in support of its counterclaims. The documents that the court found Gefco failed to produce in no way so much as suggested that Gefco had somehow played a role in the production of shafts from other rigs which Cascade and Niermeyer then represented as among the ones that failed on the 50K at Wheeler Canyon. CP 1484-87.

Furthermore, given Gefco's transgressions could not prejudice Cascade's case (based as it was on falsified evidence), Cascade and Niermeyer have no basis to assert the doctrine of unclean hands. *See Langley*, 95 Wash. at 187 (concluding that the doctrine was inapplicable where the respondents were not prejudiced by the appellants' misconduct). The trial court found: "Cascade's counterclaims would have been fatally undermined had it been candid about the provenance of the shafts. This finding makes it difficult to conclude that Gefco's transgressions prejudice Cascade's case." CP 1487 (FOF 89). Cascade and Niermeyer were, quite clearly, the more culpable parties, and the trial court was entitled to arrive at the divergent sanctions it did in light of this difference in culpability.

D. The trial court properly held Niermeyer personally liable.

Under the responsible corporate officer doctrine, "[i]f a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979), citing *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976), and *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 753-54, 489 P.2d 923 (1971).

Niermeyer was the president of Cascade. And it was he who identified the three drive shafts specifically as the second, third, and fourth shafts to fail at Wheeler Canyon, CP 1474, 1476 (FOF 1, 12), and exercised an extraordinary degree of control over the course of Cascade's pursuit of its counterclaim. *See* CP 1467 (Letter Ruling), 1477 (FOF 19-20). Given these facts, the trial court was within its discretion to hold Niermeyer liable for the sanction the court imposed on Cascade.[41]

[41] In *Grayson*, the Supreme Court held that a trial court had erred in piercing the corporate veil to impose personal liability for damages and attorney's fees on the corporate defendant's president. 92 Wn.2d at 552-53. But, citing the responsible corporate officer doctrine, the court affirmed the imposition of personal liability based on findings that the president had personally directed the wrongful acts that caused the plaintiff's damages. *Id.* at 553-54.

E. The trial court properly determined the amount of fees and costs that Cascade and Niermeyer would have to reimburse Gefco.

"The purpose of sanctions [is] to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the wrong." *Roberson v. Perez*, 123 Wn. App. 320, 337, 96 P.3d 420 (2004), citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d at 299. Here, the sanctions punished Cascade and Niermeyer for pursuing a falsified case against Gefco, and compensated Gefco for incurring expenses it should never have had to incur in the first place. The question for this Court to resolve is whether the trial court acted within its discretion when it set the amount of the sanction it imposed, in light of these legitimate purposes. Moreover, while the trial court made reasonable attorney's fees and costs the measure of the sanctions it imposed, this is not a typical prevailing party fees case. As the Court of Appeals held in *Roberson*, and as the trial court correctly recognized here, fees and costs that would generally not be compensable under a prevailing party analysis may properly be awarded as a sanction for misconduct. *Roberson*, 123 Wn. App. at 346-47 (affirming the superior court's award of monetary sanctions to party harmed by discovery violations during trial); CP 2315 (Sanction Award COL 4: "Thus it is appropriate and

reasonable in this instance to include costs that might not be awarded in an ordinary fee-shifting scenario.").

The trial court heard extensive arguments related to Gefco's initial fee request, at a hearing held on March 24, 2014. *See* RP (3/24/14) 3-63. And following that hearing the court did not grant Gefco's request but instead ordered Gefco to "go through these records and demonstrate to me that everything regarding the appeal [of the prior prevailing party fee award], any research or thought or meetings or whatever about Oklahoma law, any choice of law question is gone. I want to make sure anything to do with the underlying collection action is gone." RP (3/24/15) 59. The court further ordered that: "I want everything having to do with defending against the sanctions motion from -- motion from Hub City and the sanction motion from Cascade, I want to make sure that's out of there." RP (3/24/15) 60.

Gefco then submitted its amended application for fees and costs, using a spreadsheet to demonstrate the reductions made to billing entries according to the categories identified by the trial court. CP 2012-14, 2017-2132 (spreadsheet detailing time entries and reductions by category) and 2134-37 (spreadsheet detailing depositions taken). Gefco quoted from the orders the trial court gave at the conclusion of the March 24 hearing and affirmed its adherence to those instructions, reducing its attorney fee

request by $295,447.04. CP 2013. As an example of the reductions taken in just one category, Gefco made $81,128.50 in reductions to reflect time spent on opposing Cascade's sanction motions. CP 2013. Cascade then argued that significant further reductions were necessary. CP 2236. And the trial court largely agreed, reducing the attorney fee and cost award to $1,641,721 from Gefco's amended request of $2,698,247. CP 2014, 2315.[42]

On appeal, Cascade and Niermeyer argue that the trial court should have made yet further reductions in three areas: (1) discovery requests regarding problems with other rigs; (2) partner billing; and (3) redactions. As to fees related to discovery requests regarding problems with other rigs: Gefco was not instructed during the March 24 hearing to remove time related to those discovery requests -- that instruction did not come until December. *See* RP (3/24/14) 1-63. *Cf.* CP 2304-05 (Sanction Award FOF

[42] The trial court revised the spreadsheets provided in order to "evaluate the billings and Cascade's objections." CP 2305 (Sanction Award FOF 4). Among the additional reductions ordered, the trial court found that Gefco's lead trial counsel did not need another partner to attend an evidentiary hearing and reduced the award on that basis. CP 2306 (FOF 10). The trial court also found that it was not reasonable "to include in the fee award the cost of Mr. Siefert and a paralegal to attend depositions[]" and reduced the fee award accordingly. CP 2306-07 (FOF 13). The court found that it lacked the necessary information to award costs for attorney travel expenses, and reduced the award on that basis, as well. CP 2309 (FOF 17). As to expert fees, the court excluded expert witness expenses incurred by Mr. Rottman after March 24, 2012, cut Mr. Ayres' bill almost in half, entirely excluded all fees and expenses paid to Mr. Bunn, cut the award for Mr. Knoll's work in half, and entirely excluded the bill from Fulcrum Legal Graphics. CP 2311-12 (FOF 20-11). Finally, the court credited Cascade's concerns about Mr. Siefert's block-billing and redactions, reducing the award for his time *by one-third*, for a reduction of *$466,900*. CP 2313 (FOF 25).

2), 2313-14 (Sanction Award FOF 26).[43] Nor is there a proper basis for this Court to order the removal of such time from the sanctions award. The trial court weighed the circumstances involved, found that Gefco's actions were "perhaps necessary defensive tactics[]" and then independently punished Gefco for its actions. CP 1489 (COL 5). No remand is warranted to determine the precise amount of time spent on this one particular discovery issue, especially given that so "much of the litigation was about discovery[]" and -- as the trial court recognized -- *none* of it would have been necessary had Cascade and Niermeyer not chosen to pursue a multi-million dollar counterclaim based on falsified evidence. *See* CP 2313-15 (FOF 26).

Cascade and Niermeyer also fail to establish any prejudicial error with regard to its other two arguments for further reductions. First, the trial court specifically addressed the fees charged by two partner-level attorneys. CP 2306 (FOF 8, 12). The time entries in the trial court's Exhibit 1 to the fee award do not show any inappropriate billing by other partner-level attorneys, and the court's Exhibit 1 also shows that a vast majority of the time entries by partner attorney were subjected to reductions for time spent on categories of tasks that the trial court

[43] Cascade and Niermeyer incorrectly cite to the trial court's December 2014 findings -- which are more expansive than the March 2014 order -- to claim that Gefco's May 2014 representation was inaccurate. *See* Appellants' Brief at 57.

excluded from the fee award. Second, the trial court credited Cascade's generalized concerns about redacted time entries when it reduced Mr. Siefert's fees by one-third ($466,900). CP 2313-14 (Sanction Award FOF 25-26). The trial court did not abuse its discretion by making a percentage reduction to address concerns about redactions and block-billing. *See Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 82, 272 P.3d 827 (2012).

F. The trial court applied the correct post-judgment interest rate.

Cascade and Niermeyer waived their right to challenge the post-judgment interest rate. When Gefco moved to set the rate at 12 percent, Cascade and Niermeyer failed to respond on that issue. *See* CP 2318-29. Then, after the trial court granted Gefco's motion and set the rate at 12 percent, instead of moving for reconsideration under CR 59(a) Cascade and Niermeyer moved under CR 59(h) to amend the judgment by reducing the rate from 12 percent to 5.25 percent. *See* CP 4166-68. CR 59(h), however, "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil*

Co., 91 F.3d 872, 876 (7th Cir. 1996) (discussing the substantively identical Fed. R. Civ. P. 59(e)).[44]

Even if this Court reaches the merits of the challenge, it should affirm the trial court's decision to set the rate at 12 percent. The interest rate applicable to a money judgment is governed by RCW 4.56.110, which divides judgments into four categories and sets the applicable interest rate for each, one of which is a judgment on a tort claim. *See Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165, 208 P.3d 557 (2009). The elements of a tort, however, plainly do not need to be established before a trial court may use its inherent power to protect the integrity of the courts and prevent abuses of the judicial process. And because a sanctions judgment under that power obviously does not fit into either of the other specific categories in subsections (1) through (3), such a judgment is subject to the "catch-all" category of subsection (4), providing for interest at the "maximum rate permitted under RCW 19.52.020," which is the rate the trial court applied here.

[44] This Court has recognized the appropriateness of applying federal case law interpreting Fed. R. Civ. P. 59(e) to resolve issues arising under CR 59(h). *See Hirata v. Evergreen State Ltd. P-ship No. 5*, 124 Wn. App. 631, 640-41, n.10, 103 P.3d 812 (2004) (applying federal Rule 59(e) case law to determine whether a motion for an offset of adverse federal income tax consequences must be brought under CR 59(h)).

VI. RAP 18.1 FEES REQUEST

Gefco requests an award of its fees and costs on appeal. Depriving Gefco of its appellate fees and costs would undermine the sanction's compensatory purpose. Where a party has demonstrated intransigence at trial, to appeal the result may justify a corresponding award of attorney's fees on appeal. *See Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002); *Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). A similar rule should apply in an appeal from a sanction for bad faith litigation.

VII. CONCLUSION

This Court should affirm the trial court and award Gefco its fees on appeal.

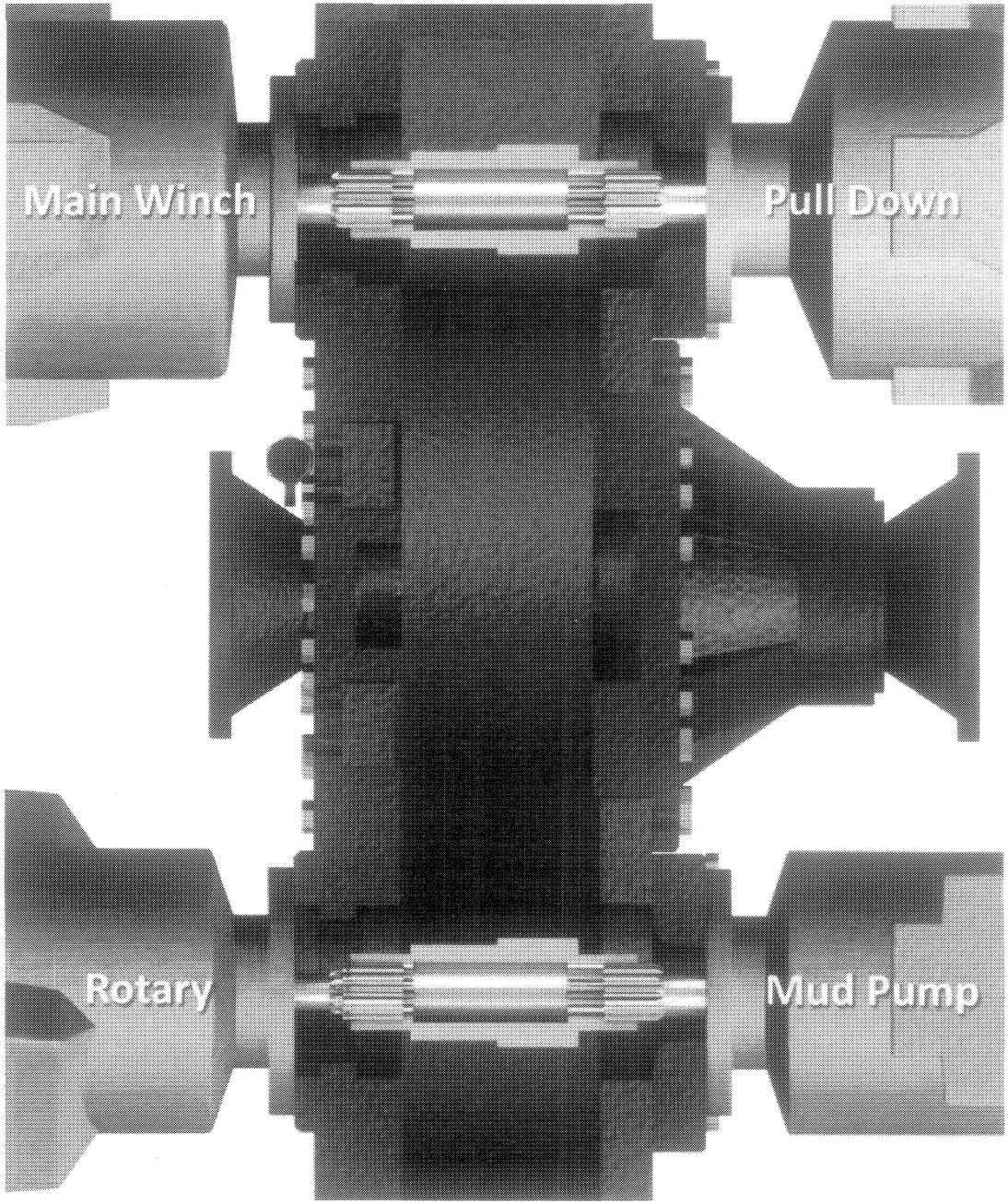
Respectfully submitted this 15th day of January, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Attorneys for Respondent

APPENDIX A

Power Take-Off (PTO) Overview



Sundstrand
SAE D
Small Chamfer

Parker
SAE D
Large chamfer

Page 4909

Cab

Rear

Sundstrand
SAE D or SAE C
+ C/D adaptor
Small Chamfer

Sundstrand
SAE D or SAE C
+ C/D adaptor
Small Chamfer

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

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

Respondent,

v.

CASCADE DRILLING, INC., a Washington corporation,

Appellant,

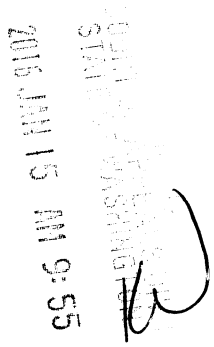
and,

BRUCE NIERMEYER,

Aggrieved Non-Party/Appellant.

NO. 73017-7-I

DECLARATION OF SERVICE



The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the *Brief of Respondent* on the below-listed attorneys of record by the methods noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Howard M. Goodfriend Ian C. Cairns Smith Goodfriend PS 1619 8th Ave N Seattle, WA 98109-3007 howard@washingtonappeals.com ian@washingtonappeals.com	Ted Buck Evan Bariault FREY BUCK, P.S. 1200 Fifth Avenue, Suite 1900 Seattle, WA 98101 tbuck@freybuck.com ebariault@freybuck.com

DATED this 15th day of January, 2016.

Patti Saiden

Patti Saiden, Legal Assistant