

FILED  
June 12, 2013  
Court of Appeals  
Division III  
State of Washington

No. 315754

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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TARGET NATIONAL BANK, RESPONDENT,

vs.

JEANETTE E. HIGGINS, APPELLANT.

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REPLY BRIEF OF APPELLANT

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Michael D. Kinkley, WSBA #11624  
Attorney for Appellant  
Michael D. Kinkley, P.S.  
4407 N. Division, Ste 914  
Spokane, WA 99207  
(509) 484-5611

Kirk D. Miller, WSBA #40025  
Attorney for Appellant  
Kirk D. Miller, P.S.  
211 E. Sprague Ave.  
Spokane, WA 99202  
(509) 413-1494

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## I. Argument

### A. Amount in Controversy

The trial court did sign the form prepared by the defendant, but she made substantial changes that were not explained. First, the Court eliminated all the “judgment” language and the “judgment summary” making the form an order that was unenforceable by statutory execution on judgment procedures<sup>1</sup>. RCW 4.84.060 (judgment for costs shall be entered in favor of defendant); RCW 4.64.030. The attorney costs and fee award was not paid until 49 days after entry of the order.

The second change that the trial court made was to arbitrarily cut the hours expended by nearly half without any direct explanation. Contrary to the Plaintiff’s argument Judge Moreno never indicated that any of the time spend was “wasteful or duplicative”. Brief of Respondent, pg. 4. The Court found the hourly rate to be reasonable. CP 272. Plaintiff did not make any specific objection to any time entry. *Id.*

Judge Moreno accepted the Defendant’s attorney’s Lodestar claim (Number of hours times hourly rate) but then made a downward adjustment of the hours. Judge Moreno did not enter any finding to support a downward adjustment because no reason for a downward departure exists. The defendant was largely responding directly to

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<sup>1</sup> E.g. RCW 6.17, executions; RCW 6.25, attachments; RCW 6.27, garnishment; RCW 6.32 Supplemental proceedings.

Plaintiff's efforts in the case then expeditiously sought an early defense summary judgment. When the court denied the defense motion for Summary Judgment of Dismissal, to allow the Plaintiff to further develop proof of its case, Defendant sent written discovery requests.

When Plaintiff was unable to respond to the written discovery with any admissible proof of its claim, defendant again sought summary judgment of dismissal which this time, was granted. This was an attempt at an efficient process with a favorable resolution wholly in favor of the defendant.

Judge Moreno hand wrote "Amount in Controversy" as the *only* reason given for the downward departure and reduction of defendant's attorney's fees by approximately one-half.

There is a substantial difference between a Plaintiff and a Defendant in litigation. The Plaintiff has the choice of whether to bring the action. The defendant does not. The Plaintiff has the right to a voluntary dismissal until the close of Plaintiff's presentation at trial. The defendant never has that right.

The "amount in controversy" argument is also frequently referred to in other jurisdictions as "proportionality". A defendant that obtains a judgment of dismissal has had 100% success and should be awarded 100% of the loadstar fee. In *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct.

1933, 1940, 76 L. Ed. 2d 40 (1983) the United States Supreme Court explained:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. **Normally this will encompass all hours reasonably expended on the litigation**, and indeed in some cases of exceptional success an enhanced award may be justified. ... The result is what matters

The fee “should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” *Hensley*, 461 U.S. at 435, 103 S. Ct. 1933; *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 557 (7th Cir. 1999).

But in this case the defendant did prevail on every issue in the case and should be awarded the full amount of the fee. It is not clear what the trial court meant by the words “amount in controversy” but if it was the amount the Plaintiff sued for, that would be an improper basis since the defendant had no control over that amount and since under RCW 4.84.250 the “amount in controversy” is always relatively small. This is why it is important to consider RCW 4.84.250; RCW 4.84.270 in determining the right to a fee. The court abused its discretion by not doing so, since a defendant defending a lawsuit can neither choose the amount in controversy nor should the amount less than ten thousand dollars (\$10,000) be a reason to reduce the fee. The fact that the amount in

controversy is less than ten thousand dollars (\$10,000) is a reason to grant the reasonable attorney fee in the first instance.

“Proportionality between fees and damages is not required”. *Spegon*, 175 F.3d at 558. "To hold otherwise would in reality prevent individuals with relatively small claims from effectively enforcing their rights." *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 228-29(7th Cir. 1972) See, e.g., *Laborers' Pension Fund v. McKinney*, No. 98C5482, 2000 U.S. Dist. LEXIS 16778, at\*6 (N.D. Ill. Nov. 15, 2000)(noting that a fee of over eight thousand dollars (\$8,000) was not exorbitant, even in light of the two thousand (\$2,000) awarded in damages); see also *Wallace v. Mulholland*, 957 F.2d 333, 339(7th Cir. 1992) (rejecting contention that Supreme Court requires "correspondence between the degree to which a plaintiff has financially prevailed and the attorney fees awarded to him").

The Second Circuit has rejected the "proportionality" argument as the basis for a fee award. E.g., *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994); *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985); *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983). Indeed, fee awards in civil rights and consumer protection matters regularly exceed the plaintiff's recovery. E.g., *City of Riverside v. Rivera*, 477 U.S. 561, 580, 106 S.Ct. 2686 (1986) (awarding two hundred forty-five thousand four hundred fifty dollars (\$245,450) in fees on a thirty-three thousand

three hundred fifty dollar (\$33,350) recovery, including 143 hours for trial preparation); *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir. 1992) (fee award of five hundred thousand dollars (\$500,000) on sixty thousand dollar (\$60,000) settlement); *United States Football League v. National Football League*, 887 F.2d 408, 413 15 (2d Cir. 1989) (\$5.5 million dollar fee award on a \$3 dollar recovery); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1057 60 (2d Cir. 1989) (four hundred fifteen thousand dollar (\$415,000) fee for recovering two thousand six hundred eighty-nine dollars and two cents (\$2,689.02) monthly pension). See *Norton v. Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 220 (D. N.J. 1999) (rejecting proportionality in awarding fifty-eight thousand dollars (\$58,000) in fees in an FDCPA case).

#### B. Notice by a Defendant

Under RCW 4.84.270, “when a plaintiff seeks less than \$10,000 in damages and recovers nothing, the defendant is entitled to attorney's fees, regardless of whether an offer of settlement has been made by either party.” *Lowery v. Nelson*, 43 Wash.App. 747, 719 P.2d 594 (1986); *Pub. Utilities Dist. 1 of Grays Harbor Cnty. v. Crea*, 88 Wash. App. 390, 393, 945 P.2d 722, 724 (1997). Any “notice requirement does not require a party seeking attorney's fees specifically to plead RCW 4.84.250 or to ask

for attorney's fees". *Beckmann v. Spokane Transit Authority*, 107 Wash.2d 785, 790, 733 P.2d 960 (1987). In this case, the defendant specifically mentioned that the Plaintiff would be liable for the defendant's attorney's fees. CP 256. At that time, November 11, 2011, the Defendants fees were approximately three thousand seven hundred dollars (\$3,700). CP 256. By the time of the final attorney fee order being entered, April 13, 2012, the Defendant's attorney's fees had grown to over eleven thousand dollars (\$11,000). CP 271. The fees were increased due to Plaintiff's request for a continuance at virtually every hearing claiming a lack of preparation by the Plaintiff. CP 64, 115, 119.

The Plaintiff in this case is a bank. It enters tens of thousands of default judgments each year. On the rare occasion on which it is opposed, it practices a scorched earth or "Stalingrad" approach. The point is to make it impossible for a defendant to hire an attorney to oppose the well-funded bank.

If a defendant was required to give notice, i.e. an offer of settlement, the legislature would *not* have enacted RCW 4.84.270 ("recovers nothing") as a separate section. RCW 4.84.260, requiring Plaintiffs to make an offer, could have just as easily said "parties" instead of "Plaintiff". But the fact is plaintiffs and defendants are different and are treated differently by the statute. Compare RCW 4.84.260 with RCW

4.84.270. The Plaintiff does not have to give any notice under RCW 4.84.260 except as an offer of settlement. A defendant can do that, or simply defend since he is entitled to fee if the Plaintiff “recovers nothing” by the plain words of the statute. RCW 4.84.270.

It matters in this case that the court refused to consider RCW 4.84.250 but instead limited her inquiry to RCW 4.84.330 because “amount in controversy” can never be a reason for a reduction of a fee under RCW 4.84.250 since it is the small amount in controversy that allows a reasonable attorney fee. RCW 4.84.250 (“\$10,000 or less”). This appeal is not frivolous; Target’s request for fees must be denied.

One of the issues for which the Washington Supreme Court accepted direct review in *AllianceOne Receivables Management, Inc. vs. William Carl Lewis Jr., et ux* Supreme Court Case No. 87445-0<sup>2</sup> was whether a defendant must give notice of intent to seek fees or whether a defendant is entitled to fees if the Plaintiff “recovers nothing”. That is the same issue the Plaintiff has raised in this case.

#### C. Respondent’s Attorney’s Fees

Target was not entitled to attorney fees at the trial court because it was not the prevailing party. This is not an action on the Target contract but rather for statute-based attorney fees. Target failed to prove the

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<sup>2</sup> Oral argument scheduled for June 11, 2013.

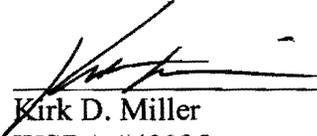
existence of a valid contract so it cannot point to an applicable attorney fee provision, even while they are judicially estopped from denying the defendants fees on a contract basis. There is no cross-appeal and no basis for an award of attorney's fees in the trial court so, in any event, the respondents request should be denied.

Respectfully submitted this 12<sup>th</sup> day of June, 2013.

Michael D. Kinkley P.S.

Kirk D. Miller, P.S.

Approved on 6/12/13  
Michael D. Kinkley  
WSBA #11624  
Attorneys for Appellant

  
Kirk D. Miller  
WSBA #40025  
Attorney for Appellant

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IN THE COURT OF APPEALS, DIVISION III  
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TARGET NATIONAL BANK,	)	
	)	
Respondent,	)	DECLARATION OF SERVICE
	)	
v.	)	
	)	
JEANETTE E. HIGGINS,	)	
	)	
Appellant.	)	
	)	

I declare that on the 12<sup>th</sup> day of June, 2013, I caused a true and correct copy of the  
Reply Brief of Appellant to be served on the following in the manner indicated below:

Ann C. McCormick  
Roy A. Umlauf  
Forsberg & Umlauf, PS  
901 Fifth Ave., Suite 1400  
Seattle, WA 98164-2047

- U.S. Mail
- Hand Delivery
- E-mail

By:   
Rachel Elston