

No. 74773-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEBORAH EWING,

Respondent,

v.

GREEN TREE SERVICING LLC,

Appellant.

FILED
Jun 23, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating a lodestar fee award of \$164,205.00 in the February 12, 2016 judgment because it failed to segregate attorney fees incurred by Respondent Deborah Ewing (“Ewing”) in prosecuting her claims against Katrina Glogowski and the Glogowski Law Firm (“GLF”) (collectively, the “Glogowski Defendants”). (CP 00816-00825.)

2. The trial court erred in calculating a lodestar fee award of \$164,205.00 in the February 12, 2016 judgment because it failed to adjust the award downward due to Ewing’s unreasonable litigation posture and failure to engage in good faith settlement discussions. (CP 00816-00825.)

3. The trial court erred in calculating a lodestar fee award of \$164,205.00 in the February 12, 2016 judgment because it failed to fully and properly reduce the attorney fee award for amounts incurred by Ewing for unsuccessful endeavors. (CP 00816-00825.)

4. The trial court erred in calculating the fee award in the February 12, 2016 judgment because the award is disproportionate to and grossly exceeds the amount of Ewing’s recovery against Green Tree. (CP 00816-00825.)

5. The trial court erred in applying a multiplier of 1.5 to the lodestar fee award in the February 12, 2016 judgment. (CP 00816-00825).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Ewing alleged that Appellant Green Tree Servicing LLC (“Green Tree”), the servicer of Respondent’s loan and the beneficiary of the Deed of Trust securing the loan, violated the Washington Consumer Protection Act (“CPA”) and the Washington Deed of Trust Act (“DTA”). Ewing alleged separate claims against the Glogowski Defendants, the foreclosing trustee, for violations of the CPA and the DTA. Early in the litigation, the trial court dismissed Ewing’s CPA claim against the Glogowski Defendants and Katrina Glogowski as a party. In her fee petition against Green Tree, Ewing did not segregate the time she spent litigating her claims against the Glogowski Defendants. Must the attorney fees incurred by Ewing in litigating her separate and distinct claims against the Glogowski Defendants be segregated from the fee award entered against Green Tree? (Assignment of Error 1.)

2. During the course of litigation, Ewing filed multiple meritless claims, which were dismissed via Green Tree’s motions for summary judgment, while ignoring Green Tree’s settlement

overtures. After losing two motions for summary judgment, Ewing finally responded to Green Tree's settlement inquiries; however, her "bottom line" demand to settle her claims was \$1,250,000.00, which included over \$600,000 for time spent on the litigation by Kevin Ewing, Ewing's husband and a non-party to the suit. Three weeks later, after losing Motions in Limine that barred most of her damages evidence, Ewing accepted Green Tree's \$50,000.00 Offer to Allow Judgment. Should the trial court have considered Ewing's unreasonable litigation and settlement posture when making a discretionary award of attorney fees to Ewing? (Assignment of Error 2.)

3. The trial court ruled that certain categories of fee entries were not recoverable, such as Ewing's work on unsuccessful or mostly unsuccessful claims or arguments. However, the court's lodestar calculation includes some of these disallowed entries. Must the amount of the lodestar fee award accurately reflect the court's fee ruling? (Assignment of Error 3.)

4. The lodestar calculation of \$164,205.00 exceeded Ewing's recovery by more than \$114,000.00. After applying the 1.5 multiplier, Ewing's total fee award of \$246,307.50 exceeded Ewing's recovery by almost \$200,000.00. Should the amount of

attorney fees awarded to Ewing be consistent with, or roughly proportional to, the monetary relief she obtained? (Assignment of Error 4.)

5. The trial court awarded the 1.5 multiplier because of the contingent nature of Ewing's representation. Ewing presented no evidence that counsel's hourly rates did not already take that fact into consideration. Should the trial court have awarded a fee multiplier without evidence regarding whether Ewing's attorneys' hourly rate took into account the contingent nature of Ewing's representation? (Assignment of Error 5.)

6. The purpose of an offer to allow judgment is to encourage resolution of a matter prior to trial. Does applying an inflated multiplier when counsel is already compensated at their full hourly rate go against the purpose of the offer to allow judgment? (Assignment of Error 5.)

C. STATEMENT OF THE CASE

In February 2012, Ewing filed a *pro se* Complaint against the Glogowski Defendants and Green Tree. (CP 00572-00591.) In August 2015, Ewing retained counsel, and Kevin Ewing and Ewing (collectively, "the Ewings") filed an Amended Complaint against the Glogowski Defendants, Green Tree, and the Bank of New York

Trust Company relating to the foreclosure of Ewing's home. (CP 00435-00540.) The Ewings alleged that Green Tree was not a proper beneficiary of the Deed of Trust recorded against Ewing's home and, therefore, violated the DTA and CPA by acting as the beneficiary and appointing GLF as the foreclosing trustee. (See CP 00443, ¶ 29(i) and (ix).) The Ewings alleged that the Glogowski Defendants foreclosed without the authority to do so, failed to comply with the statutory requirements required of a trustee to foreclose, and breached the independent duty a trustee owes to a borrower under the DTA. (CP 00442, ¶¶ 27, 28 and 00443, ¶ 29). In fact, the Amended Complaint alleges *six specific claims* against the Glogowski Defendants for alleged violations of the DTA. (CP 00443, ¶ 29(ii), (iii), (iv), (v), (viii) and (x).) The Amended Complaint also contains at least five separate and distinct allegations against the Glogowski Defendants for alleged violations of the CPA. (CP 00445, ¶ 33(i), (ii) (iv), (v) and (vi).)

The Ewings further alleged that, for their respective acts, Green Tree and the Glogowski Defendants were each liable for breach of contract, breach of the implied covenant of good faith, negligence, criminal profiteering, civil conspiracy, and the tort of

outrage. (CP 00449-00461.) Ewing's Amended Complaint also alleged that she was entitled to equitable relief. (CP 00453-00454.)

In June 2014, Green Tree asked the Ewings to dismiss a number of their legally unsupportable claims, the Bank of New York Trust Company as a defendant, and Kevin Ewing as a plaintiff. The Ewings refused. (CP 00676-00677.) In November 2014, Green Tree tried to open settlement discussions with Ewing, but Ewing ignored Green Tree's inquiry. (CP 00736, ¶ 13.) In February 2015, Green Tree successfully moved for summary judgment against Ewing's claims for declaratory judgment, equitable relief, breach of contract, breach of the implied covenant of good faith, negligence, criminal profiteering, civil conspiracy, and the tort of outrage, which claims the Ewings had refused to dismiss in June 2014.

(CP 00870-00890; CP 01098-01104.) Green Tree also successfully obtained the dismissal of Kevin Ewing as a party plaintiff and the Bank of New York Trust Company as a defendant. (CP 01101, 01103.) Kevin Ewing's claims against the Glogowski Defendants were also dismissed. (CP 01119.) Most of the Ewings' claims against the Glogowski Defendants were dismissed, including her CPA claim. (CP 01116-01121.) On April 2, 2015, Katrina Glogowski was dismissed from the case. (CP 01088-01090.)

Thus, after April 2, 2015, Ewing had a CPA and DTA claim pending against Green Tree and a DTA claim pending against GLF.

In February 2015, Ewing provided Green Tree with supplemental discovery in which Ewing claimed that she had incurred nearly \$1.4 million in damages. (CP 00631, ¶5, 00634.) In May 2015, Ewing amended her complaint for a second time to add claims for punitive damages, fraud, and injunctive relief.

(CP 01261-01278; CP 00001-00187.) Green Tree advised Ewing that these claims were legally unsupportable and requested that she dismiss them. Ewing refused to dismiss these claims.

(CP 00735-00736, ¶8; CP 00765-00768.) Green Tree then moved for a brief set over of the trial date, which the trial court granted Green Tree over Ewing's objection. (CP 01080-01082.)

In July 2015, Green Tree successfully moved for summary judgment against the punitive damages, fraud, and injunctive relief claims that Green Tree had asked Ewing to dismiss in May 2015.

(CP 01108-01113.) Ewing's motion for summary judgment against GLF was partially granted regarding her claim that GLF violated RCW 61.24.030(7) by failing to obtain a beneficiary declaration.

(CP 01094-01097.)

Ewing finally agreed to mediation in September 2015, but demanded \$1,250,000 to settle her claims. (CP 00631, ¶7.) This sum included over \$600,000 to compensate Kevin Ewing, a now-dismissed non-party, for time he allegedly spent on the litigation. (*Id.*) Green Tree offered \$40,000 to settle Ewing's claims against it. (*Id.*) After losing motions in limine (see CP 001105-001107), many relating to her alleged damages, on September 28, 2015, Ewing ultimately accepted a \$50,000 Offer to Allow Judgment, which also permitted Ewing to petition for her *reasonable* attorney fees. (CP 00631, ¶8 and CP 00891-00893.)

The trial court approved as reasonable a total of approximately 498 hours billed by five separate attorneys in the course of representing Ewing. (CP 00636-00685; CP 00816-00825.) The court additionally approved as reasonable an additional 202 hours billed by four separate paralegals. (CP 00636-00685; CP 00816-00825.) The court awarded a lodestar fee of \$164,205.00 and also applied a 1.5 multiplier to the lodestar because of the contingent nature of Ewing's representation and the remedial nature of the CPA statutes, for a total fee award of \$246,307.50. (CP 00816-00825.)

On February 26, 2016, Green Tree filed a timely appeal from the trial court's February 12, 2016 judgment awarding \$246,307.50 in fees in a case involving \$50,000 in damages. (CP 001167-001079.)

D. ARGUMENT

1. Standard of review.

Whether an attorney fee award is reasonable is reviewed for abuse of discretion. *Styrk v. Cornerstone Invest.*, 61 Wash. App. 463, 473, 810 P.2d 1366, 1371 (1991). A trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775, 784 (1971).

2. The trial court erred by awarding Ewing attorney fees for time spent litigating against the Glogowski Defendants (Assignment of Error No. 1).

If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues. *Loeffelholz v. C.L.E.A.N.*, 119 Wash. App. 665, 690, 82 P.3d 1199, 1212 (2004). This is true even if the claims overlap or are interrelated. *Id.* Where the trial court finds the claims to be so related that no reasonable segregation of successful and

unsuccessful claims can be made, there need be no segregation of attorney fees. *Id.* at 691. However, even where a number of fundamental facts are essential to every aspect of the lawsuit, the law pertaining to each claim may differ, and, thus, the legal theories attaching to these fundamental facts may differ. *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 344, 54 P.3d 665, 685 (2002). In such a case, “[r]egardless of the difficulty involved in segregation . . . the trial court has to undertake the task.” *Id.* at 345 (emphasis added).

The trial court erred in failing to segregate fees arising from Ewing’s claims against the Glogowski Defendants from fees arising from her claims against Green Tree. The trial court held that “all defendants were intertwined, with the liability of one arguably dependent on the liability of another. Under these circumstances, it is not possible to untangle the hours in a way that fairly segregates the work among the different Defendants.” (CP 00819.) This is simply not accurate.

Ewing’s claims in the Amended Complaint against Green Tree and the Glogowski Defendants were based on different statutory obligations, and the Glogowski Defendants’ potential liability to Ewing was not necessarily intertwined with Green Tree’s

potential liability. For example, Ewing alleged that Green Tree breached the DTA by claiming it was a beneficiary of the Deed of Trust and by appointing the Glogowski Defendants as foreclosing trustee. (CP 00443, ¶29(i), ix.) Ewing alleged that the Glogowski Defendants owed her a special and independent duty. (CP 00443-00444, ¶¶27, 28.) Indeed, Ewing alleged six independent violations of the DTA by the Glogowski Defendants. (CP 00443-00444, ¶29(ii), (iii), (iv), (v), (viii) and (x).) Ewings made the following DTA allegations against only the Glogowski Defendants:

“ii) when GLF did not have 'proof ' that Green Tree was the "owner of any promissory note or other obligation secured by the deed of trust" before the NOTS was recorded, transmitted or served. RCW 61.24.030(7);

iii) when GLF violated RCW 61.24.010(4) by failing to act as an independent, impartial judicial substitute. * * *

iv) when GLF violated RCW 61.24.010(3) by owing fiduciary duties to Green Tree, the purported beneficiary;

v) each time that GLF purported to Plaintiffs and/or public (through recording and publication) that Green Tree was the beneficiary under RCW 61.24.005(2);

viii) each time GLF knew or should have known that they either had insufficient proof that Green Tree was the beneficiary within the meaning of RCW 61.24.005(2), or was the owner within the meaning of RCW 61.24.030(7)(a); or relied upon a declaration when they knew or should have known the declaration was insufficient proof of note ownership under RCW 61.24.030(7), the contrary was true, or were prohibited from relying on such declaration under RCW 61.24.030(7)(b);

x) each time GLF as a trustee where they failed to exercise good faith, independence, neutrality, or were otherwise removed from a conflict of interest, and where they are also legal service providers and debt collection agents for their client Green Tree.”

(Id.)

Ewing also made five independent allegations against the Glogowski Defendants under the CPA. (CP 00445-00446, ¶¶33(i), (ii), (iv), (v) and (vi).) These allegations included:

“ i) GLF purporting to act as a judicial substitute in deciding whether it or the purported beneficiary have complied with the DTA and the terms of the DOT, when it does not exercise its own independent judgment but follows the directions and instructions of

the servicer and/or purported beneficiary in their usual course of business;

ii) GLF deceptively and unfairly exercised the power of sale which is authorized only when there is strict compliance with the DTA and the terms of the deed of trust;

iv) GLF legally determined that Green Tree factually and legally met the DTA's definition of beneficiary when the definition of "note holder" within the note prevented Green Tree from beneficiary status without the consideration of adequate evidence, legal authority, or establishing a record for review by the courts;

v) GLF's execution of documents without knowledge of their truth or authority to execute;

vi) GLF purported to have legal authority to initiate and perform a nonjudicial foreclosure sale." (*Id.*)

Ewing further alleged that the Glogowski Defendants breached the independent duty a trustee owes to the borrower and the beneficiary under RCW 61.24.010(4). (CP 00449, ¶¶48-¶50.)

Ewing's own motion for partial summary judgment against GLF unequivocally establishes that the liability of all Defendants was not intertwined. (CP 01231-01260.) In this motion, Ewing alleged that GLF independently violated RCW 61.24.010(2),

61.24.030(7), 61.24.010(4), and 61.24.010(3). This includes a breach of the independent duty a trustee owes to the borrower and the beneficiary. RCW 61.24.010(4). (CP 01241-01244) (emphasis added).) Ewing’s motion cited authority that GLF had the obligation to “investigate possible issues [with the foreclosure] using its independent judgment.” (CP 01242) (emphasis added).) The trial court determined that there was a genuine issue of fact as to whether GLF violated its independent obligations under RCW 61.24.010(4). (CP 01095.) However, the trial court did find that GLF violated its duty under RCW 61.24.030(7) by failing to obtain a beneficiary declaration. (CP 01095.) Thus, it is not accurate that the liability of the Glogowski Defendants was necessarily intertwined with Green Tree’s liability.

In other words, Ewing alleged that the actions of Green Tree breached the DTA and CPA independent of the actions of the Glogowski Defendants and, conversely, that Glogowski Defendants breached the DTA and CPA independent of anything Green Tree did or did not do. As in *Smith*, 113 Wash. App. 306, *supra*, there may be a number of common, fundamental facts, but Ewing asserted arguments against Green Tree and the Glogowski Defendants in which the liability of one did not necessarily depend

on the liability of the other. Thus, the trial court had to attempt to segregate the claims against Green Tree from the claims against the Glogowski Defendants.

Segregating the time spent on Ewing's claims against the Glogowski Defendants would not have been difficult since Ewing's counsel tracked much of their time relating to the efforts against the Glogowski Defendants separate from the time spent on her claims against Green Tree. Indeed, Green Tree's counsel segregated for the court the time Ewing spent on her claims against the Glogowski Defendants using Ewing's counsel's own time records. (CP 00736, ¶15; CP 00739-00764.) These time records showed at least 118.5 hours of time (or \$25,919.50) as directly related to the prosecution of Ewing's claims against the Glogowski Defendants. (CP 00736 ¶15; CP 00739-00764.) The trial court nonetheless failed to segregate these fees, which was an abuse of discretion.

3. The trial court erred in making the lodestar calculation without considering Ewing's unreasonable litigation posture and unwillingness to engage in reasonable settlement discussions (Assignment of Error No. 2.

Washington courts use the lodestar methodology to determine reasonable attorney fees. The lodestar approach involves two steps. First, the trial court multiplies "a reasonable hourly rate by the number of hours reasonably expended on the

matter." Second, the trial court adjusts the award "either upward or downward to reflect factors not already taken into consideration." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99 (1983). The court must play an active role in assessing the reasonableness of attorney fees awarded. *Berryman v. Metcalf*, 177 Wn.2d 644, 657 (2013). Reasonable hours do not include those spent on unsuccessful claims or other unproductive time. *Cobb v. Snohomish County*, 86 Wn. App. 223, 237 (Wash. Ct. App. 1997). The amount of hours actually worked is not dispositive regarding a fee claim. *Berryman*, 177 Wn.2d at 661-662. This is because, where fee claims are at issue, there is "a great hazard the lawyers will spend undue amounts of time and unnecessary effort to present their case." *Id.*

The trial court erred by failing to adjust the lodestar calculation downwards due to Ewing's manifest unreasonableness in her litigation posture and in discussing settlement. As set forth in detail in Section B above, Ewing filed multiple meritless claims against Green Tree, which she refused to dismiss and which the trial court ultimately dismissed via Green Tree's motions for summary judgment. (See *also* CP 00736, ¶ 9.) Ewing also refused to stipulate or agree to the most basic, undisputed facts.

(CP 00736, ¶ 10; CP 00769-00773.) As for settlement discussions, on November 6, 2014, Green Tree asked Ewing for a settlement demand. (CP 00736, ¶13.) Ewing never provided a demand. (*Id.*) Instead of engaging in meaningful settlement discussions, in May 2015, Ewing multiplied the litigation by amending her Amended Complaint by adding three legally defective claims. (CP 01261-01278; CP 00001-00187.) Green Tree obtained dismissal of all three claims via summary judgment. (CP 01108-01113.) Ewing then finally agreed to mediation, but demanded \$1,250,000.00 at mediation to settle her claims, which included the completely meritless and unrecoverable amount of \$600,000 to compensate Kevin Ewing for the time he allegedly spent on the litigation. (CP 00631 ¶7.) Less than three weeks after Ewing's unreasonable position caused mediation to fail, Ewing accepted Green Tree's Offer to Allow Judgment in the amount of \$50,000. (*Id.* ¶8; CP 00891-00893.)

This case could have settled as early as November 2014. Instead, Ewing refused to even respond to Green Tree's settlement overtures, multiplied the litigation by filing meritless claims (CP 00735, ¶ 8; CP 007736, ¶ 9), took patently unreasonable settlement positions, and then, after losing motions in limine, settled

the case for a mere sliver of what she had been demanding. Ewing's handling of this litigation was simply not reasonable. (CP 00738, ¶ 18). The trial court failed to address Ewing's unreasonable litigation and settlement posture as part of the lodestar calculation. This was an abuse of discretion.

4. The trial court erred because the fee ruling and the court's lodestar calculation cannot be harmonized (Assignment of Error No. 3).

The trial court agreed with Green Tree's argument that Ewing asserted numerous unsuccessful claims and took unsupportable positions and that Ewing should not be compensated for this work. (CP 00819, In. 20-21.) The trial court ruled that "[w]asteful or duplicative hours and hours pertaining to unsuccessful theories or claims should be excluded." (*Id.* at In. 22-23.) The trial court specifically identified the following areas where reduction of hours was appropriate: (1) work done to amend Ewing's complaint to add claims that were eventually dismissed; (2) work done to oppose defense motions for summary judgment which resulted in dismissal of claims or parties; (3) work on unsuccessful or mostly unsuccessful motions; and (4) entries that cannot be attributed because they are vague or blank. (CP 00820.) The trial court ultimately struck 125 hours billed at the associate's rate of

\$250 per hour, for a total reduction of \$31,250, to the lodestar fee.

(*Id.* at ln. 6.)

However, if the trial court had properly applied its own ruling, approximately 249.6 hours of time and at least \$57,000 in fees should have been stricken from the lodestar fee, as set forth below:

- **Category 1: work done to amend Ewing’s complaint to add claims that were eventually dismissed.**
 - Ewing spent 14 hours (\$3,000) to amend her original complaint, which had 8 of the 10 claims in it dismissed. (CP 00736-00737, 00743.) The trial court should have disallowed 14 hours and \$3,000.
 - Ewing spent 42.9 hours (\$11,330) on punitive damage research, her Second Amended Complaint, and Motion to Amend to add claims for punitive damages, fraud, and injunctive relief. (CP 00736-00737, 00757-00758.) These claims added were later dismissed via Green Tree’s second motion for summary judgment. (CP 01108-01113.) The trial court should have disallowed 42.9 hours and \$11,330.

- **Category 2: work done to oppose defense motions for summary judgment which resulted in dismissal of claims or parties.**
 - Ewing spent 52.5 hours (\$12,749) opposing Green Tree's first motion for summary judgment, which resulted in the dismissal of a co-defendant and 8 of the 10 claims against Green Tree. (CP 00736-00737, CP 00749-00750.) The trial court should have disallowed 52.5 hours and \$12,749.
 - Ewing spent 10 hours (\$2,158) on a motion to reconsider the trial court's order on Green Tree's first motion for summary judgment, which was denied. (CP 00736-00737, CP 00751-00752.) The trial court should have disallowed 10 hours and \$2,158.
 - Ewing spent 37.7 hours (\$8,999.50) opposing Green Tree's second motion for summary judgment, which was granted and resulted in the dismissal of Ewing's claims for punitive damages, fraud, and injunctive relief. (CP 00736-00737, CP 00758-00763.) The trial court should have disallowed 37.7 hours and \$8,999.50.

- **Category 3: Work on unsuccessful or mostly**

- unsuccessful motions**

- Ewing spent 17.1 hours (\$2,815) opposing Green Tree's motion to set over the trial, which was granted. The trial court should have disallowed 17.1 hours and \$2,815. (CP 00737, CP00755-00757.)
- Ewing spent 54.8 hours (\$11,244) on Ewing's motion for summary judgment, which was denied in its entirety. (CP 00736-00737, CP 00759-00763.) This was time wasted on an unsuccessful motion and thus unreasonably incurred. The trial court should have disallowed 54.8 hours and \$11,244.
- Ewing spent 13 hours (\$3,375) opposing Green Tree's motions in limine, which were mostly granted. (CP 00736-00737, CP 00763-00764.) Because Ewing's work was "mostly unsuccessful," at least 50% of these fees should be disallowed. The trial court should have disallowed 6.5 hours and \$1,687.50.
- Ewing spent 6.5 hours (\$1,625) on her own motions in limine, none of which were granted. (CP 00736-

00737, CP 00763-00764.) The trial court should have disallowed 6.5 hours and \$1,625.

- Ewing spent 7.6 hours opposing Green Tree's motion for judicial notice, which was granted. (CP 00737-00738, CP 00763-00764.) The trial court should have disallowed 7.6 hours and \$1,900.

- **Category 4: Entries that cannot be attributed because they are vague or blank.**

- The trial court did not specifically identify any entries that were vague or blank, making it impossible to know precisely which entries were disallowed. (CP 00820.)

The table below illustrates the mathematical shortcomings, set forth above, in the trial court's lodestar calculation. The first column is the activity for which Ewing billed. The second column is the amount of time that should have been disallowed if the trial court had followed its own fee ruling. The third column is the amount of fees that should have been disallowed if the trial court had followed its own fee ruling.

<u>Column 1</u>	<u>Column 2</u>	<u>Column 3</u>
<u>ACTIVITY</u>	<u>HOURS</u>	<u>FEES INCURRED</u>
First Amd'd Compl.	14.0	\$3,000
Sec. Amd'd Compl.	42.9	\$11,330
Opp. Def.'s 1st Mot. Sum. J.	52.5	\$12,749
Mot. Recon. 1st Sum. J.	10.0	\$2,158
Opp. Def.'s 2nd Mot. Sum. J.	37.7	\$8,999.50
Opp. Def.'s Mot. Setover	17.1	\$2,815
Pl.'s Mot. Sum. J.	54.8	\$11,244
Pl.'s Opp. Def.'s Mot. Limine	6.5	\$1,687.50
Pl.'s Mot. Limine	6.5	\$1,625
Pl.'s Opp. Def.'s Mot. Jud.	7.6	\$1,900
Notice		
TOTAL DISALLOWANCES	249.6	\$57,508

The "total disallowances" row shows that the hours and fees that should have been disallowed, according to the trial court's own fee ruling, greatly exceeded the 125 hours and \$31,250 that the trial court actually struck from Ewing's fee petition. Moreover, the foregoing table does not even include any time entries that could

not be credited because they were blank or ambiguous, which the trial court acknowledged warranted further reduction. The trial court abused its discretion by failing to follow its own fee ruling in calculating the lodestar fee award.

5. The trial court's fee award was grossly excessive (Assignment of Error Nos. 4 and 5).
 - a. *The size of the attorney fee award was grossly disproportionate to the result obtained.*

A comparison of plaintiff's recovery to his demand is relevant and critical in awarding attorney's fees. *Martinez v. City of Tacoma*, 81 Wash. App. 228, 247, 914 P.2d 86, 96 (1996). The amount of fees sought must be consistent with the relief obtained. *Berryman*, 177 Wn.2d at 660-661. A lodestar amount that grossly exceeds the amount in controversy should be adjusted downward. *Id.* at 661. Applying a multiplier to the lodestar calculation should be reserved only for "exceptional" cases. *Berryman, id.* at 677. When the granting of a multiplier becomes routine, it undermines the Washington Supreme Court's repeated statement that adjustments to the lodestar should be rare. *Id.* at 671.

In the present case, Ewing received an excessive lodestar fee award of approximately \$164,000, which exceeded her \$50,000 recovery by more than \$114,000. This award violates the

proportionality requirement under *Berryman, supra*. Consequently, the trial court's total fee award of \$246,307.50, almost \$200,000 more than Ewing's recovery against Green Tree, is grossly excessive and completely unsupported.

Moreover, *Styrk* and *Berryman, infra*, suggest that a downward reduction in the lodestar fee was warranted here because Ewing extensively litigated meritless claims/issues or claims/issues not directly related to her CPA claim. The trial court absolutely abused its discretion by awarding fees to Ewing which were grossly disproportionate to her recovery against Green Tree.

b. A multiplier was not warranted in this case.

Comparing this case's minimal damages and excessive attorney fee award to those in other CPA-related cases emphasizes that a 1.5 multiplier was totally unwarranted. In *Evergreen Int'l v. Am. Cas. Co.*, 52 Wash. App. 548, 761 P.2d 964 (1988), which involved an insurance company's bad faith in denying coverage, the plaintiffs were awarded approximately \$380,000 in damages, but only \$281,730 in attorney fees. The trial court refused to apply a multiplier based on the contingent nature of the case. *Id.* at 553. *Styrk v. Cornerstone Investments, Inc.*, 61 Wash. App. 463, 810 P.2d 1366 (1991), involved breach of fiduciary duty and CPA claims

against the plaintiff's realtor. Plaintiffs received approximately \$83,000 in damages, but the court reduced the lodestar fee from approximately \$38,000 to \$12,695. *Id.* at 472. The court was particularly concerned that the parties extensively litigated issues not directly involved in proving a claim under the CPA. *Id.* at 473. In *Ethridge v. Hwang*, 105 Wash. App. 447, 452, 20 P.3d 958 (2001), the plaintiff received \$22,000 in damages, and the court awarded a 1.25 fee multiplier to the lodestar fee of approximately \$39,000, for a total fee award of approximately \$49,000.

The fee award in *Evergreen Int'l* suggests that when a lodestar fee is already substantial, a multiplier is unwarranted even where the plaintiff's recovery exceeds the lodestar fee. And even in the rare circumstance when a multiplier is applied and the attorney fee award exceeds the plaintiff's recovery, *Ethridge* suggests the fee award cannot be blatantly excessive (award exceeded the plaintiff's recovery by only \$27,000). Here, the trial court applied a 1.5 multiplier to an already excessive lodestar fee award, which resulted in a fee award of nearly \$250,000 or almost \$200,000 more than Ewing's ultimate recovery. This is a grossly excessive fee award.

In light of the proportionality requirement, this Court's admonition that application of the fee multiplier should be reserved for "exceptional" and "rare" cases, and Ewing's limited recovery, the trial court abused its discretion by applying a multiplier and awarding attorney fees amounting to nearly five times Ewing's recovery.

- c. *The trial court erred by not considering whether Ewing's counsel's hourly rates already compensated for contingency risk.*

The party requesting a deviation from the lodestar bears the burden of justifying it. *Chuong Van Pham v. Seattle City Light*, 159 Wash. 2d 527, 541, 151 P.3d 976, 982 (2007). "The lodestar may be adjusted, if appropriate, to reflect either the contingent nature of the representation or the quality of the representation, provided those factors have not already been factored into the lodestar amount." *Perry v. Costco Wholesale, Inc.*, 123 Wash. App. 783, 808, 98 P.3d 1264, 1276 (2004) (emphasis added). When considering whether to apply a contingency-based multiplier to a lodestar fee, a court must have sufficient evidence that the hourly rate does not already take the contingent nature of the representation into consideration. *McGreevy v. Or. Mut. Ins. Co.*, 90 Wash. App. 283, 295, 951 P.2d 798, 804 (1998).

Here, Ewing failed to meet her burden of producing sufficient evidence that the partner hourly rate of \$300 for an attorney with eight years' experience and the associate hourly rate of \$250 for a new bar admittee did not already take the contingent nature of the representation into consideration. (See CP 00905.) The trial court's ruling merely reflects that "these fees are reasonable for this type of case and for the level done." (CP 00818.) The attorney declarations on which the trial court relied did not address whether the hourly rate already compensated Ewing's counsel for contingency risk. (CP 00620-00626, 00627-00629.) Applying the multiplier without sufficient evidence of this threshold question was an abuse of discretion.

6. The award of a 1.5 multiplier eviscerates the intent of CR 68 (Assignment of Error No. 5).

Civil Rule 68 serves important purposes in the administration of justice including the avoidance of litigation and the encouragement of settlement. *Dussault v. Seattle Pub. Sch.*, 69 Wash. App. 728, 731, 850 P.2d 581, 582 (1993). The trial court's attorney fee award to Plaintiff, which exceeded Plaintiff's actual recovery by nearly *five times* and \$200,000, eviscerates the policy underlying Rule 68. Such an egregiously disproportionate fee award disincentives a party from pursuing settlement under Rule 68

when a claim for attorney fees has been asserted against that party. If a trial court is allowed to punish a settling defendant who properly uses Rule 68 with a disproportionate attorney fee award against it, then more and more defendants will eschew settlement in order to take their cases to trial to see if they can prevail on the merits. The courts should not encourage parties to unnecessarily litigate (or over-litigate) cases with small damages at issue, nor should they encourage a situation where plaintiff's counsel can take unreasonable settlement positions and "run up" their fees with no real downside. The trial court's fee award in this case sets just such a precedent. The trial court failed to consider the public policy underlying Rule 68 offers of settlement, and its excessive attorney fee award was an abuse of discretion.

E. CONCLUSION

This case is an example of what the court warned of in *Berryman*. Where fee claims are at issue, there is "a great hazard the lawyers will spend undue amounts of time and unnecessary effort to present their case." *Berryman*, 177 Wn.2d at 661-662. Ewing's unreasonableness in continually adding legally meritless claims, refusing to dismiss those claims or to stipulate to basic factual matters, and refusing to engage in meaningful settlement

discussions, drove her attorney fees into the stratosphere. The amount of litigation and the trial court's fee award may have arguably been warranted had Ewing actually recovered \$1.5 million in damages. She did not. Instead, she grossly over-litigated a case that resulted in a \$50,000 recovery. Awarding nearly a quarter-million dollars in attorney fees, in a \$50,000 case, in which Ewing's recalcitrance was the primary driver of costs, is an abuse of discretion. This case should be remanded to the trial court with instruction that a multiplier is not warranted on these facts, that the fees incurred by Ewing in prosecuting her claims against the Glogowski Defendants must be segregated, and for the recalculation of an attorney fee award that can be harmonized with the trial court's ruling regarding Ewing's recoverable fees.

Respectfully submitted this 23rd day of June, 2016.

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By s/ William G. Fig

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION ONE**

DEBORAH EWING,)	
)	
Respondent,)	No. 74773-8-1
)	
v.)	
)	
GREEN TREE SERVICING LLC,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, KAREN D. MUIR, STATE THAT ON THE 10TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[x] Joshua B. Trumbull JBT & Associates P.S. 106 E. Gilman Avenue Arlington, WA 98223 josh@jbtlegal.com	(x) First Class Mail (x) Email
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SIGNED in Portland, Oregon, this 23rd day of June, 2016.

s/ Karen D. Muir
Karen D. Muir, Legal Assistant