

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
Oct 07, 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 REPLY BRIEF

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INTRODUCTION

Respondent Deborah Ewing's Answering Brief ("Response") shows why Ewing's attorney fees are excessive and must be reduced. Just as Ewing has throughout this case, the Response raises irrelevant issues, argues irrelevant points, and misunderstands the arguments of Appellant Green Tree Servicing, LLC ("Green Tree"). In particular, Green Tree takes issue with Ewing's mischaracterization of the record, especially Ewing's wild allegations that Green Tree falsified testimony, falsified documents, and committed perjury – allegations, it should be noted, that are wholly unsupported and entirely irrelevant to Green Tree's arguments on appeal.

Notwithstanding Ewing's unfounded accusations, the fundamental question before this Court is whether, in a case involving a mere \$50,000 in damages, the Trial Court's authorization of an attorney fee award of nearly a quarter-million dollars to Ewing was excessive and unreasonable. Under this case's circumstances – and particularly, where Ewing time and again raised meritless claims and arguments, thereby driving up the cost of litigation – the answer is "yes." Green Tree does not dispute that Ewing is entitled to reasonable attorney fees. But for the

reasons set forth below and in Green Tree's Opening Brief, the fee award in Ewing's favor is not reasonable. The Court should remand this case to the Trial Court for recalculation of Ewing's attorney fee award.

A. Ewing's Discussion Of The *Bowers* Factors Is Irrelevant.

Ewing wastes considerable time arguing that because the Trial Court applied the lodestar factors expressed in *Bowers*, 100 Wash. 2d 581, 675 P.2d 193 (1983), the Trial Court did not abuse its discretion in awarding nearly \$250,000 in fees to Ewing. But Green Tree does not contend that the Trial Court abused its discretion because it failed to apply the *Bowers* lodestar factors. Rather, the Trial Court abused its discretion by (1) failing to segregate fees arising from Ewing's claims against the Glogowski Defendants from fees arising from her claims against Green Tree; (2) failing to fully consider Ewing's unreasonable claims and litigation posture; (3) miscalculating the lodestar amount based on the trial court's own fee ruling; (4) applying a multiplier where none was warranted; and (5) ignoring the legislative intent behind CR 68.

The mere fact that the Trial Court applied the lodestar analysis does not insulate the fee ruling from appellate review. *Bowers* itself establishes this. See *Bowers* at 601 (reversing the

trial court's attorney fee award in part even though the trial court conducted the lodestar calculation). The Court must independently determine the merit of Green Tree's assignments of error, and the fact that the Trial Court conducted a lodestar analysis is no panacea.

B. A Consumer Protection Act Claim Does Not Justify an Unreasonable Attorney Fee Award.

Ewing next argues that the purpose of the CPA supports the Trial Court's attorney fee award. But relevant case law establishes that CPA's liberal construction does not provide attorneys free rein to over litigate cases to obtain an unreasonable attorney fee award.

In a case involving a “* * * Consumer Protection Act violation, there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744 (1987). *Accord Travis v. Wash. Horse Breeders Ass'n*, 111 Wash. 2d 396, 410, 759 P.2d 418, 425 (1988) (“The crucial question, regardless of the total fees charged . . . is whether the entire fee is subject to a CPA award.”) In other words, the CPA supports an award of reasonable attorney fees. Here, Ewing spent undue amounts of time and unnecessary effort presenting her case, as detailed in the Opening Brief at pp. 4-8 and pp. 15-18. The fee

award in Ewing's favor is unreasonable notwithstanding that it is based on a CPA claim.

C. The Response Fails To Demonstrate That The Trial Court Did Not Abuse Its Discretion In Calculating The Lodestar.

1. The Trial Court abused its discretion by awarding Ewing attorney fees for time spent litigating against the Glogowski Defendants (Assignment of Error No. 1)

Loeffelholz v. C.L.E.A.N., 119 Wash. App. 665 (2004), makes it clear that an attorney fee award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues. Ewing attempts to distinguish *Loeffelholz* on the basis that the trial court in *Loeffelholz* failed to segregate between successful and unsuccessful claims, “not whether the trial court properly segregated between multiple defendants, both of whom were jointly and severally liable for damages.” (Response, p. 23) (emphasis added.)

As an initial matter, Ewing's attempted distinction of *Loeffelholz* rests on a false premise. Ewing cites nothing in the record that establishes, or even suggests, that the Trial Court held Green Tree and the Glogowski Defendants jointly and severally liable for Ewing's damages. It would be convenient for Ewing if this were the case. However, all Defendants were not jointly and

severally liable. Indeed, the judgment giving rise to the fee claim is only against Green Tree Servicing LLC (CP 00816-00825). The Trial Court thus abused its discretion by failing to segregate time spent on the claims against the Glogowski Defendants from time spent on the claims against Green Tree when the legal theories pertaining to each Defendant differed.

Ewing also contends that *Loeffelholz* is distinguishable on the basis that the trial court “did not make a record segregating the time spent between successful and unsuccessful claims, or a record detailing why segregation was not possible.” (Response, p. 23.) Ewing argues that because the Trial Court found that segregation was not possible, unlike the *Loeffelholz* trial court, the Trial Court did not abuse its discretion. The problem with this argument becomes evident when it is rephrased as, “Because the Trial Court found that segregation between the parties was not possible, unlike the *Loeffelholz* trial court, it follows that this Court cannot review that finding for abuse of discretion.”

The Opening Brief, on pp.10-15, clearly sets forth the different claims and different legal theories asserted against the Glogowski Defendants on the one hand and Green Tree on the other. The Trial Court’s finding that “all Defendants were

intertwined, with the liability of one arguably dependent on the liability of another,” is simply not accurate as a matter of law and was an abuse of discretion. Contrary to Ewing’s argument, *Loeffelholz* does not stand for the principle that this Court cannot review the Trial Court’s findings regarding whether segregation was possible.

Green Tree acknowledges that there were a number of fundamental facts underlying the claims in this lawsuit. But even where this is the case, 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 these circumstances, “[r]egardless of the difficulty involved in segregation . . . the trial court has to undertake the task.” *Id.* at 345 (emphasis added). Ewing erroneously attempts to differentiate *Smith*’s clear mandate on the basis that *Smith* “related to time spent litigating a CPA claim from time spent litigating other claims . . . not segregating between multiple defendants.” (Response, p. 24.) This is irrelevant. The Trial Court was required to segregate the time between the Defendants because the legal theories attaching to the fundamental facts differed. *Smith* at 344. For just one example, Ewing argued

that the Glogowski Defendants breached the independent duty of good faith that a trustee owes to the borrower and the beneficiary under RCW 61.24.010(4). (CP 00449, ¶¶48-¶50.) *Smith* requires segregation when the law pertaining to a party's claims differs, irrespective of whether the claims are asserted against one defendant or multiple defendants.

Ewing argues that “the record demonstrates that [Defendants'] conduct was intertwined, dependent, and impossible to segregate.” (Response, p. 24.) Ewing then highlights several examples in alleged support of this position, such as the fact that the Glogowski Defendants relied on Green Tree's records in conducting the foreclosure and that the Glogowski Defendants argued that they had been properly appointed as trustee by Green Tree. But Ewing's examples merely demonstrate that there were fundamental facts that were essential to the claims in this lawsuit. Green Tree has already acknowledged as much. The key issue – and the reason the Trial Court abused its discretion on this point – is that the liability of the Glogowski Defendants and Green Tree was not coextensive. (See Opening Brief at pp. 10-15.) The facts were intertwined, but the legal theories asserted against each Defendant were still separate.

Finally, Ewing erroneously argues that *Klem v. Washington Mutual Bank*, 176 Wn.2d 771 (2013) required Green Tree to face liability for the actions of the Glogowski Defendants. *Klem* requires proof that the lender “so controlled” the trustee that the trustee was the lender’s agent. 176 Wash. 2d at 791 n.12. There was no such finding in this case. Ewing’s *Klem*-based argument is a mere reiteration of her “joint and several liability” argument, which is wholly unsupported by citation to the record. The Trial Court did not rely on *Klem* in making its fee ruling. *Klem* is irrelevant.

2. 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.)

Ewing relies on *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wash. 2d 495, 242 P.3d 846 (2010) for the proposition that “the Washington Supreme Court has already rejected basing an award of attorney fees off parties’ conduct during settlement discussions.” (Response, p. 27.) Ewing overstates *Humphrey*.

First, Green Tree contends that Ewing’s failure to engage in reasonable settlement discussions warrants a downward adjustment to the lodestar. ER 408 does not and cannot bar evidence that Ewing never provided a settlement demand, notwithstanding Green Tree’s request, and Ewing instead multiplied

the cost of the litigation by amending her Amended Complaint by adding three legally defective claims. (CP 01261-01278; CP 00001-00187.)

Second, ER 408, by its very text, “does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” Ewing’s unreasonable position at mediation included demanding an amount of more than \$600,000 to compensate Kevin Ewing, a dismissed non-party, for time that he allegedly spent on the mediation. Ewing first took this position via a “Damages Summary” produced in discovery. (CP 00634.) Ewing cannot shield her unreasonable position on damages behind a mediation-created force field.

Third, ER 408 does not bar evidence of mediation conduct when presented for a purpose other than establishing the validity or invalidity of a claim. Green Tree relies on Ewing’s mediation misconduct to show her lack of good faith in attempting settlement, and Washington case law expressly permits the consideration of settlement communications to determine whether a party was acting in good faith. *Matteson v. Ziebarth*, 40 Wn.2d 286, 294, 242 P.2d 1025 (1952).

Ewing claims that Green Tree cites “no authority” for the proposition that a party’s unreasonableness in attempting settlement has any bearing on the amount of a subsequent attorney fee award. But this is inherent in the lodestar calculation, which requires the trial court to determine the amount of time reasonably expended in the litigation. *Bowers*, 100 Wash. 2d at 597. (Emphasis added.) Were it otherwise, an attorney could overlitigate a CPA with minimal damages and clear liability and reject all settlement offers in order to increase the attorney fee award.

Ewing also argues that it was Green Tree’s litigation conduct, not Ewing’s, that was unreasonable. This argument is utterly meritless, which Ewing’s own examples illustrate. Ewing argues that the order compelling the production of certain documents by Green Tree shows Green Tree’s unreasonableness. (CP 01091-01093.) But the order shows that the Trial Court refused to compel production of the vast majority of the documents that Ewing had been demanding. Ewing also argues that Green Tree’s motion for a trial continuance – which was granted over Ewing’s objection – shows Green Tree’s unreasonableness. Actually, this is a perfect example of how Ewing’s bullheadedness

unnecessarily increased attorney fees in this case. Then, Ewing references Green Tree's two Motions to Strike Jury Demand, which the Trial Court denied. Ewing does not mention that this was the only substantive motion practice on which Ewing prevailed. (See CP 00737-00738 and CP 00774-00798 (detailing 11 separate issues on which Ewing mostly or entirely lost and Trial Court's orders on each issue).) Green Tree did not challenge any Ewing's fees incurred with respect to the Motions to Strike Jury Demand.

Finally, Ewing argues that even if Green Tree's claims are true, "they do not amount to an abuse of discretion when the Trial Court apportioned out work done for unsuccessful claims in calculating the lodestar amount." (Response, pp. 30-31.) But, as set forth in the Opening Brief at pages 18-24 and described in more detail below, the Trial Court did not properly segregate the work done for unsuccessful claims in calculating the lodestar amount, and thus abused its discretion.

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

Green Tree pointed out multiple areas in which the Trial Court's fee award simply could not be harmonized with the Trial Court's fee ruling. Ewing argues that Green Tree's position "lacks

any supporting evidence and ignores the clear language of the Trial Court's order." (Response, p. 33.) Actually, it was the Trial Court which ignored the clear language of the Trial Court's order, which is precisely why the Trial Court abused its discretion.

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.)

For the first category, Ewing does not dispute Green Tree's position that 56.9 hours and \$14,330 should properly have been stricken from Ewing's fee petition.

For the second category, Ewing argues that she was properly reimbursed for some portion of the work she performed in opposing Green Tree's First and Second Motions for Summary Judgment. But this ignores the plain language of the fee ruling, which is that Ewing was not entitled to recover for "work done to oppose defense motions for summary judgment which resulted in dismissal of claims or parties." Both the First Motion for Summary

Judgment and the Second Motion for Summary Judgment resulted in “dismissal of claims or parties.” (CP 00774-00779; CP 00783-00788.) Thus, under the plain language of the fee ruling, Ewing was not entitled to recover fees for work opposing these motions. Approximately 100 hours and \$24,000 was thus not recoverable.

For the third category, Ewing claims that Green Tree “does not explain or provide a citation to the record for its self [-] serving statements that [Ewing’s response to Green Tree’s motion for a trial continuance or Ewing’s own Motion for Summary Judgment against Green Tree] were unsuccessful.” (Response, p. 36.) This position is, to say the least, perplexing. The Trial Court granted Green Tree’s motion for a trial continuance over Ewing’s objection. (CP 00794-00795.) The Trial Court denied Ewing’s Motion for Summary Judgment against Green Tree in full. (CP 00789-00793.) Ewing’s motion practice on these issues epitomizes “unsuccessful.” The Trial Court should have disallowed approximately 72 hours and \$14,000 incurred with respect to these two motions. Ewing’s argument that its Motion for Partial Summary Judgment against the Glogowski Defendants was partially successful is irrelevant. Green Tree only included in the “54.8 hours should be disallowed” figure the time that Ewing spent with respect to the Motion for Summary

Judgment against Green Tree, not the time spent with respect to the Glogowski Defendants.

Ewing argues that a 50% reduction of the fees incurred opposing Green Tree's Motions in Limine, which totaled 13 hours and approximately \$3,400, would be improper. Whether the appropriate reduction for these fees – incurred in a mostly unsuccessful effort by Ewing – is 25%, 50%, 75%, or somewhere in between is frankly not important. The point is that some reduction of this entry is appropriate, according to the Trial Court's own fee ruling. And, when combined with the other entries that should have been disallowed based on the fee ruling, the Trial Court's disallowance of 125 hours is nowhere near adequate.

Ewing contends that Green Tree's position is that the "Trial Court was required to provide what amounts to an hour-by-hour analysis of the time entries submitted" by Ewing. (Response, p. 37.) Not so. Green Tree does not and has never argued that the Trial Court should have combed through each individual entry to ascertain its reasonableness. In this case, Green Tree specifically pointed out the entries at issue and provided the Trial Court with a highlighted, itemized list of the objectionable entries. (CP 00734-00764.)

What a trial court must do as part of the lodestar calculation – and what the Trial Court did not do in the case – is properly reduce the lodestar amount “to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998). The Trial Court properly identified in the fee ruling the four broad categories for which Ewing could not recover fees. But the Trial Court then abused its discretion by awarding fees for entries within each of these categories after ruling that such fees were not recoverable.

4. 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.*

Ewing relies on *Mahler* for the proposition that this Court will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small. *Id.* at 433. However, as *Berryman v. Metcalf*, 177 Wash. App. 644, 660, 312 P.3d 745, 755 (2013) very saliently points out, “This cautionary observation should not, however, become a talisman for justifying an otherwise excessive award.”

Contrary to Ewing's portrayal, Green Tree does not argue that the Trial Court abused its discretion "by refusing to reduce the attorney fees just because they totaled an amount greater than [Ewing's] recovery." (Response, p. 39.) But the amount of fees awarded must be consistent with the relief obtained, and applying a multiplier to the lodestar calculation should be reserved only for "exceptional" cases. *Berryman*, 177 Wash. App. at 677, 312 P.3d 745 (2013). The Trial Court's fee award of \$246,307.50 exceeded Ewing's \$50,000 in damages by nearly five times. This is even greater than the "four times damages" fee award found to be excessive in *Berryman*. *Id.* at 661.

Ewing's remaining arguments on this issue may be dealt with in short order. First, contrary to Ewing's contentions, the total amount of Ewing's damages is the amount that she obtained – namely, \$50,000. Ewing is welcome to believe that she had more than \$1.5 million in damages, but the proportionality analysis is based on the damages that she actually obtained. See *id.* at 661. Second, Ewing cites *Miller v. Kenny*, 180 Wash. App. 772, 325 P.3d 278 (2014), in support of her argument that Green Tree cannot challenge the reasonableness of Ewing's fees because Green Tree's billing records are not in evidence. This portion of

Miller is predicated on a challenge to the reasonableness of opposing counsel's hourly rates, not the reasonableness of total hours expended by opposing counsel. See *id.* at 821. Third, Ewing argues that this Court may not limit the fee award because to do so would eclipse the purposes of the CPA. This argument ignores, *inter alia*, *Styrk v. Cornerstone Investments, Inc.*, 61 Wash. App. 463, 810 P.2d 1366 (1991), in which the court reduced the lodestar fee in a CPA case because the court was particularly concerned that – as here – that the parties extensively litigated issues not directly involved in proving a claim under the CPA. *Id.* at 473.

b. *The Trial Court should not have applied a multiplier because the lodestar award was already excessive.*

Ewing did not and could not distinguish the cases of *Evergreen Int'l v. Am. Cas. Co.*, 52 Wash. App. 548, 761 P.2d 964 (1988), *Styrk, supra*, and *Ethridge v. Hwang*, 105 Wash. App. 447, 452, 20 P.3d 958 (2001), which Green Tree relied upon in the Opening Brief, and which strongly suggest that a multiplier is inappropriate given that the lodestar fee was already significantly in excess of Ewing's damages. (Opening Brief, pp. 25-27.)

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

Ewing improperly attempts to shift the burden to Green Tree to prove that a multiplier for contingency risk was inappropriate. (See Response at 46 (“[Green Tree] simply fail[s] to offer any credible citation to the record that would show [Ewing’s] attorneys charged a rate above their normal hourly rates in order to account for the contingency factor.”) But 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). 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) (emphasis added). Ewing relies heavily on the fact that her attorneys charged their “standard rate” – that is \$300/hour for partner time and \$250/hour for associate time. This is not evidence that the hourly rates of counsel for Ewing does not already take the contingent nature of the representation into consideration. Their “standard rate” could very well take into account the contingent

nature of their work, including this case, and is adjusted upward accordingly. Similarly, Ewing relies on expert testimony that the hourly rates of counsel for Ewing were “reasonable.” The reasonableness of the hourly rates is not the issue. Counsel for Ewing may have reasonable hourly rates that still take into account the contingent nature of the representation.

Ewing contends that *Somsak v. Criton Techs./Heath Tecna*, 113 Wash. App. 84, 98-99, 52 P.3d 43, 51 (2002), rejects the requirement that the party requesting the multiplier put forth evidence that the hourly rate does not already compensate for contingency risk. *Somsak* and *McGreevy* are incompatible. Compare 113 Wash. App. 84 at 98-99 (“The record contains no indication that the hourly rate claimed by Somsak's attorneys already took into account the factors relied upon by the superior court,” including contingency risk, but nevertheless upholding the trial court’s award of a 1.5 multiplier) and 90 Wash. App. at 295 (“The trial court relies heavily on the contingent fee agreement in making its award without sufficient evidence that the \$150 hourly rate did not already take that into consideration” and remanding for further proceedings on that basis.) Green Tree urges the Court to follow *Chuong Van Pham* and *McGreevy* and remand for

consideration of whether Ewing's counsel's hourly rates are already set to account for contingency risk.

CONCLUSION

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. 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 7th day of October, 2016.

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WASHINGTON DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, KAREN D. MUIR, STATE THAT ON THE 7TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **APPELLANT'S REPLY BRIEF** 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 7th day of October, 2016.

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