

COURT OF APPEAL NO. 74773-8
SKAGIT COUNTY SUPERIOR COURT NO. 12-2-00224-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEBORAH EWING,

Respondent,

v.

GREEN TREE SERVICING, LLC,

Appellant.

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STATE OF WASHINGTON
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RESPONDENT DEBORAH EWING'S ANSWERING BRIEF

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I. INTRODUCTION

On December 10, 2015, Judgment was entered against Appellant for violating the law when it wrongfully foreclosed on Mrs. Ewing's home. CP 826-28. On February 12, 2016, the Trial Court awarded Mrs. Ewing reasonable attorney fees and costs under applicable law. CP 816-825. Appellant filed its notice of appeal on February 26, 2016 claiming the trial abused its discretion when entering the order awarding Mrs. Ewing attorney fees and costs. CP 1067-1079.

The Trial Court did not abuse its discretion in awarding the plaintiff, Deborah Ewing ("Mrs. Ewing"), attorney fees and costs in the amount of \$247,104.47. The Trial Court took an active role in assessing the reasonableness of the fees, provided specific findings based on the record, adequately addressed Appellant's objections, and followed lodestar precedent in its calculations. Additionally, the Trial Court's award of a 1.5 multiplier as part of that amount was well within its discretion and reasonably based on the enormous risk Mrs. Ewing's attorneys faced in litigating the case under the Consumer Protection Act ("CPA") and Deeds of Trust Act ("DTA") and the importance of the issues to the community at large.

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II. STATEMENT OF THE CASE

A. Background on Underlying Dispute that Gave Rise to Lawsuit

This case arises out of Appellant Green Tree's mismanagement of Mrs. Ewing's mortgage payments. CP 2393 at ¶ 5. From the time Appellant, and its predecessor in interest, Greenpoint, began servicing Mrs. Ewing's loan in 2000, it would periodically fail to credit Mrs. Ewing's monthly payments and falsely claim Mrs. Ewing was in default. *Id.*; CP 2759 ¶ 10. This was likely because Green Tree had hired a third party vendor to process payments for it. CP 2135. Strangely, Green Tree's CR 30(b)(6) deponent, a Director of Collections, did not know who the vendor responsible for administering Ms. Ewing's payments was, how the vendor operated, or how Appellant obtained the information from the vendor. CP 2135-2140. Thankfully, prior to 2010 Appellant always appeared to rectify these situations upon Mrs. Ewing's husband calling to get the issue sorted out. CP 2393 at ¶ 5.

It was not until December 2010/January 2011, that Appellant's mismanagement of Mrs. Ewing's loan escalated to a point where Mrs. Ewing was unable to resolve it. CP 2394 at ¶ 7; CP 2607-2609. During this time, Appellant began calling and claiming Mrs. Ewing's loan was in default even though Mrs. Ewing had made her payments. *Id.*; CP 2402-2418. This was not the first time the Ewings had been through this with

the Appellant, but this was the first time Appellant refused to fix the situation and give Mrs. Ewing credit for her payments. CP 2393 at ¶ 5; CP 2759 ¶ 10. Mr. Ewing, on behalf of Mrs. Ewing, repeatedly called to resolve the matter throughout this time frame, but Appellant simply ignored him. CP 2393 at ¶ 5; CP 2394 at ¶ 7. Finally, Appellant's mismanagement of Mrs. Ewing's loan led to Appellant's Trustee, Glogowski Law Firm ("Trustee"), sending Mrs. Ewing a Notice of Default in June 2011, despite Mrs. Ewing being current on her payments. *Compare* CP 2420-2425 (Notice of Default states Mrs. Ewing did not make a payment from March 2011 through June 2011) with CP 2402-2418 (Mrs. Ewing's checking statements and copies of checks showing proof of payment for those months).

Mrs. Ewing, and her husband, felt it would no longer be reasonable to send Appellant monthly payments because of Appellant's refusal to credit their payments and Appellant's commitment to selling Mrs. Ewing's home, no matter what she did. CP 2395 at ¶¶ 10-11. Unsure of what to do, Mrs. Ewing and her husband began researching the law on foreclosure and sent both Appellant and its trustee qualified written requests attempting to resolve the mistakes made by Appellant, which included nonjudicially foreclosing on the Ewings even though when they had been current on their monthly payments when they received a Notice of Default. CP 2395-

2396 at ¶¶ 12-15; CP 2427-2437. Ignored by Appellant and its Trustee, the only option Mrs. Ewing had to protect her home and her life's savings was to file a lawsuit. CP 2397 at ¶ 23. It was Mrs. Ewing's hope that filing the lawsuit would stop Appellant and its Trustee from selling her family home. *Id.* at ¶ 24.

B. Mrs. Ewing Files a Lawsuit to Save Her Home From Appellants Mismanagement of Her Loan Payments

On February 3, 2012, Mrs. Ewing and her husband filed a lawsuit in Skagit County Superior Court against Appellant and its Trustee. CP 572-591. However, not even a lawsuit could get the attention of Appellant and its trustee, and on February 10, 2012, Appellant sold Mrs. Ewing's home, through the trustee.¹ CP 2397 at ¶ 25; CP 2568-2569.

Counsel for Mrs. Ewing entered the case on March 13, 2014 in the midst of two Motions for Summary Judgment on behalf of Appellant and its trustee. CP 818; CP 637 at ¶¶ 4-5. The case had been going on for two years and Mrs. Ewing had conducted some discovery *pro se*, but her discovery efforts were essentially ignored by appellant and had resulted in virtually no document production. CP 2003-2040. In addition to amending

¹ The Ewings attempted to enjoin the sale prior to filing the complaint, but were unsuccessful. CP 2397 at ¶¶ 23-24. Despite being aware of Mrs. Ewings' attempts to stop the wrongful taking of her family home, Appellant and its trustee chose to ignore her pleas for help and decided to take Mrs. Ewing's family home, and Mrs. Ewing's life savings, through a "credit bid" at a sale held by its Trustee. CP 2568-2569.

the complaint, and getting the summary judgment motions continued, Counsel for Mrs. Ewing began the significant discovery process against Appellate, and filed a demand for a trial by jury. CP 637 at ¶ 5.

In response to Mrs. Ewing's Counsel appearing and amending the complaint, Appellant's counsel sent a letter threatening CR 11 sanctions against Mrs. Ewing's counsel and his former law firm. CP 640 ¶ 19, CP 676-677. Appellant's counsel demanded Mrs. Ewing drop all claims, except for her claim under the CPA. CP 676. If this demand was not complied with, Appellant would move for sanctions. *Id.* Additionally, Appellant counterclaimed for CR 11 sanctions. CP 550 at ¶ 75. Appellant alleged all Mrs. Ewing's claims, except the CPA claim, "were filed in violation of CR 11 because they are brought in bad faith and with the intent to harass Defendants and to drive up Defendants' litigation costs in order to coerce settlement of plaintiff's claim." *Id.*

Moreover, Appellant claimed in its answer that Mrs. Ewing's filing of a jury demand, ". . . was made in bad faith and in violation of CR 11." *Id.* at ¶ 76. Farcically,² "[d]efendants request[ed] that the court enter an award of sanctions against plaintiffs and in Defendants' favor in the amount of \$25,000 to **deter plaintiffs and future plaintiffs from filing such bogus and unwarranted claims.**" CP 551 at ¶ 77. (emphasis added).

² See *infra* § C. (Appellant filed "fraudulent" documents under the penalty of perjury.)

C. Appellant increased the length and costs of litigation by “litigating aggressively,” filing duplicative motions, and continuing to litigate after being caught filing falsified documents and offering false testimony.

Throughout the litigation, Appellant increased the length and costs of litigation by “litigating aggressively,” filing duplicative motions, and filing falsified documents and offering false testimony. CP 818; *see also generally* CP.

Prior to litigation, when Appellant’s error could have been easily resolved without the destruction of Mrs. Ewing’s life, Appellant had provided Mrs. Ewing a copy of the note with no indorsements or an allonge.³ Its Trustee, also sent Mrs. Ewing a copy of the note with no indorsements or and allonge.⁴ Instead of resolving its error, Appellant claimed these copies of the unindorsed note provided “proof” it was entitled to foreclose on Mrs. Ewing’s home and demanded payment in error. CP 2420-2425; CP 2538-2541.

Once litigation started, Appellant represented that its authority to nonjudicially foreclose arose from an assignment of the Note. *See* CP 2041-2042; CP 1898 at ¶¶ 2, 5; CP 1899-2005. Appellant continued to file a copy of the note with no indorsements or allonge. *Id.*

It was not until Appellant sought to strike Mrs. Ewing’s Jury

³ CP 2483-2489 (copy of note received from GreenTree with no allonge.)

⁴ CP 2497-2503 (copy of note received from Trustee with no allonge.)

Demand in February 2015, years after the lawsuit started, that Appellant first produced a new copy of the note with an assignment stamp and an “attached” allonge. CP 3540-3547.⁵

Appellant contested Mrs. Ewing’s jury demand on the grounds that the note’s indorsements and allonge entitled it to enforce the jury demand waiver provision of the note. CP 2055-2060. The court denied Appellant’s Motion to Strike Mrs. Ewing’s Jury Demand,⁶ but Appellant filed a renewed objection and motion to strike Mrs. Ewing’s jury demand, which the trustee joined. CP 2061-2066; CP 3359-3361. Again, Appellant argued it was entitled to enforce the note’s jury demand waiver provision because it was the “holder” of the note. *Id.* This assertion was once again based upon the new copy of the note that contained indorsements and an allonge. *Id.* For a second time, the court denied Appellant’s motion to strike the jury demand after Mrs. Ewing was forced to respond. CP 3398-3421; CP 3382-3383. Appellant then proceeded to file a motion for reconsideration, re-hashing the same argument for a third time. CP 2111-2119. Ultimately, the court denied the motion for reconsideration. CP 1679.

In anticipation of having to turn over discovery demonstrating the allonge was executed after the sale of Mrs. Ewing’s home, Appellant

⁵ In addition to producing a new copy of the Note, Appellant also filed an Affidavit of Lost Note. CP 3539. This was the first time in the lawsuit that Appellant claimed the note was lost.

⁶ CP 3379-3381

moved to continue trial in order to change its entire litigation strategy. CP 2049-2054. The Court granted Appellant's request for continuance over the objection of Mrs. Ewing. CP 1197-1220, CP 1080-1082.

Later, when evidence was finally pried from Appellant that showed the Allonge was fraudulent, the futility of these motions became even more pronounced. The Allonge was signed by Teresa G. Harris, an employee of Appellant. CP 3547. However, Appellant admitted that Teresa G. Harris was not even employed by Green Tree until February 2013, over a year after Appellant and its Trustee sold Mrs. Ewing's home. CP 2824. In other words, the Allonge Appellant argued gave it the right to nonjudicially foreclose was not created until a year after the nonjudicial foreclosure. *Compare* CP 3547 with CP 2824. CP 3440-3441 at ¶ 10 (testimony of Plaintiff's John Campbell that Appellant engaged in document falsification in order to pursue the nonjudicial foreclosure.)

In response to discovery of the ineffective allonge, Mrs. Ewing was forced to propound additional discovery on the Appellant regarding the ineffective allonge, which included sending requests for admission and the second deposition of Appellant's 30(b)(6) Designee. CP 639 at ¶ 15; 2818 at ¶¶ 7-8, Ex. 5 (CP 2899-2981); Ex. 6 (CP 2982-2990).

Accordingly, for the first two years of the lawsuit, the work it took Mrs. Ewing to respond to Appellant's defenses were based on false

information Appellant provided to Mrs. Ewing and the Trial Court.

Appellant changed their defense for a third time when evidence surfaced that its newly produced Allonge was ineffective. Appellant moved away from its previous positions and began arguing for the first time that Appellant nonjudicially foreclosed as an undisclosed agent of the undisclosed BNYMTC, even though the agreement between Green Tree and BNYMTC specifically stated Green Tree was an “independent contractor” and in no way “agent” for BNYMTC, Appellant and its Trustee had told Mrs. Ewing numerous time that Appellant was the “holder” and “owner” of the GreenPoint-Ewing note, and Appellant was the “beneficiary. CP 2049-2054; CP 2383-2391.

Appellant then sought summary judgment again and argued the power of attorneys gave them authority to appoint GLF to nonjudicially foreclose on Mrs. Ewing’s home. CP 870-890. Contemporaneously, Mrs. Ewing filed her own motions for summary judgment asking the Court to find that Appellant violated the CPA and DTA because It was not a beneficiary or the owner of the note under RCW 61.24.005(2). CP 2069-2100. While the Court’s order on these cross motions barred Mrs. Ewing’s fraud claim, punitive damages, and injunctive relief under RCW 19.86, Mrs. Ewing’s claims under the DTA and CPA survived against Appellant. CP 1108-1113.

The Trustee also filed a motion for summary judgment against Mrs. Ewing asking the Trial Court to dismiss Mrs. Ewing's claim of common law fraud/misrepresentation and punitive damages. CP 3287-3354. The Trustee joined in Appellant's motion for summary judgment. CP 3362-3364; CP 3433-3436. Mrs. Ewing contemporaneously filed a motion for summary judgment against the Trustee asking the Trial Court to find that it violated RCW 61.24.010(2), RCW 61.24.030(7), RCW 61.24.010(4), and RCW 61.24.010(3). CP 1231-1252. The Trial Court ruled that there was a genuine of fact regarding RCW 61.24.010(2), RCW 61.24.010(4), and RCW 61.24.010(3). CP 1094-1097. Additionally, the Trial Court granted Mrs. Ewing summary judgment regarding RCW 61.24.030(7) stating: "GLF violated RCW 61.24.030(7) when it did not have proof that Green Tree was the owner of the Plaintiff's Note before GLF executed and recorded two (2) notice's of trustee's sale and ultimately sold the Plaintiff's home on February 10, 2012." *Id.*

Further, Appellant forced Mrs. Ewing to file a motion for an order to compel discovery from Appellant regarding the number of foreclosures it completed in Washington State, even though public impact must be proved in order for Mrs. Ewing to prevail on her CPA claim. CP 1466-1477. The Trial Court granted the motion to compel. CP 1091-1093, CP 3386-3397. Moreover, Mrs. Ewing was forced to file a motion to compel

against the Trustee in order to get the agreements between the Trustee and the Appellant, which the court granted in part. CP 3386-3397; CP 3384-3385.

With the October 6, 2015 trial approaching, Appellant amended its ER 904 Notices which Mrs. Ewing's counsel had to review and and file appropriate objection. CP 2043-2048; CP 2101-2110.

D. Appellant Files an Offer of Judgment

On September 18, 2015, Appellant filed an Offer of Judgment pursuant to CR 68 in the amount of \$50,000.00 plus attorneys fees to be determined by the Trial Court. CP 891-893. Appellant's offer included reasonable and necessary costs, disbursements, and attorney's fees incurred by Mrs. Ewing through the end of the business day on September 18, 2015, to be determined by the Trial Court pursuant to CR 54(d). *Id.* On December 10, 2015, the Trial Court entered the judgment against Green Tree. CP 826-828. Mrs. Ewing accepted the offer of judgment and the amount of attorney fees was reserved for the discretion of the Trial Court. CP 2067-2068.

E. The Trial Court Properly Awards Attorney Fees Based on Established Precedent

On February 12, 2016, the Trial Court entered the final judgment against Appellant for a total amount of \$247,104.47. CP 816.

This figure was calculated by the Trial Court using the lodestar methodology. CP 820; *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990)).” The lodestar figure is “. . . calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result.” *Id.*

Here, the Trial Court found that Mrs. Ewing’s counsel’s rate was reasonable because “the attorneys who filed declarations in support of Plaintiff’s fees indicate that these fees are reasonable for this type of cause and for the level of work done. The contemporaneous billing records also show these were the rates charged by these attorneys at the time the work was being done.” CP 818.

Second, the Trial Court multiplied this figure by the number of hours Mrs. Ewing’s counsel reasonably expended on litigation. CP 819-820. The Trial Court accomplished this by analyzing the billings and subtracting time spent on duplicative, unsuccessful, or wasteful efforts. *Id.* Ultimately, the court reduced the total amount of associate’s hours by 125 in order to segregate out work done on unsuccessful or partially unsuccessful efforts. CP 820. This resulted in a base lodestar calculation of \$147,035.00. CP 820. The addition of the allowable paralegal billings

increased this number to \$164,205.00. CP 819-820 (The Trial Court subtracted 202 hours of paralegal time for work it found to be clerical in nature.)

After calculating the lodestar amount, the Trial Court awarded Mrs. Ewing a 1.5 multiplier. CP 818. “After the lodestar has been calculated, the court may consider the necessity of adjusting it to reflect factors not considered up to this point[,]” such as (1) the contingent nature of success; and (2) the quality of work performed. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983).

Here, the Trial Court found a 1.5 multiplier was appropriate because of the following:

Certainly in this case Plaintiff’s counsel accepted a significant risk that they would never be compensated for the work they did. At the beginning of the case many of the critical documents had not yet been produced and it was not known what Defendants would rely on as authority for their foreclosure.

In addition, Green Tree had more resources than Ewing and litigated the case aggressively. Based on the declarations from the attorneys who handle similar types of cases, few attorneys are willing to take on what Mr. Newman calls “a war of attrition.”

Given the remedial nature of the statutes and the goal of encouraging representation of clients with claims under such statutes, I conclude the 1.5 multiplier is appropriate in this case.

CP 820. This brought the total to \$246,307.50. *Id.* After the allowable costs were added, \$796.97, the Trial Court awarded a final amount of \$247,104.47. *Id.*

III. COUNTERSTATEMENT OF ISSUES

1. Did the Trial Court exhibit manifest abuse of discretion in establishing a lodestar amount when it took an active role in assessing the reasonableness of the fees, provided specific findings based on the record, adequately addressed Appellant's objections, and followed lodestar precedent in its calculations?
2. Did the Trial Court exhibit manifest abuse of discretion in applying a multiplier of 1.5 to the lodestar fee award when Mrs. Ewing's counsel undertook substantial risk in litigating the case against Appellant Green Tree and when a multiplier is supported by the purpose of the CPA?

IV. ARGUMENT

The Trial Court did not commit a manifest abuse of discretion in awarding Mrs. Ewing attorney fees when: (1) the purpose of the CPA supports the Trial Court's award; (2) the Trial Court correctly used Lodestar precedent to award Mrs. Ewing attorney fees; (3) the Trial Court properly awarded Mrs. Ewing fees based on the work done litigating the intertwined claims against the Trustee when the Trustee nonjudicially foreclosed on behalf of the Appellant and when the Trial Court found their claims were impossible to untangle and involved a common core of facts and legal theories; (4) there was nothing in the record to support Appellant's claims that Mrs. Ewing was unreasonable in settlement,

neither is that a proper basis for overturning an award of attorney fees; (5) Mrs. Ewings' Counsel charged a reasonable hourly fee based on evidence which showed it was their standard rate and comparable to fees charged in similar litigation; (6) the number of hours expended by Mrs. Ewing's attorneys were reasonable and the trial court appropriately accounted for any billing entries it deemed duplicative, unsuccessful, or clerical in nature from the award of attorney fees; (7) The amount Ewing Settled for was not dispositive; and (8) The Court was justified in awarding a 1.5 multiplier to account for the significant risk taken on by Mrs. Ewing's Counsel and when the lodestar figure did not include a contingency fee element.

Finally, Mrs. Ewing is entitled to attorney fees and costs for having to respond to this Appeal.

A. An Award of Attorney Fees is Reviewed For a Manifest Abuse of Discretion.

An award of fees can be overturned only “for a manifest abuse of discretion.” *Bowers*, 100 Wn.2d at 595. This standard requires deference to the trial court because “[t]he trial judge is in a peculiarly appropriate position to evaluate the various factors considered in setting an attorney’s fee to be recovered in a particular case.” *Styrk v. Cornerstone Investments, Inc.*, 61 Wn. App. 463, 474, 810 P.2d 1366 (Div. I 1991).

Accordingly, “[a] trial court abuses its discretion **only when** the

exercise of its discretion is **manifestly unreasonable or based upon untenable grounds** or reasons.” *Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) (citing *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999) (emphasis added); *see also Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (Div. I 2013); *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 257, 538, 151 P.3d 976 (2007); *Styrk.*, 61 Wn. App. at 473.

A manifestly unreasonable use of discretion is a decision, “. . . outside the range of acceptable choices, given the fact and the applicable legal standard[.]” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (Div. II 1995) (citing WASHINGTON STATE BAR ASS’N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (2nd ed. 1993)). Further, the *Littlefield* Court explained a decision, “. . . is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Id*; *see also Brand*, 139 Wn.2d at 665 (citing *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990)) (Appellate courts have only overturned fee awards in limited circumstances, such as “. . . when it disapproved of the basis or method used by the trial court, or

when the record fails to state a basis supporting the award.”)

Here, the Trial Court followed the precedent in *Mahler* when it calculated the lodestar fee “by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result,” and enhancing that lodestar based on the substantial contingency risk. Compare *Mahler*, 135 Wn.2d at 434 with CP 817-820. As discussed at length *infra*, the Trial Court multiplied counsels’ reasonable hourly rate of \$350/\$250 by the number of hours spent on successful claims to come up with the lodestar figure. CP 817-820. Additionally, the final calculation was the result of the Trial Court’s careful and diligent analysis of the record, evidence before it, and sound judgment based on firsthand knowledge as the case’s assigned judge. *See id.*

Further, while Appellant acknowledges the correct standard of review, abuse of discretion, Appellant fails to articulate how the award amounts to a manifestly unreasonable action on behalf of the Trial Court when the Trial Court used the lodestar method and evidence from the record to support its decision. Appellant’s Opening Brief (“OB”) at 9 (citing *Styrk*, 61 Wn. App. at 473).

In *Styrk*, this Court upheld the trial court’s determination of attorney fees when the record showed that the trial court gave consideration to the following factors:

(1)The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship of the client; (12) awards in similar cases. . .

Styrk, 61 Wn. App. at 473 (citing *Bowers*, 100 Wn.2d at 596).

Just as in *Styke*, the Trial Court here did not abuse its discretion because the Trial Court considered the *Bowers* factors in calculating the amount of attorney fees.

Factor No. 1 (time, labor, and resource): The Trial Court’s holding specifically included its reasoning regarding the time, labor, and resources required. CP 818 (“Plaintiff was outnumbered and outgunned when she finally found an attorney to represent her, facing two summary judgment motions and a daunting uphill struggle through mountains of discovery. . . In addition, Green Tree had more resources than Ewing and litigated the case aggressively.”)

Factor No. 2 (novelty): The Trial Court addressed the novelty and difficulty of the questions. CP 818 (The Trial Court agreed that this was a complex case, even for a wrongful foreclosure case.)

Factor No.s 3, 5, 9 & 11 (skill): The Trial Court addressed the skill

of the legal services and what is customary in this type of case. CP 818 (“However, the attorneys who filed declarations in support of Plaintiff’s fees indicate that these fees are reasonable for this type of case and for the level of work done.”)

Factor No. 6 (contingent nature): The Trial Court discussed the contingent nature of the case. CP 817-18 (“Certainly in this case Plaintiff’s counsel accepted a significant risk that they would never be compensated for the work they did.”)

Factor No.10 (undesirability): The Trial court made findings regarding the undesirability of the case. CP 818 (“likelihood of success at the beginning of the case was doubtful.” and “Based on the declarations from the attorneys who handle similar types of cases, few attorneys are willing to take on what Mr. Newman calls “a war of attrition.”)

Additionally, while not specifically addressed by the Trial Court, Mrs. Ewing put forth evidence of attorney fee awards in similar CPA cases. CP 621, 625-26 (Declaration of Attorney Ben Wells with order in CPA case where he was awarded \$317,000 in attorney fees with a multiplier when the CPA damages were \$18,400.)

Here, there is no basis for upsetting the sound discretion of the Trial Court when it made clear findings supported by the record detailing the reasonableness of the fees awarded. *See* CP 817-820. Further,

Appellant simply has not met its high burden of showing the Trial Court acted manifestly unreasonable when awarding Mrs. Ewing fees.

B. The Purpose of the CPA Supports the Trial Court’s Award.

The Trial Court’s award to Mrs. Ewing is consistent with the purpose of the CPA, which is to protect consumers and the community through liberal construction of its provisions, including the provision providing an award of attorney fees to a prevailing plaintiff. RCW 19.86.920; RCW 19.86.090, *see also Bowers*, 100 Wn.2d at 595 (citing *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314-15, 553 P.2d 423 (1976) (“We note, however, that the purpose of the fee award is to encourage active enforcement of the Consumer Protection Act and that an award of fees will be overturned only for a manifest abuse of discretion.”))

It is well settled law that, “[i]n determining the amount of an award, the court must consider the purpose of the statute allowing for attorney fees.” *Berryman*, 177 Wn. App. at 668 (citing *Fetzer*, 122 Wn.2d at 149; *Brand*, 139 Wn.2d at 667.) Equally important is the established principle that, “[a] statute’s mandate for liberal construction includes a liberal construction of the statute’s provision for an award of reasonable attorney fees.” *Id.* at 758-59 (citing *Progressive Animal Welfare Soc’y*, 114 Wn.2d at 683; *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn.

App. 697, 713, 9 P.3d 898, 907 (Div. I 2000); **Brand**, 139 Wn.2d at 668.)

Accordingly, the CPA's mandate for liberal construction applies to its provisions for attorney fees. *Id*; **Panag v. Farmers Ins. Co. of Washington**, 166 Wn.2d 27, 37, 204 P.3d 885 (2009)(citing RCW 19.86.920; **Short v. Dempolis**, 103 Wn.2d 52, 61, 691 P.2d 163 (1986) (“The CPA is to be “liberally construed that its beneficial purposes may be served.”)

Here, the Trial Court appropriately considered the purpose behind the CPA, which is to protect consumers and the community, when it specifically held: “Given the remedial nature of the statutes and the goal of encouraging representation of clients with claims under such statutes, I conclude the 1.5 multiplier is appropriate in this case.” CP 818.

Further, Appellants do not dispute the statutory basis for the court's authority to award attorney fees is the CPA based on their CR 65 judgment, which conceded liability on the CPA and DTA claims against it. CP 891-893; 894.

C. The Trial Court Correctly Used Lodestar Precedent to Award Mrs. Ewing Attorney Fees

Appellant contests the Trial Court's award of attorney fees to Mrs. Ewing in the amount of \$164,205 because it claims it should have been

reduced for: (1) fees incurred against prosecuting its trustee; (2)“Ewing’s unreasonable litigation posture[;]” (3) unsuccessful endeavors; and (4) its disproportionateness in comparison to the CR 65 judgment amount.

Appellant's contentions are wrong and will be analyzed in the following four (4) sections.

1. The Trial Court did not abuse its discretion in awarding Mrs. Ewing attorney fees for work done litigating the intertwined claims against the Trustee when the Trustee nonjudicially foreclosed on behalf of the Appellant and when the Trial Court found their claims were impossible to untangle and involved a common core of facts and legal theories.

Appellants argued below, and on appeal, that the Trial Court should have excluded time spent litigating against its trustee. OB at 9-15.

However, the Trial Court rejected this argument because:

the claims against all Defendants involved a common core of facts and legal theories. And all Defendants were intertwined, with the liability of one arguably dependant 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 819.

For support, Appellants cite to the Div. II case, *Loeffelholz*. OB at 9 (citing *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 690, 82 P.3d 1199, 1212 (Div. II 2004)). However, the issue in *Loeffelholz* was whether the trial court properly segregated 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. *See id.* On its face, *Loeffelholz* simply does not stand for the proposition Appellants suggest.

Additionally, Div. II acknowledged that as far as segregating between successful and unsuccessful claims, “[a]n exception exists, however, if “no reasonable segregation . . . can be made.”” *Loeffelholz*, 119 Wn. App. at 690. The court stated: “[w]here, however, the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made made, there need be no segregation of attorney fees.” *Id.* at 691 (citing *Pannell v. Food Servs. Of Am.*, 61 Wn. App. 418, 447, 810 P.2d 952 (Div. I 1991)).

In direct opposition to this case, the trial court in *Loeffelholz* did not attempt to segregate the time spent on unsuccessful claims and that is why Div. II overturned the fee award. *Id.* at 691-692. Specifically, Div. II held that the trial court abused its discretion when it did not make a record segregating the time between successful and unsuccessful claims, or a record detailing why segregation was not possible. *Id.* Here, the Trial Court segregated the unsuccessful claims. CP 816-825. Further, the Trial Court specifically found segregation between the parties was not possible. *Id.*

Similarly, the Appellant’s reliance on *Smith* for the proposition

that the Trial Court was bound to separate out the claims against its Trustee is also misplaced. OB at 10 (citing *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344, 54 P.3d 665, 685 (Div. II 2002)). The issue in *Smith* related to segregating time spent litigating a CPA claim, from time spent litigating other claims, i.e. warranty and mutual mistake, not segregating between multiple defendants, who jointly arranged and carried out a nonjudicially foreclose. *Smith*, 113 Wn. App. at 344. Further, in *Smith*, the court awarded attorney fees based solely on the CPA. *Id.*

In this case, Appellant attempts to differentiate the claims directed toward it and its Trustee, but the record demonstrates that the conduct was intertwined, dependent, and impossible to segregate. For example, the Trustee moved for summary judgment on the grounds that Appellant was the real party in interest and “[a]t all times relevant to Plaintiff’s Complaint, Green Tree Servicing LLC was the holder and owner of the Note.” CP 3366 at 8-11; CP 3368 at 4:16-7:3. The Trustee also based its request for summary judgment on Appellant’s assertion that “[a]t the time of foreclosure, Plaintiff was delinquent on her obligations to Defendant Green Tree Servicing LLC.” CP 3366 at 23-25. Further, the Trustee argued it should be dismissed from the lawsuit because it was validly appointed by Appellant, it acted with due diligence in determining the Appellant was the beneficiary, and it complied with its duty of good faith.

CP 3279-3283

These defenses are proof of the interdependent nature of the litigation. The Trustee premised its defenses on Appellant's legal theories and asserted facts regarding the Appellant, or put forth by the Appellant, to support its claims. *See* CP 3365-3378; CP 3275-3286. Further, the Trustee's argument that it was validly appointed or that Appellant was the beneficiary⁷ were based on activities undertaken by both it and the Appellant. CP 595-598. The evidence in the record included emails between Appellant and the Trustee where they were coordinating together to execute and record both the Assignment of the Deed of Trust⁸ and the Assignment of the Successor Trustee. CP 596-598.

The Trustee also used Appellant's records as evidence, including charts "indicating which entity to name when foreclosing on various servicing pools." CP 2610 at ¶ 3. The Trustee also used Appellant's records to respond to Mrs. Ewing's correspondence and requests before it sold her house. CP 2613 at ¶¶ 16-17; CP 2665-2748.

⁷To nonjudicially foreclose, the foreclosing entity must be a beneficiary under RCW 61.24.005(2). *Bain v. Metro. Morg. Grp., Inc.*, 175 Wn.2d 83, 110, 285 P.3d 34 (2012). "Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2).

⁸Under RCW 61.24.010(4), only a valid beneficiary may appoint a trustee or successor trustee. *Rucker v. Novastar Mortg, Inc.*, 177 Wn. App. 1, 38, 311 P.3d. 31 (Div. I 2013). Further, "Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee."

Further evidence of the interdependent nature of the litigation is Appellant and Trustee's practice of joining in each other's briefing. *See generally* CP 3355-3356; CP 3357-3358; CP 3359-3361; CP 3362-3364; CP 2041-2042. Examples include the Appellant filing a joinder in the Trustee's Motion for Summary Judgment. CP 3355-3356. The Trustee filing a joinder in Appellant's motion for summary judgment. CP 3362-3364. The Trustee also joined in Appellant's briefing to strike Mrs. Ewing's jury demand. CP 2061-2066.

Finally, Appellant faced liability for the actions of its trustee under the CPA. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 789-90, 295 P.3d 1179 (2013); *see also* CP 1112 (DTA and CPA claims against Appellant survive its Motion for Summary Judgment). Accordingly, as noted by the Trial Court, it was not possible to separate out the attorney fees between Mrs. Ewing's CPA claim against the trustee and that of the Appellant, who nonjudicially foreclose as the purported beneficiary, when it faced liability by the action of its trustee. CP 819.

An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, and **subjecting itself and the beneficiary to a CPA claim.**")

Klem, 176 Wn.2d at 790 (emphasis added). Because Appellant was likely

liable for any violation of its Trustee's duty of good faith under RCW 61.24.010(4), the work done in litigating those claims against the Trustee was not segregable from Appellant. *Id.* Accordingly, the Trial Court did not manifestly abuse its discretion when it found the claims against Appellant and the Trustee were intertwined and impossible to segregate.

2. There is no evidence in the record to support Appellant's claims that Mrs. Ewing was unreasonable in settlement, neither is that a proper basis for overturning an award of attorney fees.

Appellant claims the Trial Court should have reduced the lodestar calculation because "Ewing's unreasonable litigation posture and unwillingness to engage in reasonable settlement discussions." OB at 15. However, Appellant cites no evidence to support this assertion and crucially fails to cite authority for the proposition that a prevailing party's previous positions in unsuccessful settlement discussions as an appropriate factor for the Trial Court to consider in calculating a lodestar.

This is possibly because the Washington Supreme Court has already rejected basing an award of attorney fees off parties' conduct during settlement discussions. *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 170 Wn.2d 495, 508, 242 P.3d 846 (2010). In *Humphrey*, the court reversed a trial court's award of attorney fees that was based in part on one of the parties rejection of a pretrial settlement

and a CR 68 offer. *Id.* The court reasoned, “[e]vidence of conduct in settlement negotiations, however, is inadmissible to prove liability for or invalidity of the claim or its amount. The trial court should not have relied on Humphrey’s prelitigation conduct or conduct in other suits against Clay Street and the Rogels in awarding fees against Humphrey.” *Id.* (emphasis added).

As correctly noted by the court in *Humphrey*, under ER 408: “conduct or statements made in compromise negotiations” are not admissible to prove the amount of a claim. Because the amount of attorney fees compromise the amount of the claim, the *Humphrey’s* court properly overturned the trial court’s use of 408 settlement communications. *Id.* Under *Humphreys*, the Trial Court here acted properly in not reducing the attorney fee award based on inadmissible ER 408 discussions.

Now on appeal, Appellants again cite to these protected statements without providing any authority on how doing so is proper. OB at 16-18. Further, Appellant’s cite to its counsel’s declaration submitted in response to Mrs. Ewing’s Motion for Attorney fees, which states: “In my professional opinion, plaintiff refused to engage in reasonable settlement discussions, . . .” OB at 6, 16-18 (citing CP 736). However, the Washington Rules of Professional Conduct prohibit a lawyer from acting as a witness in the same case in which he is an advocate, or attempting to

give an expert opinion. RPC 3.7(a). While attorneys may testify regarding procedural and process facts, ethical problems arise when attorneys testify regarding issues that go to the merits of the dispute. McMorrow, J.A. **The Advocate as Witness: Understanding Culture, Context and Client**, 70 Fordham L. Rev. 945, 946 (2001). Because this statement was improperly made under RPC 3.7(a), the Trial Court did not abuse its discretion when it chose not to reduce Mrs. Ewing's attorney fees on the basis of Appellant's Counsel's opinion regarding Mrs. Ewing's position during settlement discussions governed by ER 408.

The only other citation to the record that Appellants use as a basis for this argument, is its counsel's irrelevant statement that Plaintiff did not provide it with a settlement demand. OB at 6, 17 (citing CP 736 at ¶ 13). Here, Mrs. Ewing objected to Appellant's use of these ER 408 protected communications when made in the court below. CP 1129. As discussed *supra*, the Trial Court acted properly by refusing to adjust the lodestar figure based on the parties' conduct during settlement communications. CP 816-825.

Further, Appellant offers no citation that shows Mrs. Ewing acted unreasonably in settlement beyond its attorney's "professional opinion." CP 736. If anything, the negotiations show Mrs. Ewing felt she was

greatly damaged by the pain, suffering, and stress caused by Appellant and believed she would be able to be compensated for those damages by a jury of her peers. CP 2394-2399.

Lastly, as clearly stated in the Trial Court's decision, the complexity, length, and expense of litigation was a result of Appellant's litigation tactics, not that of Mrs. Ewing. CP 816-820. For example, Appellant acted unreasonably in response to discovery, as demonstrated by the order compelling their production of documents. CP 1091-1093. Appellant also filed the same motion to strike the jury two times based on an allonge to the note manufactured during litigation. CP 2055-2060; CP 2061-2066. When it became clear that the Appellant manufactured the allonge in order to steal Ms. Ewing's home after the nonjudicial foreclosure had been completed, Appellant moved for and was granted a trial continuance. CP 2049-2054; CP 1197-1220; CP 1080-1082. This was done over the objection of Mrs. Ewing and allowed Appellant the opportunity to completely change its defense for a second time. *Id.* Accordingly, Appellant's claims that Mrs. Ewing is to blame for extended litigation simply do not reflect what occurred in the Trial Court. *See Supra.* Most importantly, even if Appellant's claims were taken as 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.

3. The Trial Court did not abuse its discretion in finding Mrs. Ewings' Counsel charged a reasonable hourly fee when the evidence showed it was their standard rate and comparable to fees charged in similar litigation

Appellant argued to the Trial Court that Mrs. Ewing's Attorney fees were unreasonable, but the evidence showed Mrs. Ewing's counsel charged their standard rate of \$300/\$250 per hour through contemporaneous billing and was a rate comparable to other attorneys in similar litigation. CP 817-818; *Blair v. Washington State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987) (A court must set the lodestar based on the prevailing market rate or attorneys of similar experience in the same area of practice in the relevant community, and should not limit the hourly rate based on the prevailing party's particular fee arrangement.); *Fahn v. Cowlitz County*, 95 Wn.2d 679, 628 P.2d 813 (1981); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86, rev. denied, 130 Wn.2d 1010 (Div. II 1996).

Importantly, Appellant included no information on what its attorney fees were in this matter, what its attorneys charged on an hourly basis, or admissible evidence related to the hourly rate charged by Mrs. Ewing's Counsel. *See generally* CP 894-906, 734-805, 630-635 (Opposition and Supporting Declarations do not include information on its

attorney's fees.) In *Miller v. Kenny*, 180 Wn. App. 772, 821, 325 P.3d 278 (Div. I 2014), the court highlights the relevance of the defendant's failure to offer its own attorney fees to prove plaintiff's fees are unreasonable. The *Miller* court found that the trial court did not abuse its discretion in finding the prevailing party's rate reasonable when the challenging party failed to provide information on its fees and costs. *Id.*

Now, on appeal, Appellants do not argue the \$300/\$250 per hour rate was unreasonable. Instead, Appellants argue that the multiplier should be overturned because the Court did not specifically detail that the contingent nature of the case was not reflected in the Ewings' hourly rate. While discussed at length *infra*, this rationale makes little sense when it was clear the contingent nature was not factored into the hourly rate, because counsel for Ewing only charged their standard set rate through contemporaneous billing. CP 642 (Mrs. Ewing's counsel charged their standard hourly rate of \$300/hour for partners; \$250/hour for associates, and \$85.00/hour for paralegals.)

Further, the record shows that the attorneys, with a combined 104 years of experience, who practice in this area reviewed the billings and found the hourly rate reasonable. CP 628 (Mr. David Leen stated: "These hourly rates are reasonable because of the complexity and evolving nature of this case and the area of law involving mortgage servicers and wrongful

foreclosure.”); CP 808 at ¶ 7 (Attorney and Professor Shawn Newman stated: “These hourly rates are reasonable because of the complexity of law and deceptive practices by financial institutions, including discovery abuse.”); CP 620-24 (Attorney Ben Wells testified these rates were extremely reasonable and in some categories he charges more.)

Here, the Superior Court findings showed it, “actively and independently confronted the question of what was a reasonable fee” and explained the analysis and award. *Berryman*, 177 Wn. App. at 658. See CP 816-820.

4. The number of hours expended by Mrs. Ewing’s attorneys were reasonable and the Trial Court appropriately accounted for any billing entries it deemed duplicative, unsuccessful, or clerical in nature from the award of attorney fees.

Here, the Trial Court discounted duplicative work, clerical work, and work done for unsuccessful claims. CP 817-820. While Appellant acknowledges that the Trial Court discounted specific work it found was unsuccessful, Appellant claims those items were not accurately discounted in the court’s lodestar total. OB at 18. However, Appellant’s argument lacks any supporting evidence and ignores the clear language of the Trial Court’s order. In the Order, the Trial Court made clear it was not discounting the entire identified classifications, but only portions where the efforts were unsuccessful, which included part and/or full reductions

where it was appropriate. *Compare* OB at 18 *with* CP 819 (“However, just because an effort was only partly successful does not mean the entire billing should be stricken.”)

Essentially, Appellants argue the court’s analysis in apportioning partly successful efforts was too specific and the amount of work for each billing should be entirely stricken. OB at 18-24. However, Appellant fails to provide legal authority for the proposition that a trial court abuses its discretion when it partially segregates a billing for work done when the efforts of that billing were partly successful. *See generally* OB.

Conflictingly, the remainder of Appellant's argument highlights the importance of a trial court segregating to the extent it can reasonably do so. *See* OB at 9-10.

Here, the Trial Court found that a total reduction of 125 hours of associate attorney time appropriately accounted for unsuccessful claims and partially unsuccessful claims. CP 820. Appellants argue that total reduction should have been 249.60 hours. *Id.*

For support, Appellant offered a line item breakdown of its opinion on what it feels amounted to unsuccessful work, while ignoring the substance of the underlying billing records. OB at 18-23. For example, Appellant’s chart includes a complete reduction for the time it took Mrs. Ewing’s counsel to respond to its First Motion for Summary Judgment.

OB at 20. However, Appellant's moved for summary judgment on all claims against it, and the Court denied Appellant summary judgment regarding Mrs. Ewing's claims under the CPA and DTA. CP 829; CP 1098-1104. Mrs. Ewing's CPA and DTA claims were complicated in law as well as fact,⁹ and the Trial Court ultimately found those claims should proceed to trial. CP 1098-1104, 1108-1113. Because Mrs. Ewing was successful on her CPA and DTA claims, the court acted reasonably and did not manifestly abuse its discretion in partially reimbursing Mrs. Ewing for her attorney fees incurred in relation to Appellant's First Motion for Summary Judgment.

Similarly, Appellant's chart includes a reduction for the total amount of hours Mrs. Ewing's counsel spent in responding to Appellant's Second Motion for Summary Judgment. OB at 20. Again, Appellant requested Summary Judgment on all claims, including Mrs. Ewing's claims regarding the CPA and DTA. CP 870-890. However, the Court did not grant Appellant summary judgment on its claims under the CPA and DTA. CP 1108-1113. Accordingly, Mrs. Ewing's counsel's work in defending these claims at summary judgment was successful and the Trial Court acted reasonably in only partly reducing this billing. *See Id.*

⁹ CP 818 (Trial Court agreed it was complicated); CP 627-629 (Decl. of Leen); CP 806-809 (Decl. of Newman)

Appellant's time breakdown also includes billing entries it argues were unsuccessful not specifically addressed by the Trial Court, such as Mrs. Ewing's response to its motion to continue trial or her own summary judgment. OB at 21. However, Appellant does not explain or provide a citation to the record for its self serving statements that they were unsuccessful. *See id.* Mrs. Ewing was granted summary judgment on her claim that Appellant's nonjudicially trustee violated RCW 61.24.030(7) when it did not have proof that Appellant was the owner of the Note. CP 1094-1097. Because, Appellant was liable for the action of its trustee under *Klem*, as briefed *supra*, the work done in summary judgment was, at a minimum, partly successful. *Klem*, 176 Wn.2d 771.

Appellant also argues that it would have been proper for the court to award half of the billing for the time it took Mrs. Ewing's counsel to respond to its Motions in Limine. OB at 21. Again, Appellant cites no legal authority or evidence in the record that would support the Trial Court's use of an arbitrary percentage reduction of 50% in regards to a partially successful effort. The record is clear that the Trial Court reviewed all the billings, Appellant's chart and argument, and discounted certain time spent on unsuccessful claims, in compliance with controlling precedent. *Compare* CP 819 ("Wasteful or duplicative hours and hours pertaining to unsuccessful theories or claims should be excluded.") *with*

McGeevy v. Or. Mut. Ins. Co., 90 Wn. App. 283, 291, 951 P.2d 798 (Div. III 1998) (quoting *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (Div. I 1995)), overruled on other grounds by *Panorama Vill. Condo. Owners Ass’n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001)) (“The awarding court should take into account the hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.”)

Appellants incorrectly argue the Trial Court was required to provide what amounts to an hour-by-hour analysis of the time entries submitted by Mrs. Ewing’s attorneys. Once again, clear precedent states, “[f]indings needed for meaningful review do not ordinarily require such details as an explicit hour-by-hour analysis of each lawyer’s time sheets.” *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 143, 144 P.3d 1185 (Div. I 2006); *see also TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 214 n. 12, 165 P.3d 1271 (Div. I 2007). In this case, there were approximately 1341 line item records submitted as evidence submitted in support of Mrs. Ewing’s Motion for Attorney fees. CP 646-671. Appellant’s argument that a Trial Court is required to address each line item objection to a fee request the Trial Court’s order will impose unnecessary burdens on the Superior

Courts, encourage non-prevailing parties to file pro forma objections to fee requests, and as discussed in *Taliesen*, is not needed for “meaningful review.” *Taliesen*, 135 Wn. App. at 143.

Here, the Trial Court not only appropriately accounted for unsuccessful efforts, but made a sufficient, clear, and detailed record of its findings to support its fee award. CP 819. Specifically, the court stated:

However, just because an effort was only partly successful does not mean the entire billing entry should be stricken

In reviewing the work done, there are several areas where a reduction of hours is appropriate. Work done to amend the complaint to add claims which were eventually dismissed should not be included. Work done to oppose defense motions for summary judgment which resulted in dismissal of claims or parties should be included. Work on motions in limine and the motion for judicial notice was mostly unsuccessful and only some of that work should be compensated. And there are a few entries which cannot be attributed because they are vague or blank. In all, I have found approximately 125 hours billed at the associate’s rate that should be stricken from the attorney’s fees.

CP 819-820. Accordingly, the Trial Court did not abuse its discretion when it is clear it made specific findings addressing the lodestar criteria, which were supported by the record.

D. The amount Ewing Settled for is not dispositive

“The amount of recovery may be a relevant consideration in determining the reasonableness of a fee award, but is not conclusive.”

Brand, 139 Wn.2d at 666 (citing *Mahler*, 135 Wn.2d at 433; *Travis v.*

Washington Horse Breeders Ass'n Inc., 111 Wn.2d 396, 409-10, 759 P.2d 418 (1998)). “We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Id.* citing *Mahler*, 135 Wn.2d at 433.

Here, the Trial Court did not abuse its discretion by refusing to reduce the attorney fees just because they totaled an amount greater than Mrs. Ewing’s recovery. Importantly, the amount that Ewing essentially settled for, \$50,000 with Appellant, through the offer of judgment, was not the total amount of Mrs. Ewing’s damages. CP 634 (A breakdown of Mrs. Ewing’s damages was put in the record by Appellant, demonstrating that even the lost equity in the home far exceeded the \$50,000 she settled for in order to move on with her life.)

Conveniently, Appellant never provided a record of what its total amount of attorney fees in this litigation was. *See generally* CP 894-906, 734-805, 630-635. Likely because Mrs. Ewing’s counsel’s fees were very reasonable when compared to Appellant’s fees. Further, the Trial Court specifically spoke to the amount of work that Appellant’s litigation tactics caused Mrs. Ewing’s attorneys. CP 820 (“In addition, Green Tree had more resourced than Ewing and litigated the case aggressively.”) Mrs. Ewing submitted evidence from other attorneys who practice in this area, who all believe the amount of hours expended on this case were

reasonable in light of the complexity and deceptive practices of financial institutions, such as Appellant engaging in discovery abuses. CP 806-809 at ¶¶ 8-9; CP 627-629 at ¶ 6.

Additionally, a court may not limit a fee award that eclipses the plaintiff's recovery if to do so would undermine the purpose of the statute authorizing fees. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 807-09, 98 P.3d 1264 (Div. I 2004) (reversing trial court ruling that contingency multiplier would "result in an attorney fee's award that would be disproportionate to Plaintiff's damage award" under the Law Against Discrimination.)

Crucially, other statutes limit the amount of attorney fees, where the CPA does not. "For example, RCW 51.52.120(1) limits attorney fees awarded for a worker who prevails before the Department to "thirty percent of the increase in the award secured by the attorney's services." *Brand*, 139 Wn.2d at 669-670. However, when the statute awards attorney fees, without limitation, like with the CPA here, the amount is left to the discretion of the Trial Court.

Where the Legislature has expressly limited fees available at one phase of the proceeding, it is unlikely that the Legislature intended to limit fees awards at the other phases without expressly enumerating those limitations. This is keeping with "the judicial doctrine *expressio unius est exclusio alterius*: the expression of one is the exclusion of the other."

Brand, 139 Wn.2d at 670 (citing *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999)). *Brand* ruled that because the statute did not limit the recovery of attorney fees, it was inappropriate to limit the fees based on the plaintiff's recovery. *Id.* The court in *Brand* further held, "[a]warding full attorney fees to workers who succeed on appeal before the Superior or Appellate Court will ensure adequate representation to injured workers." *Id.*

Importantly, Appellant entered an Offer of Judgment when it faced liability on Mrs. Ewing's CPA and DTA¹⁰ claims. The CPA does not limit attorney fees, therefore the legislature intended that plaintiffs like Mrs. Ewing be awarded their entire attorney fees in order to ensure adequate representation to injured consumers. Additionally, this furthers the policy of the CPA by protecting the community from harm as well.

E. The Court did not abuse its discretion in applying a multiplier

Adjusting a lodestar for risk "is necessarily an imprecise calculation and must be largely a matter of the trial court's discretion." *Chuong Van Pham*, 159 Wn.2d at 542 (quoting *Bowers*, 100 Wn.2d at 598-599). "In adjusting the lodestar to account for the risk factor, the trial court must assess the likelihood of success at the outset of litigation."

¹⁰ Mrs. Ewing's claims related to the DTA were also CPA violations. *See e.g.* 2069-2100.

Bowers, 100 Wn.2d at 598. “The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk.” *Chuong Van Pham*, 159 Wn.2d at 541.

Even if this Court disagrees with various aspects of the Trial Court's decision, that is not enough to find an abuse of discretion. *Bowers*, 100 Wn.2d at 601. In *Bowers*, the Supreme Court disagreed with the trial court when the trial court adjusted the lodestar based on a percentage of contingent fee work and not the chances of success in litigation. However, the court said, “despite our disagreement with the trial court in this respect, we conclude that a 50 percent premium to reflect the contingent nature of success in this case does not appear to be an abuse of discretion.” *Bowers*, 100 Wn.2d at 601.

Here, the Trial Court stated: “[c]ertainly in this case Plaintiff’s counsel accepted a significant risk that they would never be compensated for the work they did.” CP 818. Additionally, the other attorneys who submitted declarations, also emphasized the risk Mrs. Ewing’s counsel faced when taking on this case. CP 620-624, 628, 807. Attorney Ben Wells testified that 1.5 multiplier is appropriate based on risk and purpose of litigation under the CPA, “Rarely do I see lawyers that are willing to

accept such significant risk. . . Many lawyers would simply not have taken the plaintiff's case and the Plaintiffs would have suffered the typical legal demise that most do against American financial institutions." CP 620-624. Additionally, attorney David Leen, a well respected Washington attorney who has been practicing law for more than forty (40) years, testified:

[b]ecause of the high-risk contingent nature of the case, and because this case furthered the purposes of the CPA by protecting the public from deceptive and unfair business practices in the extremely important area of property ownership and housing, a "multiplier" of 1.5 times the base lodestar fee is reasonable and appropriate.

CP 628 at ¶ 7. Finally, Attorney Shawn Newman testified:

In my opinion, the Ewing case is exactly the type of case where a multiplier should be applied; a multiplier of 1.5 should be applied to the "lodestar" in this case. [Mrs. Ewing's attorneys] took this case on contingency. At the time [her attorneys] took the case, the likelihood of success was low because the purported lender had the upper hand and the arguments were not well received or understood by courts.

CP 807-08 at ¶ 10 (brackets added).

1. The lodestar figure did not include a contingency fee element

The Trial Court did not manifestly abuse its discretion simply because it did not include a specific written finding that the standard rate charged by Mrs. Ewing's counsel did not include a contingency fee element.

Crucially, in *Somsak*, Div. I refused to overturn a multiplier when

the trial court did not include such a statement in its order. *See Somsak v. Criterion Technologies/Heath Tecna, Inc.* 113 Wn. App. 84, 98-99, 52 P.3d 43 (Div. I 2002). In *Somsak*, the court rejected Appellant's very argument when it stated:

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. On this record, we cannot state that no reasonable person would take the view adopted by the superior court. We therefore conclude that the superior court did not abuse its discretion by applying a 1.5 multiplier to the lodestar fee."

Somsak, 113 Wn. App. at 98-99.

Here, just like in *Somsak*, "the record contains no indication that the hourly rate" factored in a contingency element, nor did Appellant argue below that Mrs. Ewing's attorney's hourly rate was already higher than the standard rates charged. VP at 21:4-8; CP 904-905. Instead, the record contains evidence the hourly rate was a standard rate that did not factor in a contingency element. CP 642. The record shows Mrs. Ewing's counsel charged their standard rate, which was \$300/hour for partner time and \$250/hour for associate time. *Id.* Additionally, attorneys from the same locality testified that these rates were extremely reasonable and for some of the categories, such as paralegal time, he charged more. CP 623-24 at ¶ 6.

Importantly, Appellant did not argue to the Trial Court that Mrs.

Ewing's Counsel's hourly rate included a contingency element. Instead, Appellant argued that the hourly rates were too high for the "locality" and that the hourly rate charged by Mrs. Ewing's counsel were "Seattle rates, not Mt. Vernon rates" and that would "make up for any multiplier." VP at 21:4-8; CP 904-905 (Appellant argued, "Finally, the hourly rates charged by counsel is more than sufficient to cover any "risk" associated with the case.")

Appellant also failed to offer evidence regarding its assertion that the rate was too high for the locality or any evidence contradicting the testimony of the other attorneys, who all believed that the hourly rates were reasonable and standard for this type of litigation. *See generally* VP. CP 904-905.

While Appellant attempts to characterize the award to Mrs. Ewing's counsel as some sort of windfall, that is simply not accurate. Mrs. Ewing's Counsel took the case on contingency, with multiple summary judgments pending, and then ultimately did not take any percentage of the damages she recovered. This is evidenced by the testimony of Joshua B. Trumbull:

She was in a position where she had lost what was essentially her life savings (the equity in her home), and I did not feel it was right that she should endure the emotional stress and difficulty of the events complained of in the lawsuit, and the lawsuit itself which lasted

approximately three years, only to receive less than what was recovered on her behalf.

CP 641 at ¶ 21.

In sum, after shifting its arguments on appeal, Appellants simply fail to offer any credible citation to the record that would show Mrs. Ewing's attorneys charged a rate above their normal hourly rates in order to account for the contingency factor. More importantly, Appellants fail to show that no reasonable person would take the view adopted by the Superior Court. As such, Appellants have not met their burden in showing the Trial Court abused its discretion.

F. Mrs. Ewing is entitled to attorney fees and costs for having to respond to this Appeal.

RAP 18.1(a) provides:

[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies the request is to be directed to the trial court.

Here, Mrs. Ewing is entitled to her attorney fees for work done in responding to this appeal under the CPA. Under RCW 19.86.090, attorney fees are recoverable on appeal. *Evergreen Collectors v. Holt*, 60 Wn. App. 151, 803 P.2d 10 (Div. II 1991); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 568, 825 P.2d 714 (Div. I 1992)

(awarding attorney fees on appeal promotes policy of the CPA); *Nguyen v. Glendale Const. Co., Inc.*, 56 Wn. App. 196, 782 P.2d 1110 (Div. I 1989) (“The Consumer Protection Act provides adequate grounds for an award of attorney’s fees on appeal . . .”); *McRae v. Bolstad*, 32 Wn. App. 173, 646 P.2d 771 (Div. I 1982); *Wilkinson v. Smith*, 31 Wn. App. 1, 15, 639 P.2d 768 (Div. III 1982)(“The consumer Protection Act provides adequate grounds for the award [of attorney fees].”)

Accordingly, Mrs. Ewing respectfully requests this Court grant her the attorney fees she has incurred as a result of having to respond to Appellant appeal.

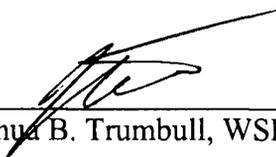
V. CONCLUSION

The Trial Court did not abuse its discretion in awarding attorney fees and costs in the amount of \$247,104.47. The Trial Court took an active role in assessing the reasonableness of the fees, provided specific findings based on the record, adequately addressed Appellant's objections, and followed lodestar precedent in its calculations. Additionally, the Trial Court’s award of a 1.5 multiplier as part of that amount was well within its discretion and reasonably based on the enormous risk Mrs. Ewing’s attorneys faced in litigating the case, and the importance of the issues to the community at large. Accordingly, the sound discretion of the Trial Court should not be disrupted in this case.

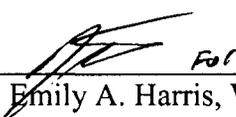
DATED this 8th day of September, 2016, at Arlington, Washington.

Respectfully Submitted By:

JBT & ASSOCIATES, P.S.



Joshua B. Trumbull, WSBA# 40992



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