

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 37403-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JAMES A. RYFFEL and LINDA B. RYFFEL, husband and wife, and  
the marital property composed thereof; and RYFFEL FAMILY  
SPRINGRIDGE LP, a foreign entity,

Appellants,

vs.

THE HUDSON COMPANY, INC.

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KITSAP COUNTY  
THE HONORABLE THEODORE SPEARMAN

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BRIEF OF APPELLANTS

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& GOODFRIEND, P.S.

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## **I. INTRODUCTION**

The trial court awarded attorney's fees of almost \$90,000 in a \$25,000 remodeling contract dispute. The trial court erred in calculating a lodestar fee amount using an hourly rate that far exceeded the rates charged by competent local counsel for the time of Seattle counsel in traveling to Kitsap County to litigate this garden variety dispute, and by then applying a 1.5 multiplier to the lodestar fee based on an unwritten contingent fee arrangement. This court should reverse and remand for an award of fees that does not exceed \$25,000.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering judgment for attorney's fees of \$89,397 on a principal judgment amount of \$24,805. (CP 139-40)

2. The trial court erred in entering its order on plaintiff's motion to set amount of attorney's fees. (CP 137-38)

3. The trial court erred in entering Finding of Fact 1.27:

The parties' contract provides for the award of reasonable attorney's fees which the Court awards in the amount of \$89,397, after considering lodestar factors and after reducing same by a reasonable amount representing the fees defendants incurred in establishing the reductions set out in Paragraph 23 above, and as further explained in the Court's

supplemental oral decisions of 12/10/2007 and 2/08/2008.

(CP 134)

4. The trial court erred in entering Conclusion of Law

2.7:

THC is entitled to money judgment for its reasonably incurred attorney's fees of \$89,397.00; and its statutory costs of \$445.05.

(CP 135)

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Whether the trial court in calculating the lodestar amount erred in failing to establish a reasonable hourly rate based on the rates of competent local counsel to litigate this simple contract and lien dispute?

2. Whether the trial court erred in calculating the lodestar amount by including excessive time, including excessive travel time, in the hours necessary to litigate this simple contract and lien dispute?

3. Whether given the amount in controversy the trial court erred in awarding a 1.5 multiplier on the lodestar amount based on an unwritten and indefinite contingent fee agreement?

#### IV. STATEMENT OF CASE

**A. Plaintiff Hudson Company Charged Defendant Ryffels Over \$120,000 In The Course Of A Three-Month Remodeling Project. The Ryffels Paid Hudson Almost \$95,000, But Questioned Some Charges.**

This action began as a dispute over a contract for improvements to a cabin off Springridge Road NE on Bainbridge Island. (See CP 6-7) In early 2006, appellants Jim and Linda Ryffel (“Ryffel”)<sup>1</sup> purchased the cabin and moved in with their four children from Fort Worth, Texas, where Jim Ryffel is a real estate developer. (RP 356-357) At the recommendation of their realtor, the Ryffels contracted with plaintiff Hudson Company (“Hudson”) for a portion of the project on a fixed price basis, and for other interior remodeling work on a “time and materials” basis. (RP 115-16)

The parties’ contract was a form used by Hudson, which has been a remodeling contractor on Bainbridge Island since the mid-1990’s. (RP 85-88) Hudson agreed to build and install kitchen cabinets and a spice rack for a fixed cost of \$15,275 (RP 119; Ex. 1), and to perform additional work on a “time and materials” basis on the following terms:

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<sup>1</sup> Shortly after purchase, the Ryffels transferred ownership of the property to defendant Ryffel Family Springridge Trust. (See Ex. 22) This appeal is brought on behalf of all defendants. (CP 129-41)

If designated as a 'time and materials' agreement, the contract amount shall be the total sum of all labor, materials and subcontractors plus 15% overhead and profit plus Washington State Sales Tax.

(Ex. 1)

Hudson Company owner Thomas Hudson testified that this provision in the contract meant that the time of Hudson's employees would be billed out at the "market price" on Bainbridge Island, at a billing rate based on "investigation" and "knowledge of the market" (RP 124-25) that was not tied in any way to what the workers were actually paid. (RP 199) The contract did not state that Hudson intended to charge Ryffel a markup for profit and overhead on the hourly labor rates, nor did it explain that this additional component for overhead and profit was in addition to the 15% markup for profit and overhead called out in the contract. (RP 219-20)

Although Mr. Ryffel had extensive experience with construction contracts as a real estate investor and developer in the Southwest, the Ryffels had never employed a contractor on Bainbridge Island before. (RP 371-74) Mr. Ryffel was not allowed to testify to his understanding of this 'time and material' term in the contract. (RP 372-73) He was allowed to testify that, based on 25

years of contracting experience, he understood that the contract obligated the Ryffels to pay Hudson's actual cost of labor plus 15 percent for overhead and profit. (RP 374-75)

Work commenced at the property on February 16, 2006. (RP 256) It was to be concluded by Easter, March 25, 2006, but continued until May 20, 2006. (RP 256, 360) The Ryffels paid a \$5,000 deposit. (Ex. 1) In early April 2006, based on a March 20 billing, they made a payment of \$29,818.63. (RP 167; Ex. 2) On May 2, the Ryffels paid an additional \$60,000, on an April 24 bill of \$61,955.72. (RP 167-68, Ex. 2) The Ryffels at the same time asked for backup to support the hours charged, work performed, and hourly rates reflected in the invoiced amounts. (RP 369) In particular, the Ryffels questioned the billings of laborer Tony Rollman. (RP 167-68).

Hudson invoiced an additional \$14,542.13 on May 15, and invoiced a final billing of \$17,300.15 on May 20, 2006, the day work ended on the project. (Ex. 2) In total, Hudson invoiced the Ryffels \$123,616.23 over three months, including over \$100,000 on a "time and material" basis for painting five rooms, refurbishing and painting 13-16 windows, repairing dry rot in a closet, partially renovating one of two bathrooms in the cabin, and subcontracted

plumbing and electrical work. (RP 96-99, 148-51, 216-18, 233-38 265-70; Exs. 1 and 2)

None of plaintiff's invoices to the Ryffels had spelled out the hours charged, the hourly rates, or the tasks performed (RP 203-06; Ex. 2) and Hudson had failed to fully respond to the Ryffels' requests for a breakdown of hourly rates, hours charged, and tasks performed. (RP 368-71, Ex. 27) The Ryffels were never provided with a copy of labor costs or a breakdown of components for labor. (RP 396) With continued problems with the quality of painting work (RP 364-67),<sup>2</sup> and having questions concerning the time and labor rate being charged on the "time and material" portion of the contract, the Ryffels paid no more on the contract after May 2, 2006. (RP 367-69; see Ex. 2) Ryffel objected in writing to the labor charges and invoices on May 31 and June 15, 2006. (Ex. 27, 28)

**B. Hudson Commenced This Lien Foreclosure Action Despite the ADR Provisions Of Its Contract. After A Three-Day Trial, The Trial Judge Awarded Hudson \$24,805.**

The contract drafted by Hudson had an alternative dispute resolution provision for mediation and arbitration through Judicial

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<sup>2</sup> Hudson at the Ryffels' insistence eventually brought in a painting subcontractor to correct and complete some of this work. (RP 366-67) Under the parties' contract, Hudson also charged 15% overhead and profit on subcontracted work. (Ex. 1; RP 372)

Dispute Resolution in Seattle. (Ex. 1, ¶ 9) Hudson on July 25, 2006, nevertheless commenced this action in Kitsap County Superior Court, asserting a lien claim for \$28,856.26. (CP 1-13) One of plaintiff's employees served the lawsuit on defendants at their home before 8 a.m. the following day. (Ex. 14)

Plaintiff in September 2007 discovered that it had miscalculated the amounts allegedly owed by the Ryffels. (RP 337) At the time of trial in December 2007 (but not before), plaintiff conceded an even greater error, caused by calculating 15% overhead on the fixed-fee portion of the contract (RP 143), and asserted the amount due was \$25,305.01, \$3,551.25 less than its recorded lien. (RP 35)

Plaintiff never corrected its recorded lien claim. (Ex. 12, RP 245) Plaintiff never sought to invoke the arbitration provision of the contract. (RP 245) The dispute proceeded to a 3-day trial in Kitsap County Superior Court beginning December 4, 2007. There was very little pretrial activity. (RP 3, 105, 300) Defendants served one set of interrogatories (13 questions) and requests for production (10 requests) on plaintiff. (CP 81-93) Even then, plaintiff failed to identify as an expert a local contractor counsel announced he would call as an expert the day before trial began. (See RP 11-17)

The dispute at trial centered around the meaning of the “time/cost of labor” clause in Hudson’s contract, and the Ryffels’ claims of overcharging, both in hours worked and hourly rate. For example, Hudson’s owner claimed plaintiff was forced to rent a power washer (RP 101), that inadequate water pressure had affected its work (RP 102), and that the laborer whose time on the job the Ryffels had particularly challenged had spent 5.5 hours pressure washing half a flight of stairs. (RP 224-25) In fact, the Ryffels owned the power washer used on the project (RP 377, 380), and the trial court found that the work should have taken no more than two hours. (Findings of Fact (FF) 1.23, CP 133) The Ryffels complained that they were charged for materials and labor on a custom shower door that was never installed, and in fact never delivered, to the project. (RP 178, 238-39) Hudson also claimed costs were increased by a third coat of paint on window frames. (RP 289)

More fundamentally, however, the Ryffels presented evidence that, had time been charged at Hudson’s labor costs, including L&I assessment, federal unemployment, and other direct labor costs as testified to by plaintiff’s bookkeeper, rather than at Hudson’s claimed “market rate,” they had been overcharged

\$10,452.14 on the hours Hudson claimed had been worked under the contract. (RP 341-54) Mr. Ryffel explained in his testimony that he was offended by this overcharging and hidden profit, and did not think he should be responsible for it. (RP 381-82)

At the conclusion of trial, the trial court ruled largely for the plaintiff, but reduced the amounts claimed for power washing and for the claimed third coat of paint on interior window surfaces. (FF 1.23, CP 133) The trial court awarded plaintiff \$24,805, plus prejudgment interest of \$6,899.19 at 18% per annum under the contract. (Conclusion of Law (CL) 2.8, CP 135) The court set over for separate consideration plaintiff's claim for fees under the contract.

**C. The Trial Court Awarded Plaintiff Fees Of Over Three Times The Amount In Controversy, Including A 1.5 Multiplier.**

Plaintiff's attorney repeatedly told the judge that this case was "about attorney fees" by the time the matter got to trial. (RP 187) This fact became abundantly clear when plaintiff's attorney made his fee request for over five times the amount in controversy:

Plaintiff's attorney, Thomas Dreiling, has worked as a civil litigator for many years before becoming a sole practitioner in Seattle. Mr. Dreiling and Mr. Hudson have known each other for

over twenty years and their children grew up together. (RP 85, 2/1/08 RP 49) Mr. Dreiling told the court he had taken this case on a contingent fee basis, but that the agreement was unwritten and indeterminate. (2/1/08 RP 48-49) Plaintiff and his lawyer had not established what Mr. Dreiling would receive if plaintiff prevailed, only that they would do "what's fair at the end." (2/1/08 RP 12)

Plaintiff's counsel proposed as fair compensation an hourly rate of \$350<sup>3</sup> for 194.75 hours, to establish a lodestar amount of \$68,152.50, and requested a multiplier of two, for a total fee of \$136,305. (CP 31) Plaintiff proposed an offset of \$1,200 for the fees associated with the court's reductions for excessive charges established by the defendant related to power washing the stairs and painting the windows. (CP 64)

Defendants' counsel, solo practitioner David Horton of Silverdale, submitted a declaration attaching his billing records and showing that he had spent 102.8 hours, and charged the defendants a total of \$20,560, at \$200 an hour. (CP 108-18) The

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<sup>3</sup> Mr. Dreiling represented to the court that he had been awarded fees in this court at the rate of \$350. (2/1/08 RP 8-9) He acknowledged in a supplemental declaration that he had in fact been awarded fees at the rate of \$300 an hour. (CP 119)

defendants also submitted declarations from four local attorneys addressing a reasonable rate for plaintiff's attorney's services:

Silverdale attorney Ron Templeton was admitted to practice in 1978. (CP 96) He confines his practice to real estate, including construction litigation, and is familiar with the rates charged by other attorneys. (CP 96) He reviewed both Mr. Dreiling's fee request and Mr. Horton's file. (CP 96) Mr. Templeton's hourly rate is between \$230 – \$250 an hour. He believed that an hourly rate in excess of \$260 would be "unreasonable." (CP 97) Agreeing with Mr. Dreiling that the issues in the case were neither novel nor complex, and "warranted a relatively modest amount of pretrial discovery and limited legal briefing," (CP 97) Mr. Templeton provided his opinion that a reasonable fee for Mr. Dreiling's services would be \$21,600. (CP 98)

In addition, Richard Shattuck, a Silverdale attorney who graduated from the University of Washington law school in 1985 and had previously been associated with Karr Tuttle, submitted a declaration that he billed his time for real estate matters, including representation involving lien claims, at the rate of \$200 per hour (CP 103-07); Port Orchard attorney Michael Uhlig submitted a declaration establishing that his hourly rate was \$225, "and

conforms to the rate generally charged in Kitsap County for this type of work” (CP 101-02); and Poulsbo attorney Lincoln Miller submitted a declaration that his lien foreclosure work was charged at \$210 an hour, “the rate generally charged in Kitsap County for this type of work.” (CP 99-100)

The trial court awarded plaintiff’s counsel \$89,397, reducing the number of hours from 194.75 claimed by counsel to 170.28, at the requested hourly rate of \$350, and then applying a 1.5 multiplier. (2/8/08 RP 59-60, 63)

## V. ARGUMENT

### A. The Trial Court’s Award Of Over \$89,000 In Fees, Including A 150% Multiplier, On A \$25,000 Garden-Variety Contract Dispute, Was An Abuse of Discretion.

Attorney fee awards must be reasonable. *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). The party seeking attorney fees has the burden of proving a reasonable fee. *Loeffelholz v. Citizens for Lenders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

In calculating a fee award, the court first must establish a “lodestar” amount, calculated by multiplying a reasonable number of hours by a reasonable hourly rate. *Mahler*, 135 Wn.2d at 434.

A “reasonable” number of hours necessarily entails consideration of the “novelty and complexity of issues” and the “amount in controversy.” **Scott Fetzer Co. v. Weeks**, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993) (citing **Blum v. Stenson**, 465 U.S. 886, 898-900, 104 S.Ct. 1541 (1998)). The vast majority of fee awards should be for this “lodestar” amount, but the court may adjust the amount awarded by a multiplier, up or down, in “rare instances” when justified by the circumstances of the case. **Mahler**, 135 Wn.2d at 434.

This court exercises “a supervisory role” in reviewing attorney fee awards, to ensure that the trial court’s discretion is exercised on proper grounds. **Mahler**, 135 Wn.2d at 435. “Courts must take an *active* role in assessing the reasonableness of fee awards. . . .” **Mahler**, 135 Wn.2d at 435 (emphasis in original). Where a trial court’s fee award relies on improper factors or misapplies the lodestar method, it will be reversed. See **Sintra, Inc. v. City of Seattle**, 131 Wn.2d 640, 666-67, 935 P.2d 555 (1997) (reversing fee award where plaintiff recovered only nominal damages on civil rights claim for denial of procedural due process); **Scott Fetzer Co.**, 122 Wn.2d at 156-57 (reversing fee award to

prevailing defendant under long arm statute based on limited amount at issue in “run-of-the-mill commercial dispute”).

In this case, the trial court erred both in calculating the lodestar amount without regard to fees charged in the relevant legal community, the amount in controversy, or the amount actually charged plaintiff, and in awarding a 1.5 multiplier based on an unwritten contingent fee agreement.

**B. The Trial Court Erred In Calculating The Lodestar Amount.**

**1. The Lodestar Hourly Rate Of \$350 Was Not Based On The Reasonable Hourly Rates Prevailing In The Community.**

Under the lodestar method, the court must calculate a reasonable hourly rate based upon market rates prevailing for similar services in the relevant community. *Mahler*, 135 Wn.2d at 433-34, fn. 20; *see also* RPC 1.5(a)(3) (defining reasonableness of fee in terms of “the fee customarily charged in the locality for similar legal services.”). Despite uncontroverted evidence that no lawyers based in Kitsap County charged in excess of \$260 per hour for construction contract disputes of the sort at issue here, the trial court refused to restrict the prevailing market rate to Kitsap County, holding that the relevant market was the “entire Puget Sound area”

and setting a lodestar at an hourly rate of \$350 for the services of Hudson's Seattle-based lawyer. (2/08/08 RP 59)

While Washington courts have not addressed the issue, the federal courts uniformly hold that “the relevant community is the forum in which the district court sits.” **Barjon v. Dalton**, 132 F.3d 496, 500 (9<sup>th</sup> Cir. 1997) (affirming refusal to award fees for litigation in Sacramento at hourly rates prevailing in San Francisco); See **Wells v. New Cherokee Corp.**, 58 F.3d 233, 239-40 (6<sup>th</sup> Cir. 1995); **Grendel's Den, Inc., v. Larkin**, 749 F.2d 945, 955 (1<sup>st</sup> Cir. 1984); **Polk v. New York State Dept. of Correctional Services**, 722 F.2d 23, 24-25 (2<sup>nd</sup> Cir.1983); **Avalon Cinema Corp. v. Thompson**, 689 F.2d 137, 140-41 (8<sup>th</sup> Cir.1982) (en banc); **Donnell v. United States**, 682 F.2d 240, 251-52 (D.C. Cir.,1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1190, 75 L.Ed.2d 436 (1983). An exception to the “forum rule” may be made only where the prevailing party establishes that local counsel with the requisite expertise was unavailable. **Barjon**, 132 F.3d at 500. Washington courts generally follow federal decisions in awarding reasonable attorney fees under the lodestar method. See **Rice v. Janovich**, 109 Wn.2d 48, 66-67, 742 P.2d 1230 (1987); **Roberson v. Perez**, 123 Wn. App. 320, 344, 96 P.3d 420 (2004).

The trial court erred in holding that the relevant community was “the entire Puget Sound area.” The trial court stated that “while certain events are handled exclusively within a market of this county, this kind of suit and litigation is really – a much broader degree of talent is required.” (2/8/08 RP 59) Nothing in this record suggests that this case demanded a particular “degree of talent,” and the trial court did not and could not find that competent local counsel was unavailable to handle this garden-variety contract claim in Kitsap County. Hudson’s counsel, though undoubtedly an experienced and talented litigator, did not possess special expertise unavailable in Kitsap County for undertaking this contract litigation. Indeed, he repeatedly emphasized that this was a simple contract dispute that presented no difficult issues, and represented that he undertook the representation instead because of his personal relationship with the plaintiff’s principal.

While there may be a “rich exchange of lawyers” across the different venues of Puget Sound (2/8/08 RP 59), their hourly rates reflect their distinctive local markets, varying overhead costs, and specialization. Any particular attorney’s friendship with a litigant is not a basis for expanding the relevant market for services in a particular forum, or increasing the reasonable hourly rate for

particular services. The lodestar hourly rate of \$350 was not based on the reasonable hourly rates prevailing in the community.

**2. The Lodestar Hours Were Unreasonably Inflated.**

The trial court's refusal to follow the forum rule in setting a reasonable hourly rate also inflated the lodestar amount, because the fee request included 43.7 hours that included significant travel time. (CP 34-38) Hudson's Seattle-based counsel justified spending almost twice as much time on the case than did his opponent based in part upon the decision to spend many hours crossing Puget Sound by ferry to attend hearings, depositions, and trial. (2/1/08 RP 11-12); see *Mayer v. Sto Industries, Inc.*, 256 Wn.2d 677, 692, 137 P.3d 115 (2006); *Roberson v. Perez*, 123 Wn. App. 320, 346, 96 P.3d 420 (2004) ("travel time is generally not compensable," but may be awarded where necessitated by opposing party's misconduct), quoting *Eve's Garden, Inc. v. Upshaw & Upshaw, Inc.*, 801 So.2d 976, 979 (Fla.App. 2001).

This unreasonably inflated the lodestar hours. As a result, the defendants were doubly penalized by the trial court's refusal to limit attorney fees to what would normally be charged in Kitsap County. Not only were they required to pay Seattle rates for Hudson's legal services, they were charged for the additional time

and expense incurred by Hudson's choice of a Seattle lawyer in the absence of evidence that competent counsel was unavailable in Kitsap County.

**3. The Lodestar Was Not Justified By What Counsel Would Charge Plaintiff Under Their Unwritten And Indeterminate Contingent Fee Agreement.**

The trial court's calculation of the lodestar amount using a Seattle market rate of \$350 per hour for long-distance litigation of this simple Kitsap County contract dispute, was erroneous for the additional reason that it was not related to the fee actually charged Hudson by his trial counsel. The court determines a reasonable hourly rate "at the time the lawyer actually billed the client for the services." *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (reversing fee award; "we do not know if the hourly rates were reasonable."). While plaintiff's counsel claimed that he charged \$350 per hour to some "national clients" (2/1/08 RP 8), it was undisputed that he was not charging Hudson at that rate, as there was no written, or even unwritten, agreement setting out the terms of representation. (2/1/08 RP 11-12) Instead, Hudson's verbal contingent fee arrangement with his trial counsel required only that Mr. Hudson "do what's fair at the end . . . look at the end

and see if that fee is still reasonable under all of the circumstances.” (2/1/08 RP 12-13)

This indeterminate, unwritten fee arrangement was not a license for counsel to charge whatever he could convince the trial court to extract from the opposing party. A determination of reasonableness requires the court to consider “the terms of the fee agreement between the lawyer and client.” RPC 1.5(a)(9). The fee quoted to the client, while not conclusive, is “helpful in demonstrating that attorney’s fee expectations when he accepted the case.” ***Allard v. First Interstate Bank of Washington, N.A.***, 112 Wn.2d 145, 150, 768 P.2d 998 (1989), quoting ***Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air***, 483 U.S. 711, 723, 107 S.Ct. 3078, 3085, 97 L.Ed.2d 585 (1987); ***Johnson v. Georgia Highway Express, Inc.***, 488 F.2d 714, 718 (5th Cir.1974). Here, the terms of the unwritten fee agreement only required “fair” compensation to counsel.

As Hudson had no written contingent fee agreement, but expected only to pay “what’s fair at the end”, it is impossible to evaluate the contingent terms of his counsel’s representation. The Rules of Professional Conduct require that a contingent fee agreement must be in writing. RPC 1.5(c)(1), (2) (while “[a] fee

may be contingent on the outcome of the matter for which the service is rendered, . . . [a] contingent fee agreement *shall* be in writing [and] *shall* state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer. . .”) (emphasis added). Although the absence of a written fee agreement may not disqualify Hudson from an award of attorney fees as a prevailing party under the contract, it affects the court’s determination of a reasonable lodestar fee under RPC 1.5(a). See ***Brand v. Dept. of Labor and Industries of State of Wash.***, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999); ***Mahler***, 135 Wn.2d at 433 n. 20.

Hudson failed to establish that this was the “unusual case” justifying an hourly rate in excess of what a regular client would pay competent counsel to litigate this construction contract and lien in Kitsap County. See ***Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany***, 522 F.3d 182, 190-91 (2<sup>nd</sup> Cir. 2000). The absence of a fee agreement made the trial court’s determination that \$350 was a reasonable hourly rate, and that the litigation justified counsel commuting from Seattle, an abuse of discretion, where the undisputed evidence established that the prevailing market rate for similarly competent and

experienced counsel did not exceed \$260. See **Medders v. Autauga County Bd. Of Educ.**, 858 F.Supp. 1118, 1127-28 (M.D.Ala. 1994) (limiting counsel to “current market rate for work performed by attorneys of similar knowledge and experience in similar cases” where counsel had no written fee agreement). The lodestar was not justified by what counsel charged plaintiff under their unwritten, indeterminate contingent fee agreement.

**C. The Lodestar Award Should Have Been Adjusted Down, Not Up, Given The Amount In Controversy And The Lack Of A Written Contingent Fee Agreement.**

**1. The Private Nature Of The Dispute And The Amount In Controversy Required A Downward Adjustment.**

The lodestar method of determining reasonableness is supplemented by the factors under RPC 1.5(a), including “the amount involved and the results obtained.” RPC 1.5(a)(4); **Mahler**, 135 Wn.2d at 433 n.20. “A lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment,” not the upward adjustment of 1.5 awarded here. **Scott Fetzer Co. v. Weeks**, 122 Wn.2d 141,150, 859 P.2d 1210 (1993). The trial court’s fee award of \$89,347, including an upward multiplier of 150%, failed to properly take into account the \$25,000 amount in controversy.

Though the amount at issue is not conclusive, it is a “relevant consideration in determining the reasonableness of the fee award.” *Mahler*, 135 Wn.2d at 433. In *Scott Fetzer Co.*, for instance, the Court reduced a fee award of over \$72,000 to \$22,454.28, holding that the award, granted to a prevailing defendant under the long arm statute, RCW 4.28.185(5), could not be sustained under the lodestar method. 122 Wn.2d at 143-44, 148.

The defendant in *Scott Fetzer Co.*, had originally sought fees of over \$180,000 after prevailing on a motion to dismiss for lack of jurisdiction. The trial court’s original fee award of \$116,785 was reversed as excessive in a first appeal, and remanded for recalculation under the lodestar method. *Scott Fetzer Co., Kirby Co. Div. v. Weeks*, 114 Wn.2d 109, 124-25, 788 P.2d 265 (1990). On remand, the trial court further reduced the fee to \$72,746.38. The Supreme Court again reversed, holding the fees “patently unreasonable” under the lodestar method given the jurisdictional issue involved and the \$19,000 at issue under the parties’ contract. *Scott Fetzer Co.*, 122 Wn.2d at 152. The Court held that “[w]hile the amount in dispute does not create an absolute limit on fees, that figure’s relationship to the fees requested or awarded is a vital

consideration when assessing their reasonableness.” **Scott Fetzer Co.**, 122 Wn.2d at 150.

Whether a fee award disproportionately exceeds the damages award is a particularly significant factor in determining reasonableness of fees in private contract litigation, compared to cases involving statutory or common law public policies in furtherance of the common good. The court must take an active role in ensuring that private contract litigation is not driven by disproportionate demands for attorney fees, where there is no public policy in favor of rewarding a private attorney who has vindicated an important statutory or constitutional right. See **Hubbard v. United States**, 480 F.3d 1327, 1333 (Fed.Cir. 2007) (“The present case involves only a garden variety contract claim that, unlike civil rights litigation involves no broad public policy issues and the only relief sought was damages for the loss Hubbard allegedly suffered because of the breach.”). Compare **Martinez v. City of Tacoma**, 81 Wn. App. 228, 914 P.2d 86 (1996) (“While the degree of success might arguably be an appropriate factor in some types of cases. . . discrimination is not just a private injury which may be compensated by money damages.”).

This action was not for redress of a deprivation of civil rights, or for violation of any other public policy, but a dispute under a construction contract poorly drafted and incorrectly invoiced by the prevailing party. Indeed, plaintiff's counsel admitted at trial that his fee request drove the litigation. (RP 187) The trial court's fee award, which exceeds the damages awarded for breach of the contract by a factor of 3.5, "grossly exceeds the amount involved [and] should suggest a downward adjustment," rather than the upward adjustment of 150% awarded by the trial court. **Scott Fetzer Co.**, 122 Wn.2d at 150; see also **Mayer v. City of Seattle**, 102 Wn. App. 66, 93, 10 P.3d 408 (2000) (remanding for recalculation of \$274,000 fee award where plaintiff recovered \$26,000 in damages under the Model Toxics Control Act, RCW ch. 70.150D). The private nature of the dispute and the amount in controversy required a downward, not an upward, adjustment to the lodestar amount.

**2. The 1.5 Multiplier Was Not Justified By The Quality Or Contingent Nature of Representation.**

A lodestar amount may be adjusted upwards, but only in "rare instances." **Mahler**, 135 Wn.2d at 434. Upward adjustments to the lodestar amount "are considered under two broad categories:

the contingent nature of success, and the quality of work performed.” *Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 425-26, 759 P.2d 418 (1988) (reversing 1.5 multiplier), (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983)). Neither factor justified the 1.5 multiplier awarded in this case.

While recognizing that it was impossible to determine the terms of counsel’s unwritten, indeterminate contingent fee agreement, the trial court nonetheless held that this violation of RPC 1.5(c) by Hudson’s counsel was not relevant to the determination of the fee to be awarded, because of the risk of non-payment. (2/8/08 RP 61-62) This was error. As counsel’s expectation was to be paid a reasonable fee under the circumstances, the trial court should have limited its fee award to a reasonable lodestar fee, without an enhancement for an undeterminable “risk.” See *Scott Fetzer Co.*, 122 Wn.2d at 156 (RPC 1.5’s mandate that attorneys charge a reasonable fee applies “whether one’s fee is being paid by a client or the opposing party.”).

Where, as here, there is no written contingent fee agreement, but only an expectation of paying a fee that is “reasonable under all the circumstances,” a prevailing party should

be limited to local market rates, and not be granted a multiplier for contingency. See **Medders v. Autauga County Bd. Of Educ.**, 858 F.Supp. 1118, 1127-28 (M.D.Ala. 1994) (limiting counsel to “current market rate for work performed by attorneys of similar knowledge and experience in similar cases” and rejecting multiplier where counsel had “no written agreement which would demonstrate the attorney’s fee expectations”). The parties’ expectation that trial counsel would be paid only a reasonable fee in this case if plaintiff prevailed precluded the trial court from granting a multiplier, and should have limited counsel’s reasonable hourly rate to the market rate of similarly experienced trial counsel in Kitsap County.

**3. The Hourly Rate Already Compensated Counsel For The Contingency And Quality Of His Representation.**

The trial court erred in granting a multiplier in this case for the separate reason that its award of \$350 per hour fully compensated counsel for the contingent nature of his representation and the quality of his services. A contingency enhancement should not be granted “in a case where the hourly rate underlying the lodestar figure already comprehends an allowance for the contingent nature of counsel’s work.” **Pham v. City of Seattle**, 124 Wn. App. 716, 721-722, 103 P.3d 827 (2004),

*aff'd in part, rev'd in part on other grounds*, 159 Wn.2d 527, 151 P.3d 976 (2007). Where, as here, counsel is highly experienced and performs high quality services, the quality of representation will normally be reflected in the hourly rate chosen by the trial court as a reasonable rate. ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581, 599, 675 P.2d 193 (1988) (quality of work provides “an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.”). The trial court’s selection of an hourly rate of \$350 more than compensated counsel for high quality representation. The additional multiplier of 1.5 was unjustified, particularly if the hourly rate and hours used in establishing the lodestar amount were within the trial court’s discretion.

**D. Appellants Should Be Awarded Fees and Costs On Appeal.**

This court should award the Ryffels their attorney fees on appeal pursuant to the parties’ contractual fee provision and RAP 18.1. Under paragraph 11 of the contract, the “owner will pay all costs of collection.” (Ex. 1) This fee provision, relied upon the trial court to assess fees against the Ryffels, is reciprocal, and authorizes an award of attorney fees to a prevailing party on

appeal. RCW 4.84.330; see *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988) (“Contractual authority as a basis for an award of attorney’s fees at trial [to plaintiff] supports such an award on appeal” to prevailing defendant.). The Ryffels are also entitled to fees as prevailing parties on appeal under RCW 60.04.181(3).

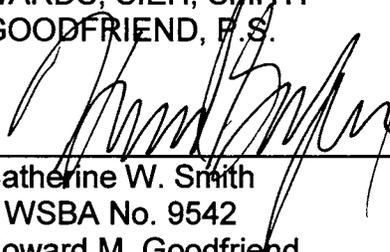
## VI. CONCLUSION

The trial court erred in calculating the lodestar amount, and in awarding an upward multiplier. Applying Kitsap County market rates of \$200-\$260, and reducing the compensable hours to the amount of time necessary to resolve this straightforward commercial case in a geographically rational manner, should result in a reasonable lodestar fee that does not exceed the \$25,000 in controversy. This court should reverse and remand for entry of a reduced fee award, and award the Ryffels attorney fees and costs as prevailing parties on appeal.

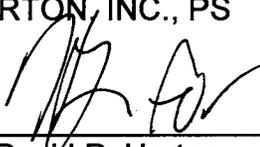
Dated this 6th day of August, 2008.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 6, 2008, I arranged for service of the foregoing Brief of Appellants to the court and counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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**DATED** at Seattle, Washington this 6<sup>th</sup> day of August, 2008.

  
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Carrie O'Brien

CO. AIR-7 PM 1:35  
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