

No. 37403-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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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.

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

REPLY BRIEF OF APPELLANTS

EDWARDS, SIEH, SMITH
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I. REPLY IN SUPPORT OF STATEMENT OF THE CASE

Many of respondent's mischaracterizations of the facts are irrelevant to the issues raised on appeal. This case ends, as it began, with a dispute over questionable billings. Respondent simultaneously complains that appellants are not challenging the trial court's fact-based resolution of the underlying dispute over an ambiguous remodeling contract drafted by respondent, under which the Ryffels paid Hudson Company \$95,000 to paint five rooms and 16 windows, repair a small amount of dry rot, and partially renovate a bathroom, while failing to address on the merits the real, specific, and concrete challenges to a fee award of almost \$90,000 over additional, disputed, charges that were less than a third of the fee awarded.

The responsive brief is emblematic of the same lack of care that led to this dispute in the first place. For instance, just as respondent only conceded significant invoicing errors on the eve of trial (RP 35, 143, 337), and respondent's principal continued to insist, under oath (RP 101, 226-27), that he had rented equipment that appellant had purchased and supplied, for claimed work that was termed "exorbitant" by the trial judge (12/10 RP 14),

respondent now complains that he was “put to his proof” of payments to subcontractors at trial, neglecting to mention that counsel utterly failed to avail himself of ER 904 (RP 23-30) and consequently increased *both* parties’ litigation expenses. Respondent precipitously commenced this litigation, without responding to reasonable (and, as the trial court found, in part justified) inquiries about billings, yet complains that appellant would not mediate, contrary to the trial court’s observation that both parties appeared to have “waived” ADR under respondent’s poorly drafted contract. (2/1 RP 24)

Responding to one set of discovery requests, defending two short depositions, and handling a three-day bench trial on a \$25,000 remodeling contract claim is simply not worth \$90,000. But there was no possibility that this matter could be resolved short of trial not because appellants insisted on litigating it but because respondent’s first, and only, demand was for \$45,000 – almost twice the amount at issue – and was itself premised on the threat to run up even more fees based on an indeterminate unwritten contingent fee “agreement” between sailing buddies. (CP 80) And yet, despite the trial court’s initial announcement that the fee award “will be less than the amount of money the defendant has paid his

counsel” (12/10 RP 16), both respondent, and respondent’s counsel, have been rewarded for their dilatory conduct.

II. REPLY ARGUMENT

A. Unwritten Contingent Fee Agreements Violate RPC 1.5.

Respondent’s counsel himself admitted that “[t]he amount in controversy did not warrant an hourly fee” (CP 29), but now argues that fact justifies the fee awarded because he handled the case for his friend on a “contingent” basis. Respondent in particular claims that contingent fee agreements entered into before the amendment of RPC 1.5 on September 1, 2006, were not required to be in writing. See Resp. Br. 9 (“Ryffels’ counsel was in error in their opening brief to suggest a contingent fee agreement had to be in writing); 18 (“Appellants . . . misstated the then applicable RPC 1.5, claiming contingent fee agreements had to be in writing.”); see 2/1 RP 12 (Respondent’s counsel: “I fully am cognizant of the RPCs on contingent fees.”).

It is respondent’s counsel who misstates the law. Since its promulgation in 1985, RPC 1.5(c) has *always* required that contingent fee agreements be in writing:

(1) *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 in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

Former RPC 1.5(c) (emphasis added). See also, e.g., **Seattle-First Nat'l Bank v. WIGA**, 94 Wn. App. 744, 763 fn. 17, 972 P.2d 1282 (1999) ("Contingent fee agreements must be in writing. RPC 1.5(c)(1).")

RPC 1.5(c) was amended in 2006 to require that the writing be signed *by the client*. A "redlined" version of the rule follows:

(1) A contingent fee agreement shall be in a writing signed by the client;

(2) A contingent fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. . . .

RPC 1.5(c) (effective September 1, 2006). Besides this serious mischaracterization of the law governing his ethical obligations not only to his client but to the court, respondent's counsel does not otherwise address or try to justify the trial court's reliance in making its fee award on a claimed indeterminate unwritten, contingent fee agreement.

The appellate court “will reverse an award of attorney fees . . . if the [trial] court used an improper method” in calculating fees. *WIGA*, 94 Wn. App. at 744; see also *Progressive Animal Welfare Soc’y v. University of Washington*, 114 Wn.2d 677, 689, 790 P.2d 604 (1990) (reversing and remanding fee award that was based on improper factor of party’s “failure to negotiate.”). As argued in the opening brief at 18-20 and 25, the trial court erred in concluding that respondent’s unwritten, indeterminate contingent fee agreement, in violation of RPC 1.5, justified either the lodestar amount or the multiplier.

B. The Relevant Community Is Kitsap County.

Although not as spectacular an example, respondent’s counsel similarly mischaracterizes the law governing the proper “community” to be considered in determining a fee award in his citation of *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005) (Resp. Br. at 17, 21). In *Crest*, the relevant “local fees” were those charged in Whatcom County, not the “entire Puget Sound area.” The appellate court correctly noted that “local fees are just one factor in determining the reasonableness of fees” and remanded for reconsideration of the fee award, “directing the court to consider all applicable factors and

to provide a written, articulable basis for its determination.” **Crest**, 128 Wn. App. at 774, ¶ 31.

The point of appellant’s argument, as set out in the opening brief at 15, is that the party seeking fees should have the obligation to prove a higher rate than that normally charged in the community is justified. That was precisely what the trial court in **Crest** was directed to address on remand. In this case, to the contrary, respondent’s counsel argued that prevailing rates in the local community are irrelevant, and not a factor at all in establishing the lodestar:

Local rates are – Well, let’s put it this way, not meaning to cast aspersions on the quality of counsel in this locality, if a client wants to hire Washington, D.C. counsel and have that person admitted pro hac vice and that person provides the service that Mr. Hudson wanted and was in a position to request fees from this Court and they were astronomically higher than the locale, it seems to me if they were consistent with all of the other ethical responsibilities, that’s what the Court should be granting.

(2/1 RP 19-20)

This is simply not the law governing the court’s lodestar analysis in setting *reasonable* fees. Yet respondent’s counsel, claiming hourly rates commanded in serving a “national” clientele, relied upon his decision to handle this simple case for his buddy,

“causing [him] no less than seven separate trips across the Sound” as a basis for claiming not only that the Kitsap County local rules should be inapplicable (2/1 RP 6), but that he was entitled to fees four times that charged by defendants’ trial counsel. (2/1 RP 8-12)

On a related issue, there are *no* Washington cases authorizing an award for travel time *except* when fees are awarded as a sanction. See ***Roberson v. Perez***, 123 Wn. App. 320, 346, 96 P.3d 420 (2004), *rev. denied*, 155 Wn.2d 1002 (2005) (Opening Br. at 17; Resp. Br. at 21), *quoting Eve’s Garden, Inc. v. Upshaw & Upshaw, Inc.*, 801 So.2d 976, 979 (Fla. App. 2001) (“Although travel time is generally not compensable . . . when setting a reasonable fee, we conclude that travel time may be awarded *when fees are awarded as a sanction . . .*”) (emphasis in ***Roberson*** original). Similarly, as set out in the opening brief at 17, the party seeking fees should have the obligation to prove why travel time should be compensated. In this simple contract case, the trial court erred in awarding fees, including travel time, for out-of-county counsel.

C. The Appellate Courts Exercise A “Supervisory” Role In Review Of Fee Awards.

Contrary to respondent’s argument that a trial court has essentially unfettered discretion in awarding fees, this court exercises a “supervisory” role in review of trial court fee awards. ***Mahler v. Szucs***, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998) (Resp. Brief at 21) (remanding for redetermination of fees based on proper factors). As is apparent from ***Mahler*** and many of the other cases respondent itself cites, the appellate courts have not hesitated to modify or remand a trial court award that does not reflect a proper application of the relevant factors. See, e.g., ***Absher Construction v. Kent School District***, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995) (Resp. Br. at 12) (continuing client relationship was one basis for reducing requested appellate fee of \$36,911.54 to \$23,044.40); ***Boeing Co. v. Sierracin Corp.***, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (Resp. Br. at 15) (eliminating nonstatutory cost award as “inflating” fees); ***Bowers v. Transamerica Title Insurance Co.***, 100 Wn.2d 581, 600-01, 675 P.2d 193 (1983) (Resp. Br. at 6, 8, 14, 15, 20) (error to adjust lodestar upward based on quality of work); ***Crest v. Costco***, 128 Wn. App. at 774 (Resp. Br. at 17, 21) (remand for determination of

the fee considering all applicable factors and to provide a “written, articulable basis for its determination”); ***Eagle Point Condominium Owners Assoc. v. Coy***, 102 Wn. App. 697, 715, 9 P.3d 898 (2000) (Resp. Br. at 15) (remand for entry of findings).

In particular, “litigation between private parties, seeking to enforce no private right affecting the public interest, is not the appropriate forum for attorney fee enhancement.” ***Fisher Properties, Inc. v. Arden-Mayfair, Inc.***, 115 Wn.2d 364, 378, 798 P.2d 799, 804 P.2d 1262 (1991) (Resp. Br. at 23-24). “While 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. v. Weeks***, 122 Wn.2d 141,150, 859 P.2d 1210 (1993) (discussed in Opening Br. at 21-25; Resp. Br. at 19-20). *See also* ***Sintra, Inc. v. City of Seattle***, 131 Wn.2d 640, 935 P.2d 555 (1997) (Resp. Br. at 19) (remand for reduction of fee award; plaintiff not entitled to \$196,381.82 on damage award of \$3 regardless of importance of issues raised). Just as it has in the majority of the cases cited by respondent itself, this court should exercise its supervisory authority in this case to reverse the excessive fees awarded below.

III. CONCLUSION

Respondent makes much of Jim Ryffel's testimony that this dispute was "not about the money" (RP 381) in justifying the trial court's punitive fee award. Here is what Mr. Ryffel actually testified:

Q. And as opposing counsel has said a few times, that this claim isn't over a very large sum in the grand scheme of things. Why are you pursuing defending this claim to these ends?

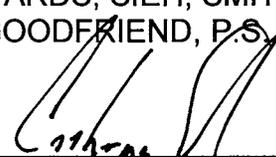
A. It's not about the money. \$25,000 doesn't change my life one way or another. It's – I feel like my wife has been violated, my family has been violated. This is my home. I don't think it's right that you can deceive and withhold information, have hidden profits in a transaction, just because somebody is from out of town. Maybe people think that just because you are from out of town, you are not going to fight it. But this is my home and I want to be treated fairly. Maybe if it was a business deal, I would just write it off and forget about it, but this is my home and he treated my wife unfairly and he lied about it and his painter lied. And I just – I just don't want to be treated like that.

(RP 381-82) Mr. Ryffel's testimony was not a license for the trial court to hand respondent's counsel a blank check for fees. The Ryffels, and all litigants, should be able to resolve their contractual disputes without risk that an award of fees, run up by opposing counsel without regard for the amount of stake, will dwarf and subsume the underlying controversy.

In short, attorneys fees should not drive litigation. Yet that is precisely what happened in this case. Because the trial court erred in calculating the lodestar fee amount using an hourly rate and hours charged that far exceeded that charged by competent local counsel, and by then applying a 1.5 multiplier, this court should reverse and remand for entry of a reduced fee award, and award appellants their reasonable fees and costs on appeal.

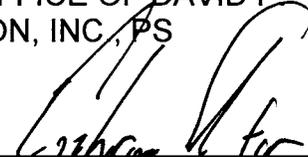
Dated this 29th day of October, 2008.

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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 October 29th, 2008, I arranged for service of the foregoing Reply 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 type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 29th day of October, 2008.



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