No. 13-AA-199

DISTRICT OF COLUMBIA COURT OF APPEALS

TENANTS OF 710 JEFFERSON STREET, NW,

Petitioners,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Respondent,

and

STEVEN LONEY

Intervenor.

ON PETITION FOR REVIEW FROM THE
DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

BRIEF OF PETITIONERS, TENANTS OF 710 JEFFERSON STREET NW, IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING AND INTERVENOR'S PETITION FOR REHEARING OR REHEARING *EN BANC*

Paul M. Smith (No. 358870)
Melissa A. Cox (No. 984680)
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
202 639-6000

Counsel for Tenants of 710 Jefferson Street NW and The Legal Aid Society of the District of Columbia

REHEARING SHOULD BE DENIED

This Court should deny the petitions for rehearing filed by the D.C. Rental Housing Commission ("Commission" or the "District") and intervenor, Steven Loney.[1] The Division awarded attorneys' fees for work performed by the Legal Aid Society of the District of Columbia ("Legal Aid") in representing prevailing tenants on appeal before this Court and during fee proceedings on remand. In doing so, the Division properly awarded fees based on hourly rates derived from the Laffey Matrix, a fee schedule set forth by the United States Attorney's Office in the District of Columbia ("USAO Laffey Matrix"), which is widely used to determine fee awards under fee-shifting statutes in the District of Columbia.

The District seeks rehearing by the Division, contending that the Division "overlooked or misapprehended" a "point of law," D.C. App. R. 40(a)(2), as set forth in *Eley v. District of Columbia*, 793 F.3d 97 (D.C. Cir. 2015). Although Mr. Loney seeks rehearing or rehearing *en banc*, his arguments do not differ materially from the arguments the District makes in support of its request for rehearing only by the Division.[2] Because the Division's decision does not "overlook[] or misapprehend[] any "point of law," D.C. App. R. 40(a)(2), much less conflict with controlling authority, D.C. App. R. 35(b)(1)(A), or pose any "question of exceptional importance" that has not already been settled by this Court and the D.C. Circuit, D.C. App. R. 35(a)(2), rehearing by either the Division or the full Court is unwarranted.

---

[1] Mr. Loney filed a petition for rehearing or rehearing *en banc* ("Loney Pet."), after which the District filed a petition for rehearing only by the Division ("Pet.") (collectively the "Petitions").

[2] Notably, the District was a party in *Eley*, but failed to bring *Eley* to this Court's attention until *after* the District obtained an unfavorable decision by the Division.

I. The Division's Analysis of Fees Under the Rental Housing Act Was Sound.

This Court has stated that "the purposes of the attorneys' fee provision [in the Rental Housing Act, D.C. Code § 42-3509.02] are to encourage tenants to enforce their own rights, in effect acting as private attorneys general, and to encourage attorneys to accept cases brought under the Rental Housing Act of 1980." Slip Op. at 16 (quoting *Ungar v. District of Columbia Rental Housing Comm'n*, 535 A.2d 887, 892 (D.C. 1987)). The Division was faithful to that principle in rejecting the notion that attorneys' fees under the Rental Housing Act should be based on rates charged by lawyers in the specialized field of rent control or rental housing. Private counsel who practice in Rental Housing Act matters before the Rental Housing Commission are "typically small or boutique firms, or single member practices," Pet. 9, who specialize in representing landlords. Attracting counsel to help tenants enforce their rights under the Rental Housing Act necessarily involves attracting additional lawyers who do not engage in practice under the Rental Housing Act, not trying to enlist these few landlord-side lawyers at the rates they charge repeat-client landlords. *Cf. Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1521 (D.C. Cir. 1988) (en banc) (noting that expertise an attorney develops when representing one side in litigation is "a less than desirable source of expertise" when it comes to representing the other side, even when the same, statutory area of expertise is involved).

The Division's determination that the USAO Laffey Matrix is a presumptively valid measure of "prevailing market rates" for calculating "reasonable attorneys' fees" also was faithful to the purpose of the USAO Laffey Matrix and established fee-shifting practice and precedent. The USAO Laffey Matrix, a fee schedule issued and updated by the United States Attorney's Office in the District of Columbia, is specifically designed to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover 'reasonable' attorney's

fees." Laffey Matrix 2014-2015, U.S. Attorney's Office for the District of Columbia, *available at* http://www.justice.gov/sites/default/files/usao-dc/legacy/2014/07/14/Laffey%20Matrix_2014-2015.pdf. The USAO Laffey Matrix thus represents the rates the government will not contest. *Novak v. Capital Mgmt. Dev. Corp.*, 496 F. Supp. 2d 156, 159 (D.D.C. 2007). *Accord* Oral Argument at 5:10-18, *Eley v. District of Columbia*, 793 F.3d 97 (D.C. Cir. 2015) (No. 13-7196) (the District accepting USAO Laffey rates as reasonable where the District was liable for fees).

Courts and agencies in this jurisdiction have recognized the USAO Laffey Matrix as a presumptively valid measure of "prevailing market rates" for calculating "reasonable attorneys' fees" for work of lawyers who lack customary billing rates, including Legal Aid lawyers. *See, e.g., Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 990 (D.C. 2007) (recognizing USAO Laffey Matrix as a "legitimate means of calculating attorneys' fees" in the District); *Covington v. District of Columbia*, 57 F.3d 1101, 1110 (D.C. Cir. 1995) (affirming fee award for *pro bono* counsel and ruling that district court properly accorded a "presumption of reasonableness" to USAO Laffey rates); *Miller v. Holtzmann*, 575 F. Supp. 2d 2, 14 (D.D.C. 2008) (compiling cases and noting that the USAO Laffey Matrix "has served as a guide in nearly every conceivable type of case" in the District of Columbia), *aff'd in part, vacated in part sub nom. United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 786 F. Supp. 2d 110 (D.D.C. 2011); *Thanos v. District of Columbia*, 109 A.3d 1084, 1091 (D.C. 2014) (affirming fees for *pro bono* counsel for the District of Columbia in nuisance eviction proceedings at rates from the "well-established *Laffey* matrix"); *Kent JDL II LLC*, No. RH-TP-08-29295 (OAH Nov. 25, 2009) (unpublished) (awarding USAO Laffey Matrix rates as "presumptively reasonable" to Legal Aid lawyer).

Consistent with that established practice and precedent, the Division concluded in its decision that while the USAO Laffey Matrix need not be "applied in every case where the

requester has no established rates," Slip Op. at 27, the rates contained in the USAO Laffey Matrix are "presumptively reasonable and that departure from these rates should not be lightly undertaken," *id.* at 30. In doing so, the Division was mindful that the alternative – "engag[ing] in an analysis of market definition for each fee application" – would come at a grave "sacrifice to judicial efficiency." *Id.* Requiring every fee applicant to submit market evidence – such as expert testimony, market surveys, and affidavits from other counsel – to obtain compensation at rates derived from the USAO Laffey Matrix would greatly increase the cost and complexity of fee proceedings, in a way that is directly contrary to the principle that "[a] request for attorneys' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[3] The District appears to have taken that same position in the *Thanos* nuisance eviction litigation, where the District sought and obtained attorneys' fees based on USAO Laffey rates and provided the USAO Laffey Matrix itself as the only evidence of "prevailing market rates."[4] There is no reason to revisit the Division's award of fees at USAO Laffey Matrix rates.

II. The D.C. Circuit's Decision in *Eley* Does Not Provide Any Reason for Rehearing.

The Petitions argue that rehearing should be granted because the Division's opinion is inconsistent with *Eley v. District of Columbia*, 793 F.3d 97 (D.C. Cir. 2015). In *Eley*, a parent sought attorneys' fees after prevailing in an action arising under the Individuals with Disabilities Education Act ("IDEA"), and requested fees based on hourly rates contained in an "enhanced" version of the Laffey Matrix based on higher inflation adjustment than the USAO Laffey Matrix.

[3] The Division's rule – which treats USAO Laffey rates as presumptively reasonable for attorneys without customary billing rates – prevents such second litigations. *E.g.*, D.C. Rental Housing Comm'n, *The Woodner Apartments v. Taylor*, RH-TP-07-29, 40 (Nov. 2, 2015) (awarding attorneys' fees based on USAO Laffey rate to Legal Aid lawyer representing tenants).

[4] *See* Brief of Appellee/Cross-Appellant District of Columbia at 14-15, *Thanos v. District of Columbia*, No. 12-CV-324 (D.C. May 8, 2013) (describing fee request); Appendix of Appellee/Cross-Appellant District of Columbia at App. 38-39, *Thanos v. District of Columbia, supra* (awarding fees); *Thanos v. District of Columbia*, 109 A.3d 1084 (D.C. 2014) (affirming).

The district court granted the request, but the D.C. Circuit reversed and remanded, requiring a showing that the requested rates were in line with hourly rates "prevailing in the community *for similar services – i.e.*, IDEA litigation." *Id.* at 104 (internal quotation marks omitted).

The Petitions contend that *Eley* "rejects the notion" that the USAO Laffey Matrix can be a presumptively valid measure of "prevailing market rates" for calculating attorneys fees. They read *Eley* to stand for the proposition that Laffey rates can never be a presumptively valid measure of "prevailing market rates" – under the Rental Housing Act or any other fee-shifting statute – because doing so would "wrongly relieve[] fee applicants of the burden of establishing 'the prevailing market rates' for lawyers 'doing the *same type of litigation*.'" Pet. 4 (quoting *Eley*, 793 F.3d at 105). But *Eley* does not support that proposition, and nothing in that decision provides any reason to revisit the Division's decision or its award of attorneys' fees to Legal Aid.

Eley is inapposite because it dealt with a different fee matrix. The Division awarded fees based on rates from the USAO Laffey Matrix, which is maintained by the U.S. Attorney's Office for the District of Columbia and updated based on "inflation levels specific to Washington, D.C." 793 F.3d at 101-02. *Eley*, on the other hand, dealt with a competing matrix, which is maintained by a professor, tracks the "*national* rate of change in legal services," *id.* at 102, and reflects higher hourly rates than the USAO Laffey Matrix.[5] Because *Eley* was about whether the district court erred in approving a fee award based on the "'enhanced' hourly rates in the LSI *Laffey* Matrix," *id.* at 105, it says nothing about the Division's award of USAO Laffey rates.

If anything, *Eley* highlights the reasonableness of the USAO Laffey Matrix. The D.C. Circuit in *Eley* left open the question whether "either version" of the Laffey Matrix could be appropriate for IDEA litigation, *id.*, and one member of the panel wrote separately for the sole

[5] The USAO Laffey Matrix rate for Eley's counsel was between $420 and $445 per hour, compared to the "elevated" LSI Laffey Matrix rate of $625 per hour. *Eley*, 793 F.3d at 102-03.

purpose of expressing his view that "the United States Attorney's Office Laffey Matrix is appropriate" even for IDEA litigation. *Id.* (Kavanaugh, J., concurring). The reasonableness of hourly rates contained in the USAO Laffey Matrix is reinforced by the fact that the District accepted even during oral argument before the D.C. Circuit that the USAO Laffey Matrix (and not the LSI Laffey Matrix) "set the market" and established hourly rates appropriate for calculating attorneys' fees in that IDEA litigation when the District was liable to pay the fees. Oral Argument at 5:10-5:18, *Eley*, 793 F.3d 97 (D.C. Cir. 2015) (No. 13-7196).

The Petitions' reliance on *Eley* is further misguided because that case was about the award of fees under the IDEA. The IDEA permits the award of "reasonable attorney's fees" to the prevailing party "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished," 20 U.S.C. § 1415(i)(3)(C), but requires the court to reduce the amount of "otherwise authorized fees" if the amount "unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience," *id.* § 1415(i)(3)(F)(ii). The text of the IDEA thus requires the court to reduce otherwise reasonable attorney's fees based on rates prevailing "in the community for similar services," *id.*, and in that sense differs from the Rental Housing Act, which instead "refers generally to 'reasonable attorney's fees,'" Slip. Op. at 26 (quoting D.C. Code § 42-3509.02), "as do a number of other fee-shifting statutes," *id.*

Because the text of the IDEA looks specifically to hourly rates prevailing "in the community *for similar services*," 20 U.S.C. § 1415(i)(3)(F)(ii) (emphasis added), as a basis for reducing otherwise reasonable fee amounts, the determination of whether the Laffey Matrix is an appropriate measure of hourly rates for fee awards under the IDEA has no bearing on whether the Laffey Matrix can be an appropriate measure of reasonable hourly rates for setting

"reasonable attorney's fees" generally. For, by the terms of the IDEA, even if rates in the Laffey Matrix were sufficient to establish an amount of "reasonable attorney's fees" (which they are), the court would be required to reduce those reasonable rates if they were out of step with rates for "similar services." 20 U.S.C. § 1415(i)(3)(F)(ii). The fact that the D.C. Circuit in *Eley* remanded for a showing that the requested Laffey rates were "in line with those prevailing in the community for *similar services, i.e.*, IDEA litigation," *Eley*, 793 F.3d at 104 (internal quotation marks omitted), says nothing about whether those (or any other) Laffey rates could be appropriate for establishing "reasonable attorney's fees" generally, such as under the Rental Housing Act or under any other general fee-shifting statutes.

Nor does *Eley* undermine the Division's reliance on *Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995) for the proposition that the USAO Laffey Matrix is a valid measure of "prevailing market rates" for calculating "reasonable attorney's fees," and that the burden should be "on the party *opposing* a fee request based on the Laffey Matrix to proffer specific countervailing evidence which demonstrates the existence of a defined submarket and the prevailing rates within that [sub]market." Slip Op. at 30 (emphasis added) (citing *Covington*, 57 F.3d at 1111). In *Covington*, the D.C. Circuit *rejected* the District's argument that the USAO Laffey Matrix was insufficient to establish "prevailing market rates" under a general fee-shifting provision, reasoning that the District, as the party opposing the fee request, had "failed to show that a civil rights and employment discrimination market actually exists. . . ." 57 F.3d at 1111. *Covington* teaches that USAO Laffey rates are a presumptively valid measure of prevailing market rates, and that fee applicants need not produce additional detailed market evidence in order to justify compensation based on those hourly rates unless and until the party opposing the request provides countervailing evidence to challenge the use of the USAO Laffey Matrix.

Covington does not support the contrary proposition that fee applicants must submit evidence – such as other fee matrices, market surveys, or affidavits from other attorneys – to show USAO Laffey rates are in line with rates lawyers charge for "doing the same type of litigation." Pet. 4 (quoting *Eley*, 793 F.3d at 105). That is clear from the dissent in *Covington*, which criticized the majority for *not* requiring the fee applicants to submit "specific evidence" of rates charged for "similar work." *Covington*, 57 F.3d at 1113 (Henderson, J., dissenting) (outlining the type of "specific evidence" as "*statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services*" (emphasis in original)). Nothing in *Eley* or *Covington* requires evidence of market or sub-market rates charged for "similar services" in order to justify fee awards at USAO Laffey Matrix rates.[6]

In any event, the fees the Division awarded were for work Legal Aid lawyers performed on appeal, and, to a lesser extent, during the fee remand.[7] The legal services at issue were for "appellate advocacy" and litigation about fees, Slip Op. at 29, and Legal Aid submitted substantial evidence that USAO Laffey rates were consistent with rates charged by other attorneys performing those "similar services." *Id.* at 7 & n.6 (noting "affidavits from attorneys who practice in District of Columbia who attested to the reasonableness of Laffey rates for work performed by Legal Aid in this case"). On these facts, even if there *were* a tension between the

[6] In fact, courts expressly following *Eley* have concluded that USAO Laffey Matrix rates can be appropriate for setting fee awards in IDEA litigation, as well as in other types of litigation. *E.g.*, *Merrick v. District of Columbia*, No. 14-1174, --F. Supp. 3d--, 2015 WL 5732105 (D.D.C. Sept. 29, 2015) (awarding fees at USAO Laffey rate in IDEA case); *Gaston v. District of Columbia*, No. 14-1249, 2015 WL 5029328 (D.D.C. Aug. 26, 2015) (same), *report and recommendation adopted by* 2015 WL 5332111 (D.D.C. Sept. 10, 2015); *Ventura v. L.A. Howard Constr. Co.*, No. 14-v-01884, --F. Supp. 3d--, 2015 WL 6153310, at *2 (D.D.C. Oct. 19, 2015) ("*Laffey* Matrix is appropriate for determining fees in FLSA litigation in this Court.").

[7] Of the fee award, $25,862.75 was for work performed in connection with the appeal in *Loney v. District of Columbia Housing Commission* (*Loney I*), 11 A.3d 753 (D.C. 2010), and $4,936.05 was for work performed during the fee remand before the Commission. *See* Slip Op. at 45.

D.C. Circuit's decision in *Eley* and the use of USAO Laffey rates to award fees under non-IDEA statutes (there is not), the Division's decision is not the vehicle to resolve that tension.[8]

III. There Is No "Conflict" With the Abuse of Discretion Standard.

The Division's decision does not "conflict" with the abuse of discretion standard. Pet. 6. The Division recognized that this Court "usually review[s] the Commission's attorney's fees awards for an abuse of discretion," but noted that the "exercise of discretion must be founded upon correct legal standards." Slip Op. at 14 (quotation marks omitted). The Division also recognized that this Court had remanded to the Commission to provide only a "recommendation" about fees for the work performed on appeal, not an award. *Id.* at 6 & n.2. In addition, it was not disputed that even for work performed before the Commission, the Division had authority to make "its own independent decision" regarding the amount of fees. *Id.* at 14.

Against this backdrop, the Division was not required to provide *any* deference to the Commission's *recommended* amount of fees for work performed on appeal before this Court. *Cf.* Fed. R. Civ. P. 53(f)(3), (4) and 72(b)(3) (special master "recommendations" on fees are reviewed *de novo*, unlike situations where court delegates authority to issue binding decision). To the contrary, Judge Fisher's dissent makes clear that no deference is owed to the Commission's determination of the reasonable number of hours spent litigating an appeal before this Court because this Court – and not the Commission – is expert in the reasonableness of such hours. Slip Op. at 46 n.1 (Fisher, J., dissenting) (concurring in the opinion "with regard to the number of hours reasonably expended" and noting that "[g]ood appellate advocacy takes time").

[8] Many decisions award attorneys' fees at the USAO Laffey Matrix rates for work before this Court and administrative agencies. *E.g.*, *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 39, 48-49 (D.D.C. 2011) (using USAO Laffey rates to compensate attorneys who prepared appellate briefs); *Nw. Coal. for Alts. to Pesticides v. Browner*, 965 F. Supp. 59, 62, 65-66 (D.D.C. 1997) (using USAO Laffey rates to compensate attorneys who prevailed in appeal of FOIA denial).

That same reasoning applies to the reasonableness of the hourly rates for those same hours. The Commission has no discernible expertise with regard to appellate advocacy before this Court, in stark contrast to this Court, which has considerable experience and expertise on that subject.

Even for the small amount of work on remand, the Division was not required to defer to the Commission's fee calculation. That calculation was based on an incorrect legal standard that USAO Laffey rates are *not* presumptively reasonable and that a fee applicant must present evidence about rates in a purported submarket for legal services. Because the calculation was not based on the "correct legal standard," but a standard rejected by *Covington* and its progeny – it was not entitled to any deference. *See Teachey v. Carver*, 736 A.2d 998, 1004 (D.C. 1999).

IV. The Criminal Justice Act Does Not Establish "Reasonable Hourly Rates" for Setting Fee Awards Under the Rental Housing Act or Other Fee-Shifting Statutes.

Nor does the Criminal Justice Act set a reasonable basis for setting fee awards. Although Judge Fisher notes in dissent that "talented and experienced advocates are appointed under the CJA" and "paid $90 per hour," Slip Op. at 47 (citations omitted), this Court has rejected the notion that the *higher* statutory rate of $125 per hour in the Equal Access to Justice Act can substitute for the prevailing market rate for fee awards. *Loney I*, 11 A.3d at 753. Likewise, the statutory CJA rate, which compensates appointed counsel win or lose, has been rejected as a measure of prevailing market rate under fee-shifting statutes. *See Price v. District of Columbia*, 792 F.3d 112 (D.C. Cir. 2015) (reversing court's fee award based on CJA rates in IDEA case). Accordingly, the statutory CJA rate has no bearing on the Division's fee award, and the fact that the Division awarded fees at higher USAO Laffey Matrix rates is not a reason to grant rehearing.

CONCLUSION

The petitions for rehearing should be denied.

November 17, 2015

Respectfully submitted,

Paul M. Smith (No. 358870)
Melissa A. Cox (No. 984680)
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
202 639-6000

Counsel for Tenants of 710 Jefferson Street NW and The Legal Aid Society of the District of Columbia

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing Brief of Petitioners, Tenants of 710 Jefferson Street NW, in Opposition to Respondent's Petition for Rehearing and Intervenor's Petition for Rehearing or Rehearing *En Banc* to be delivered by first-class mail, postage pre-paid, this 17th day of November, 2015, to:

Donna M. Murasky, Esq.
Office of the Solicitor General
441 4th Street NW
Suite 600 South
Washington, DC 20001

Counsel for Respondent, D.C. Rental Housing Commission

Roger D. Luchs, Esq.
1620 L Street NW
Suite 900
Washington, DC 200036-5606

Counsel for Intervenor Steven Loney

Melissa A. Cox