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Supreme Court of Texas.

Samuel Garcia, Jr., M.D., Petitioner,

v.

Maria Gomez, Individually and as representative of the Estate of Ofelia Marroquin, et al, Respondents.

No. 09-0159.

January 21, 2010.

Oral Argument

Appearances:I. Cecilia Garza, Hole & Alvarez, McAllen, TX, for petitioner.

Savannah L. Robinson, Law Office of S. Robinson, Danbury, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09-0159, Garcia vs. Gomez.

MARSHALL: May it please the Court, Mrs. Garza will present argument for the Petitioner. The Petitioner has reserved seven minutes for rebuttal.

ORAL ARGUMENT OF I. CECILIA GARZA ON BEHALF OF THE PETITIONER

ATTORNEY I. CECILIA GARZA: Good morning. May it please the Court, this was a medical negligence case governed by Chapter 74 of the Texas Civil Practice & Remedies Code. In this case no expert report was ever provided in which would require dismissal and award of attorneys' fees, a mandatory award of attorneys' fees under Section 74.351 of the Civil Practice & Remedies Code. Although the trial court entered an order granting defendant's motion for dismissal with prejudice, the order awarded Dr. Garcia zero dollars in attorneys' fees. Now there's no question that the attorneys' fees and the dismissal under Chapter 74 is mandatory --

JUSTICE DAVID M. MEDINA: Well, why are the fees mandatory? If they are mandatory, what evidence is sufficient for an award of attorneys' fees?

ATTORNEY I. CECILIA GARZA: Right, and that was my next point was it is a mandatory award, however although the statute is silent, the case law provides that it is incumbent upon the movant to provide sufficient evidence of the attorneys' fees, and that's where I was going. In this case, the evidence provided by counsel for Dr. Garcia was sufficient pursuant to the standards previously set forth by the Thirteenth Court of Appeals and by other Courts of Appeals. What actually happened at the hearing was plaintiff's counsel admitted, “I don't have a report,” plaintiff's counsel agreed to a dismissal, but plaintiff's counsel argued, “In this case, we need to create an exception to the mandatory award of attorneys' fees because they didn't give me the records.” In response to what counsel for defendant testified to was his experience in medical negligence...

JUSTICE DAVID M. MEDINA: Is that sufficient, or does there have to be an itemized bill or something more than, you know, “I spent $6,000 here, and if it's appealed I'm going to spend another $6,000”? What exactly is needed?

ATTORNEY I. CECILIA GARZA: That is sufficient because I think what courts have held generally is, yes, you can testify as to the amount of time you spent on it, yes, you can testify as to the hours you spent, the work you performed, but it's not necessary.

JUSTICE EVA GUZMAN: Do you have to have, though, some sort of calculation? You can't, can you just come up with a figure? Do you have to have some testimony about how you arrived or how you calculated that figure?

ATTORNEY I. CECILIA GARZA: You don't have to have that. Of course, it would be --

JUSTICE EVA GUZMAN: Well, how would you review that for abuse of discretion if somebody says, “I incurred $50,000,” and the court says, “Okay, it's a mandatory award, you get $50,000.” How do we review that award then after that if there's no evidence on how that was calculated?

ATTORNEY I. CECILIA GARZA: Because generally what the Courts can consider in arriving at an award of attorneys' fees is the reasonable and necessary fees testified to by counsel. They also look at --

JUSTICE EVA GUZMAN: But how do you know they're reasonable and necessary as to a particular case if there's no testimony to show how they were arrived at or calculated?

ATTORNEY I. CECILIA GARZA: But there is testimony, Justice Guzman. When counsel says, “I am counsel for defense in this case, and a reasonable attorneys' fee up to the point of dismissal is $12,200,” you have testimony as to the reasonable attorneys' fees. You may not --

JUSTICE PHIL JOHNSON: Doesn't the statute say, “The attorneys' fees incurred by the defendant”?

ATTORNEY I. CECILIA GARZA: The statute does say incurred.

JUSTICE PHIL JOHNSON: Is there any evidence that this defendant, that those

fees were charged to this defendant as opposed to those simply being an objective, if that amount had been charge, objectively it would have been my opinion that that was a reasonable fee?

ATTORNEY I. CECILIA GARZA: Okay. In this particular case, what the evidence was that reasonable fees up to this point is $12,200.

CHIEF JUSTICE WALLACE B. JEFFERSON: “For usual and customary cases like this,” it says.

ATTORNEY I. CECILIA GARZA: Right, correct. But if you go on to further down in the testimony it says, “If this case is appealed,” and then counsel goes back to correct himself, “reasonable fees up to this point is 12,200.” It should be “are.” Unfortunately we can't get our grammar perfect in these things. But that's the testimony, was that up to this point, $12,200 is a reasonable fee. Now we have to say it's reasonable because if it's not testified to --

JUSTICE EVA GUZMAN: But how do we then evaluate the sufficiency of that evidence if we're looking first whether the trial court abused its discretion in granting or not?

ATTORNEY I. CECILIA GARZA: Okay.

JUSTICE EVA GUZMAN: Then we move to sufficiency. How would you evaluate that if you were reviewing that yourself?

ATTORNEY I. CECILIA GARZA: Okay, well, let me -- I need to clarify one thing before jumping in there. I'm not trying to avoid your question, Justice. But what this Court held in the Aviles case was that -- and let me get the language exact -- and the deal with the Aviles case was the question of incurred. The Thirteenth Court of Appeals said, “Insurance company paid for it, therefore doctor didn't incur it, insurance company incurred it,” and that was their basis for not awarding the fees. What this Court held in Aviles was that, “The doctor was personally liable in the first instance for both defense costs and any potential judgment.” Now prior to this case, courts of appeals, including --

JUSTICE PHIL JOHNSON: Let me ask this, in that case was the testimony as to how much was a reasonable fee, or was the testimony, “This is what I charge to defend the case”?

ATTORNEY I. CECILIA GARZA: There was no testimony in that case, there was a stipulation that the fees in the certain amount, I don't remember the exact amount, was paid for by the insurance company. That was the stipulation. There was testimony in that case. What this Court did was --

JUSTICE PHIL JOHNSON: The fees were actually paid by someone?

ATTORNEY I. CECILIA GARZA: Right. That was --

JUSTICE PHIL JOHNSON: Not what a reasonable fee was, but that the fees were actually paid by someone?

ATTORNEY I. CECILIA GARZA: Right. That was the stipulation in Aviles, and it went back down and it's actually just sitting back down there now for an award of attorneys' fees post hearing. But what I'm trying to get at is, in

this case Dr. Garcia was sued by the plaintiff. At the point that he was sued in the first instance, he became liable for any judgment, for any defense costs. Now when we look at the record and we look at the evidence presented by counsel, what we have in this case during the hearing was we have Dr. Garcia being represented by counsel, we have the record indicating that Ron Hole, who testified as to attorneys' fees, filed the motion for dismissal for Dr. Garcia. He had been representing him since the inception of the matter. The motion itself asked for attorneys' fees incurred, as written by the statute. The motion includes the language from the statute. In addition to that, he testified that the reasonable fees up to this point was $12,200. Now, I think that --

JUSTICE DAVID M. MEDINA: Excuse me. You said that there is evidence that the fees were incurred?

ATTORNEY I. CECILIA GARZA: No, no, I misspoke. I'm sorry. I think if you look at everything together, it's obvious that Dr. Garcia incurred these fees. He is the defendant; he is liable for the defense costs. The defense costs are $12,200. I think if we look at even the argument of counsel in connection with the record itself, this is what we're here for. I'm a defense attorney representing my client on a motion for dismissal, obviously these fees are for this matter, they're for this medical negligence litigation. I don't think that it has to be -- I don't think that the magic words a defense counsel or any counsel has to use is, “Dr. Garcia incurred $12,200 in attorneys' fees.” I don't think that's necessary. Prior to this case, it's never been necessary.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, what is the standard of appellate review? You've got this figure, $12,200, now how is the Court of Appeals or this Court supposed to analyze whether that sum is an abuse of discretion or not?

ATTORNEY I. CECILIA GARZA: Well, I think in this particular case, you have testimony. You have testimony that $12,200 is a reasonable fee. In this case you have a mandatory award of attorneys' fees, with testimony only that it's $12,200 and the fact that an award of fees is mandatory, you cannot award zero. That's an abuse of discretion. Now, generally a court can reduce the amount of fees, the court doesn't --

JUSTICE DAVID M. MEDINA: Was there an objection to that evidence?

ATTORNEY I. CECILIA GARZA: No, Your Honor. There was no objection to the evidence, there was no cross-examination of counsel, there was no argument to the Trial Court that the --

JUSTICE DAVID M. MEDINA: But it's like a default judgment, if you don't make an objection, you don't appear, then you have to enter the award.

ATTORNEY I. CECILIA GARZA: Then you enter the award, and that's kind of where all these cases go. This is uncontroverted, unchallenged testimony; it should be taken as true as a matter of law. I think this --

JUSTICE DON R. WILLETT: Well, just because you can take it as true, does that ipso facto make it legally sufficient?

ATTORNEY I. CECILIA GARZA: The fact that the testimony is there makes it sufficient. The fact that --

JUSTICE DON R. WILLETT: If there were no testimony at all presented, would a trial court still have a duty to award attorneys' fees?

ATTORNEY I. CECILIA GARZA: I don't think so. I think I would agree, in that situation it is incumbent on the movant to provide some evidence, at least a scintilla, and I don't think that having counsel who's got his experience, his familiarity in medical negligence, the fact that he's defense counsel in this case, and the fact that this amount of attorneys' fees has been, is reasonable up to this point of dismissal, that is definitely more than a scintilla of evidence. There is evidence there. I mean we've got what happened in the Aviles case was the Trial Court specifically asked, “Were they incurred? Who paid for them?” If that's really a question, which I really don't see how it would be a question because I think it's obvious that that's what we're all here for, what we're at the trial court for. It could have been brought up. There was no --

JUSTICE DALE WAINWRIGHT: Counsel, the attorney's testimony here was testimony as an expert, right?

ATTORNEY I. CECILIA GARZA: That's correct.

JUSTICE DALE WAINWRIGHT: In other expert contexts, for example, there's a car wreck; one car crosses the median and hits another. The plaintiff's expert says the metal in the axel was defective, it was weak, it caused a tire to come off and that's what caused the accident. And that's all the expert says at trial. No support, no testing done, no studies to support the opinion, would that expert's testimony that the defective metal in the axle caused the wreck be sufficient to support a jury verdict on that basis?

ATTORNEY I. CECILIA GARZA: It's enough to get to the jury.

JUSTICE DALE WAINWRIGHT: Oh, it is?

ATTORNEY I. CECILIA GARZA: It would be enough to get to the jury. You know, you may have other testimony; you may have defense counsel bringing up other matters to argue, bringing other matters on cross-examination or other matters through another expert, but expert testimony, that's enough to get to the jury. It's at least a scintilla of evidence, it may be wrong, there may be no basis for it and that may come out in other aspects of the case, but that's enough.

JUSTICE DALE WAINWRIGHT: What about the Robinson, Havner, Daubert [Ph.] requirements that expert testimony be reliable and relevant and be supported with methodology and data?

ATTORNEY I. CECILIA GARZA: Well, that would be an issue that would have already been addressed prior to trial. If we're talking about at the trial and the expert has already been allowed to testify and that is his only testimony, obviously it's subject to challenges, but that is, you know, usually done pretrial, and by that time, you know, a lot of times judges will let them in and let them testify. Also talking about expert opinion testimony, Rule 704 of the Texas Rules of Evidence says, “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” So because counsel for defendant, I think what the Thirteenth Court of Appeals said was, his testimony was conclusory. The Rules of Evidence allow expert

witness testimony to be as to an ultimate issue of material fact. Now back what I wanted to mention about the incurred aspect of what the Thirteenth Court of Appeals kind of threw in there was, Justice Valdez wrote the Aviles opinion in February of 2008, and that was the first time that the Thirteenth Court of Appeal, and I think any of the Courts of Appeals because this Court did take it up, took up that matter of what is “incurred.” Now, Justice Valdez wrote this opinion, and I think that at the time -- and he even cited his Aviles opinion, to deny saying, “We don't evidence of incur in this case.” Now he was relying on an erroneous opinion, this Court reversed him and said, “No, you're wrong.” So I think that they were relying on an incorrect definition of what “incurred” means, and also going a step further saying evidence must have the word “incurred” in it. In fact, in Doctor's Hospital at Renaissance vs. Ramirez, which actually included the same counsel here, the Thirteenth Court of Appeals considered very similar evidence to the evidence we have here, and exactly, Ramirez had nothing. There was no testimony as to the amount incurred by the doctor, nothing at all, and the Thirteenth Court of Appeals in 2008 said, “This is enough. It's a mandatory award of attorneys' fees, we need to send this back down,” and they did. So it seems as though they're relying very heavily on Aviles, and they're actually putting emphasis, all of a sudden, we need to have testimony on incurred. When I think that actually attorneys' fees is not only -- and the Thirteenth Court of Appeals had this in their opinion is that, “Courts are free to look at the entire record, the evidence presented, the amount in controversy, the common knowledge of the participants, and the relative success of the parties.”

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank, you Ms. Garza, I see that your time has expired. Are there any further questions?

ATTORNEY I. CECILIA GARZA: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you very much, and the Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mrs. Robinson will present oral argument for the Respondents.

ORAL ARGUMENT OF SAVANNAH L. ROBINSON ON BEHALF OF THE RESPONDENT

ATTORNEY SAVANNAH L. ROBINSON: That would be “Miss” Robinson.

JUSTICE DALE WAINWRIGHT: Counsel, let me ask you, the trial judge in the judgment entered “N/A” for attorneys' fees, not zero, right?

ATTORNEY SAVANNAH L. ROBINSON: Correct.

JUSTICE DALE WAINWRIGHT: Is there any explanation or reason to know what “N/A” meant?

ATTORNEY SAVANNAH L. ROBINSON: At the time of the hearing that we had in front in Judge Cantu, we argued the waiver argument. The “N/A” to me means that he accepted the waiver argument. This lawsuit should not have been brought.

JUSTICE DALE WAINWRIGHT: Is there anything in the record that shows he accepted the waiver argument?

ATTORNEY SAVANNAH L. ROBINSON: Nothing except the “N/A,” and the Court of Appeals did not go there either. This lawsuit should not have been brought and would not have been brought if Dr. Garcia had complied with the Texas Medical Liability Act. I'd like to address first the narrow point raised by the Appellant, by Dr. Garcia, and then I would like to discuss with you the ramifications of this case, because I believe Justice Wainwright is absolutely correct, that if we allow lawyers to testify based on solely their ipse dixit, not only do we not have something for review, but we open up an exception to the requirement that the expert testimony have a sufficient basis, that there be no cognitive gap and that the testimony be supported by relevant and material evidence.

JUSTICE DAVID M. MEDINA: Don't we allow attorneys to testify on their own behalf as experts on expenses that they have incurred on other cases?

ATTORNEY SAVANNAH L. ROBINSON: Absolutely, and he did not do so today.

JUSTICE DAVID M. MEDINA: Then what evidence then is there? I mean I read something that says a reasonable fee is here $6,000, or whatever the number may be.

ATTORNEY SAVANNAH L. ROBINSON: In other cases, in a vast number of other cases, they bring in itemized billings, they talk about all eight of the factors required by the Rules of Professional Responsibility, 1.04, and they address each element. There are even Courts of Appeals' decisions that go through all eight elements.

JUSTICE DAVID M. MEDINA: But was there an objection to the evidence that was offered by this lawyer?

ATTORNEY SAVANNAH L. ROBINSON: There was not.

JUSTICE PAUL W. GREEN: And there's no reason to have to go through all eight elements or it's no evidence. I mean can't you --

ATTORNEY SAVANNAH L. ROBINSON: Well, that's why we didn't object, because there was no support at all. He didn't go through any one of the elements.

JUSTICE PAUL W. GREEN: Well, I mean the attorney, he testified that he was an experienced attorney in medical malpractice cases, tried a lot of them --

ATTORNEY SAVANNAH L. ROBINSON: And he has.

JUSTICE PAUL W. GREEN: -- well known, everybody in the courtroom new that, so there's no objection there. He testified that having done all these kinds of cases, it was his experience that this amount of $12,200 was reasonable under the circumstances. Now he's already hit some of the Arthur Anderson factors in so testifying, right? So why isn't that at least some evidence of an attorney fee? It may not be legally sufficient, it may not be sufficient for $12,200, but it's got to be enough to defeat a zero finding.

ATTORNEY SAVANNAH L. ROBINSON: Not necessarily under the factors of this case. I think the narrow issue raised is completely answered by Chief Justice Jefferson's decision in Smith vs. Patrick Trust. The thing we need to focus on is it reasonable. We've been arguing waiver in all of our briefing, including argument to the trial court, the Court of Appeals and to this Court, and I think waiver is a mistaken argument. I think the better argument

is is it reasonable to award attorneys' fees when a doctor has brought upon himself a lawsuit by failing to comply with the only requirement in the Texas Medical Liability Act that doctors have. He failed to provide medical records.

JUSTICE EVA GUZMAN: Was that a complete failure to comply, or was there some sort of gap in the records provided, and then some sort of supplementation afterwards?

ATTORNEY SAVANNAH L. ROBINSON: It was a complete failure. What happened was the family came to us in April of 2007; their mother had died of a blood clot. She had a long history of blood clotting and they were asking, why did the doctors not prevent this? In April of 2007 we sent the standard letter requesting medical records. We had a statute of limitations problem; the lawsuit was filed in May. As soon as the lawsuit was answered, we filed request for production again asking for the medical records, nothing provided. The 120-day report was due in September.

JUSTICE DAVID M. MEDINA: Why didn't you move for sanctions?

ATTORNEY SAVANNAH L. ROBINSON: Actually this case happened so fast we didn't have time. This is what happened; our report was due in September. We had a report ready to go, and the report said that the doctor should have put this filter in her chest to prevent the blood clots from forming. A different defendant, the hospital, provided us their medical records and they provided us films taken before her abdominal surgery.

CHIEF JUSTICE WALLACE B. JEFFERSON: But then the doctor gave you his records, right?

ATTORNEY SAVANNAH L. ROBINSON: No, not until after September. The deadline for the 120-day report was in September, we did not receive records from Dr. Garcia until after September.

JUSTICE EVA GUZMAN: Well, why wouldn't that be sort of a -- when they're asking for attorneys' fees, why wouldn't there be some sort of cross-examination and sort of going to the amount of the fees. They're asking for a certain amount and you come in and you ask a lot of questions to show that none of that would have been incurred but for the failure to turn over the medical records. Why wouldn't you address it that way?

ATTORNEY SAVANNAH L. ROBINSON: At the time, I thought that his testimony was so wholly incomplete that it would not suffice to support an award of any amount.

JUSTICE EVA GUZMAN: It makes more sense to take it up through the appellate process than to attack it? I'm just asking.

ATTORNEY SAVANNAH L. ROBINSON: Well, I didn't think it would go up the appellate process truthfully.

JUSTICE EVA GUZMAN: Okay.

ATTORNEY SAVANNAH L. ROBINSON: In fact, the hospital, who was also a defendant and was also dismissed on the same day, has not appealed it and has not made a claim for attorneys' fees. They fully accepted our apology, we're sorry, the filter is there after all because of their records, and they went

on with their business, they didn't go through this whole complaint.

JUSTICE NATHAN L. HECHT: So do I understand, I'm not exactly clear. Your complaint is not about the amount, it's about whether any award is due in a situation like this where the doctor has not come forward with the records?

ATTORNEY SAVANNAH L. ROBINSON: That is Plan A. Plan B is that if you want to remand it for a new trial on the issue of attorneys' fees, we will contest the attorneys' fees.

JUSTICE NATHAN L. HECHT: The amount of the attorneys' -- I'm not --

ATTORNEY SAVANNAH L. ROBINSON: Yes, absolutely.

JUSTICE NATHAN L. HECHT: But you cited to Smith and Smith refers to the Ragsdale case, which does say that a lawyer can come in and say X amount, and as long as it's controvertible and it's plain and it's affirmative and there's no challenge made to it at the time, that's enough to support the award.

ATTORNEY SAVANNAH L. ROBINSON: We've turned into squirrels. We go through these decisions and we pick up little nuts of clichés that we want to quote, and as Justice Jefferson, Chief Justice Jefferson pointed out in the Smith decision, Ragsdale goes further. It doesn't say just ipse dixit works for attorneys' fees, it says, “Unless there are circumstances that tend to prove that this would be unreasonable.” In this case, the circumstance that makes that ipse dixit unreasonable is that the only reason the lawsuit was filed is Dr. Garcia refused to produce medical records.

JUSTICE NATHAN L. HECHT: Well, the reason for the Ragsdale ipse dixit exception is that the other lawyer is standing right there and if he wants to say no, he can say no, and then Ragsdale doesn't apply any more. But if nobody says no, then there you have it. As opposed to another case where not everybody who's sitting in the room is an accident reconstructionist or a physician. So you say because of the doctor's records there shouldn't be an award and even if that's not true, then you're challenging the amount?

ATTORNEY SAVANNAH L. ROBINSON: Yes, sir, absolutely.

JUSTICE DAVID M. MEDINA: Do you agree that the fees are mandatory under the statute?

ATTORNEY SAVANNAH L. ROBINSON: Absolutely, but the statute is silent as to what happens when a doctor refuses to produce medical records. You know, there's only one thing that doctors have to do to take advantage of the protections of the Medical Liability Act and that's produce records.

JUSTICE DAVID M. MEDINA: Okay.

JUSTICE PHIL JOHNSON: Let me ask one question, though to go on your position. The Court of Appeals' opinion says that Garcia's counsel did not state that Garcia incurred the attorneys' fees that were requested under the statute. And that's at the very back of the opinion, and it goes through and says that Garcia's counsel's testimony was conclusory and it failed to establish an essential statutory element. Are you waiving any contention that there was a requirement --

ATTORNEY SAVANNAH L. ROBINSON: Absolutely not.

JUSTICE PHIL JOHNSON: -- that counsel prove that Dr. Garcia had incurred any specific amount of attorneys' fees?

ATTORNEY SAVANNAH L. ROBINSON: Absolutely not. There was no discovery and there was no itemized bill, no exhibits, nothing that we could base a decision on that it was actually incurred. In the real world, doctors don't pay for defense costs out of their pocket, they have an insurance company. And we already have decisions, the Aviles case that says the insurance company's money is the doctor's money. Good. But think about it, insurance company hires attorneys at a reduced rate. If the going rate is $200, but the insurance company only paid $85, that is a windfall to Dr. Garcia. So the actually incurred --

JUSTICE PHIL JOHNSON: But explain exactly how it's a windfall?

ATTORNEY SAVANNAH L. ROBINSON: Because you're paying $200 while he's actually out-of-pocket only $85.

JUSTICE PHIL JOHNSON: All right, you're saying that if the 12.2 is calculated on the $200, but the only actual payment was less than half of that, you're only liable for what was actually paid?

ATTORNEY SAVANNAH L. ROBINSON: Yes, sir.

JUSTICE PHIL JOHNSON: That's the incurred?

ATTORNEY SAVANNAH L. ROBINSON: Yes, sir.

JUSTICE PHIL JOHNSON: All right.

ATTORNEY SAVANNAH L. ROBINSON: And we've had no discovery on that.

JUSTICE DAVID M. MEDINA: It seems to me that you need to make an objection on those type of things. I mean certainly insurance companies and businesses negotiate reduced fees for volume work. You do this work, instead of paying you 350, we're going to pay you 250. Why should you benefit for that if you make no objection to it? It seems to me that the best argument is what Justice Guzman said it should be, it's the District Court. Let the judge take all this into consideration. “All right, we're going to award $6,000 in fees, but because you didn't do this, we're going to reduce it.”

ATTORNEY SAVANNAH L. ROBINSON: In hindsight I agree with you. At the time, his testimony was so grossly insufficient that I didn't think an objection was necessary, that it could not support an award of fees. And, you know, I was wrong, but it still isn't, it still is insufficient testimony.

JUSTICE EVA GUZMAN: Can you address that aspect of your argument, more specifically the legal insufficiency of the amount, other than the incurred aspect?

ATTORNEY SAVANNAH L. ROBINSON: The Disciplinary Rules have the eight requirements, and it's clear that you don't have to have testimony on all eight, but you have to have testimony on enough of those eight to have an expert opinion that's backed by real facts, material and relevant facts.

JUSTICE EVA GUZMAN: Which of those eight would you contend must be here in order to make this legally sufficient?

ATTORNEY SAVANNAH L. ROBINSON: I think the magic words that I have reviewed, the billing records. The billing records include X hours that, you know, we actually billed the insurance company or the doctor for those hours at this rate. I think there has to be testimony, as there has been in virtually every other case where attorneys' fees have been upheld, about the actual itemized billings. In one case there was a contest over a guy who had testified in 13 pages of affidavit, attaching to it 16 pages of itemized billings. Now that kind of testimony seems extreme and outrageous, but when you have an attorney who just stands up and says, “I want $12,200.” You've had no discovery on it, you don't have any billings to cross-examine him from, where do you go?

JUSTICE EVA GUZMAN: If the attorney testifies, “This is all I do is defend these types of cases, I've defended them many times. I know a reasonable fee.” Why isn't I guess the testifying as an expert, that experience and that background sufficient?

ATTORNEY SAVANNAH L. ROBINSON: Because he's mixing apples with different kinds of apples. If he has charged one doctor $200 an hour, but another doctor $85 an hour and a different doctor $155 an hour, you can't lump them all together. This was not an average case, we have very little discovery, they didn't produce any records. Where's the effort that goes into $12,200?

JUSTICE EVA GUZMAN: What is the procedure for forcing a doctor to comply with the Act and produce those records, generally speaking? Assuming you had the time, and I understand that there were some time constraints here.

ATTORNEY SAVANNAH L. ROBINSON: Yeah, this case happened very quickly. We received the medical records from the McAllen Medical Center in early September and the case was dismissed by November. There really was not time to have motions practice, particularly in the very busy court that we were in. The ordinary procedure would be, you send a letter, they give you the records with 45 days. You have 15 more days at least, if you don't have a statute of limitations issue, to have your experts look at it. You prepare an expert report before you file the lawsuit, and the lawsuit gets filed, the report gets filed within 120 days. If the doctor doesn't provide you the records with the 45-day letter, you can file suit, do a request for production, and if they refuse the request for production, you can get a motion to compel if you can get a hearing.

JUSTICE EVA GUZMAN: Okay.

ATTORNEY SAVANNAH L. ROBINSON: The problem is in many, many courts things happen a lot faster than that and you don't have time to get a hearing.

JUSTICE EVA GUZMAN: Thank you.

ATTORNEY SAVANNAH L. ROBINSON: The danger and the ramifications of this case are that we're creating an exception to the Expert Witness Rule, and --

JUSTICE PAUL W. GREEN: But let me ask you something. You know, back in the old days, and my dad is a lawyer and my grandfather was a lawyer, and I know that back in the old days before they had time records, no computerized records weren't available, keeping time records. What used to happen was at the end of a file in a case like this that the dismissal has taken place, the

lawyer would sit down with a secretary and they'd go through the file and see what was done and consider the amount in controversy, the kind of case that it was, you know, just the whole thing that went on in the case and said, you know, that's the benefit to the client. And says, you know, “I think a reasonable fee in this particular case is X.” Now what you're saying is is that kind of testimony is incompetent testimony in a fee case like this.

ATTORNEY SAVANNAH L. ROBINSON: If he had testified, “I went through the file with my secretary and I've looked at all the work we've done, and I've looked at the seriousness of the case and I've looked at the result obtained, and this is a reasonable fee,” that may have been good enough testimony, but that's not what he said. He said, “Similar cases I would charge $12,000.” Not this case, not based on going through the file.

JUSTICE PAUL W. GREEN: So you don't need time records to create some evidence of a reasonable fee?

ATTORNEY SAVANNAH L. ROBINSON: That gets into the argument over contingency fee contracts and how you present testimony. Because, see, what happens with plaintiff's attorney is we don't keep time records today, most of us don't.

JUSTICE PAUL W. GREEN: Right.

ATTORNEY SAVANNAH L. ROBINSON: So what we do is exactly what your father did. We go through the file, and discovery--well, that's good for an hour. A pleading, that's good for 15 minutes, a letter, that's good for five minutes. And we count pages in the file, and then based on that we give, this is a reasonable fee based on our examination of the file, but we have something to support the opinion. It's not, “I just want $12,000 because it's the right kind of file for it.”

JUSTICE PAUL W. GREEN: Okay. Do you think that by failing to object, that any of that is implied in the testimony?

ATTORNEY SAVANNAH L. ROBINSON: I wish I had objected, but I had nothing to cross-examine him with. We had no records been produced, and I think in today's world, unlike the world that your father lived in, they do keep time records and they can produce them and they should.

JUSTICE DALE WAINWRIGHT: Does your argument, would it change the law in Texas that judges can take judicial notice of their files in reaching a determination about attorneys' fees amounts?

ATTORNEY SAVANNAH L. ROBINSON: I don't think it changes that at all. In this case there's no evidence that Judge Cantu did that. And if he did, there was very little in the file.

JUSTICE DALE WAINWRIGHT: I mean in a different context.

ATTORNEY SAVANNAH L. ROBINSON: I don't see any context where if you have sufficient testimony to begin with, and the judge has testimony that this lawyer actually charges $200 an hour, and he actually billed this number of hours and this amount to this client, where the judge says, “Okay, I will say that's reasonable for this area,” I don't see why that is improper at all, I think the judge can and should know what the fees are. I mean he sees lots of these cases. Attorneys' fees issues come up in lots of different cases, not just TMLA cases. We get attorneys' fees for contract disputes, deceptive

trade practices disputes, declaratory judgment disputes, and under all of those the standard for how you present attorneys' fees should be the same. It's a factual question.

JUSTICE DAVID M. MEDINA: Well, if you were writing this opinion, what type of bright-line test would you have?

ATTORNEY SAVANNAH L. ROBINSON: Sufficiency of the evidence, that there has to be a substantial compliance with 1.04, and the attorneys' fees in TMLA cases are no different than attorneys' fees in every other kind of case- the ultimate test being whether it is reasonable under the circumstances of the case to award a set fee. I would go back to Smith vs. Patrick Trust, which I think is a well-reasoned decision. In this case, it's unreasonable to award attorneys' fees because the only reason the lawsuit was filed is the doctor's failure to comply.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

JUSTICE DAVID M. MEDINA: Should we take in consideration the doctor's failure to comply with the request for these documents?

REBUTTAL ARGUMENT OF I. CECILIA GARZA ON BEHALF OF PETITIONER

ATTORNEY I. CECILIA GARZA: You should not because it's not true. Even if you look at --

JUSTICE DAVID M. MEDINA: Let's say if it were true, should we take that into consideration?

ATTORNEY I. CECILIA GARZA: No, because even -- this issue has arisen, the issue of equitable relief adding an additional 120 days because I don't have the doctor's records. Actually out the Fourteenth Court of Appeals, it was not an opinion that Justice Guzman was a panel member of, but basically what the Fourteenth Court of Appeals has held and I think is a correct decision is, if you don't have the records, that's not an excuse. Because Chapter 74 changed from 4590(i). Back in the old days, if you didn't have records or if you didn't have -- if you had a reason or an excuse to not complying with the 180-day requirement, you could ask for an additional 30 days, you could ask for an additional time period. Chapter 74 specifically did away with that. There are no more excuses unless --

JUSTICE DAVID M. MEDINA: In this situation, you've got a plaintiff trying to meet a deadline because perhaps there's some wrongdoing by a doctor, you're up against a deadline, you file everything you need to file, and for whatever reason the other side is not complying.

ATTORNEY I. CECILIA GARZA: There are ways. You go to the Court, you ask for sanctions. Even so, Justice Medina, I don't think this is the proper case to address that situation because that wasn't -- those are not the facts of this case. Even if you look at counsel's argument in the Reporter's Record on page 7 and 8, where counsel admits, “When we got the records from Dr. Garcia, there was nothing in the record about the filter.” She says, so we got his records, so we had a statute of limitations, so we filed a lawsuit, then we requested records from the hospital. Dr. Garcia complied with the request.

CHIEF JUSTICE WALLACE B. JEFFERSON: Within 45 days?

ATTORNEY I. CECILIA GARZA: I can't say whether it was within 45 days, that I don't know, but it was before the lawsuit was filed. That is definitely, that was part of the argument to the Court by both sides during the trial court hearing. It was complied with. Now what she didn't get was a page out of the record that it talked about a specific filter. It was a page out of --

JUSTICE DAVID M. MEDINA: Well, you know, sometimes a page or a paragraph or a word is the smoking gun that a party needs to go forward.

ATTORNEY I. CECILIA GARZA: But it was the hospital record page that she was missing, not Dr. Garcia's record. The statute doesn't require Dr. Garcia to go out and get all of the records pertaining to the plaintiff to then provide to the plaintiff. He's got to give his records. His records were accurate, they were complete, they were his records, they did not have that hospital record in there. So this is not actually the case, you know, if the Court is inclined to consider her waiver argument, which I don't think is what is a valid argument, and I think that the Fourteenth Court of Appeals dealt with it appropriately. There are things you can do, you can ask for a motion to compel, you can ask the Court to grant you, you know, sanctions against the other side for not complying. There are ways to deal with that issue which didn't even come up in this case and wouldn't have had to because she had the records, she just didn't have the record from the hospital she needed, not from the doctor.

JUSTICE DAVID M. MEDINA: What impact, if any, does a failure to object have in our --

ATTORNEY I. CECILIA GARZA: I'm sorry, I didn't catch that.

JUSTICE DAVID M. MEDINA: What impact, if any, does the failure of counsel to object to the evidence offered on the attorneys' fees have in our analysis of this case?

ATTORNEY I. CECILIA GARZA: I think it has a significant impact, because the Ragsdale case, the Smith case that she talked about, recently this Court addressed in Midland Western Building just two months ago, where if there is no testimony to support a zero award, but there is testimony to award something, you can't give zero. She was --

JUSTICE EVA GUZMAN: Would the failure to object cure any inherent insufficiencies, legal insufficiencies in your testimony? It becomes sufficient because she didn't object?

ATTORNEY I. CECILIA GARZA: I think so, and I think that's what makes it uncontroverted, unchallenged testimony. In fact, the judge asked, “Do you have any questions?” “I do not.” All of the issues raised today --

JUSTICE PHIL JOHNSON: Well, let me ask a question just a moment. Say you tried this case and counsel has an expert witness who is testifying against your doctor, and the expert witness is asked if they believe that the doctor did something improper and they said, “Well, I'm not sure.” Now, the standard, as I understand it, is they have to prove to a reasonable probability. So if you don't object to the testimony and say, “We object, they didn't ask the doctor to a reasonable medical probability.” Now if you don't object, can you still come up on appeal and say no evidence of reasonable medical probability?

ATTORNEY I. CECILIA GARZA: I think that you've waived it by not objecting to it.

JUSTICE PHIL JOHNSON: You've waived it? The legal insufficiency question, if they don't ask that question, you believe you have waived and they're then entitled to recover even though there is no evidence in the record of reasonable medical probability?

ATTORNEY I. CECILIA GARZA: I think that it is incumbent on counsel to object to the question.

JUSTICE PHIL JOHNSON: You have to tell the other side what they have to prove up?

ATTORNEY I. CECILIA GARZA: Well, no, no.

JUSTICE PHIL JOHNSON: Isn't that what we're saying here? Their failure to say that your testimony was not that the doctor actually -- this is what the doctor had to pay me. You're saying that in order to preserve an error as to the legal insufficiency on that issue, they had to tell you you didn't say it?

ATTORNEY I. CECILIA GARZA: No, I think that what we're saying is a little bit different because we are giving testimony that -- we're there, we're ready for cross-examination, we're giving sufficient testimony and they choose not to cross-examine. I don't think it's --

JUSTICE PHIL JOHNSON: But part of their position, is you didn't testify that that doctor, that this was not what the doctor actually paid, this is what we might charge everybody as a reasonable fee. And I don't think there's any question, there may not be any question about that.

ATTORNEY I. CECILIA GARZA: Right. And I --

JUSTICE PHIL JOHNSON: But part of their complaint is you didn't say, “This is what I charge this doctor in this case.”

ATTORNEY I. CECILIA GARZA: And I think that that complaint really is, I think it's an incorrect argument going by what Courts are --

JUSTICE PHIL JOHNSON: Whether it's incorrect or not, that's what they're arguing. So you're saying in order to make that argument on appeal though, they have to stand up and say, “Judge, they didn't ask the right question” [inaudible] waiver.

ATTORNEY I. CECILIA GARZA: In this particular case because this Court has held that uncontroverted testimony as to attorneys' fees is sufficient and is a matter of law, then, yes, she had to do it, she had to object to it if she had any questions. All the issues that counsel brought up today with regard to discounted rates and $200 and $85 and what they're actually paid, this is all --

JUSTICE DAVID M. MEDINA: Do you agree that sometimes evidence is so wrong and so incorrect that an objection is not needed?

ATTORNEY I. CECILIA GARZA: I do agree with that, I don't think that was the

case here. You know, I think if counsel gets up and says, you know, “Give me a hundred thousand dollars in attorneys' fees, I think that's reasonable” and that's it, I don't think that's enough, but in this case that wasn't what happened. I think especially regarding if you go back to what the Thirteenth Court of Appeals had held in ERA Realty, In re H.S.N., if you go what the Dallas Court of Appeals has held to be sufficient in -- and I apologize, just let me finish this one comment -- In re Gunstacks [Ph.] , just a couple of weeks ago, testimony where you say your expertise, what the reasonable fee is, you're familiar with it, is sufficient.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Okay, thank you, Counsel. The cause is submitted and the Court will take a brief recess.

ATTORNEY I. CECILIA GARZA: Thank you, Judge. I apologize for going over.

MARSHALL: All rise.

[End of proceedings.]

Samuel Garcia, Jr., M.D., Petitioner, v. Maria Gomez, Individually and as representative of the Estate of Ofelia Marroquin, et al, Respondents.
2010 WL 412055 (Tex.) (Oral Argument)

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