IN THE SUPREME COURT OF TEXAS

No. 09-0159

SAMUEL GARCIA JR., M.D., PETITIONER,

v.

MARIA GOMEZ, INDIVIDUALLY AND REPRESENTATIVE OF THE ESTATE OF OFELIA MARROQUIN, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 21, 2010

CHIEF JUSTICE JEFFERSON, joined by JUSTICE JOHNSON, dissenting.

In a health care liability case, a plaintiff must serve an expert report on a defendant physician within 120 days of filing suit. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). If a claimant fails to serve a report, the physician may move to dismiss the claim and recover attorney's fees. Specifically, the statute provides:

> If . . . an expert report has not been served . . . the court, on the motion of the affected physician or health care provider, shall . . . enter an order that:
>
> (1) awards to the affected physician or health care provider *reasonable attorney's fees and costs of court incurred* by the physician or health care provider; and
>
> (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

TEX. CIV. PRAC. & REM. CODE § 74.351(b) (emphasis added). Notably, the statute requires the trial court to award fees that are both "reasonable" and "incurred." *Id.* Today, however, the Court concludes that section 74.351(b) mandates a fee award even though the defendant introduced no evidence of fees incurred. For this reason, I respectfully dissent.

The Court has previously stated, and emphasizes again today, that if a timely and sufficient expert report is not served, a trial court must dismiss the case and award fees on motion by the affected physician or health care provider. *See* __ S.W.3d at __ ("[S]ection 74.351(b) mandates an award of attorney's fees and costs, when expert reports are not served timely . . . ."); *see also* *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) ("If a timely and sufficient report is not served, the trial court must award the provider its attorney's fees and costs and dismiss the case with prejudice."); *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney fees are not discretionary."). But even a mandatory fee award must have evidentiary support. *Bocquet*, 972 S.W.2d at 21.

Section 74.351(b) requires proof of "reasonable" fees and evidence of the fees "incurred." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b); *see also* __ S.W.3d at __ ("Under the statute, the fees awarded must be both 'reasonable' and 'incurred.'"). Here, the only evidence concerning fees came from Dr. Garcia's attorney, who stated the following:

> My name is Ronald Hole. I'm an attorney practicing in Hidalgo County, doing medical-malpractice law/litigation. I have done it since 1984. For a usual and customary case like this these fees for handling it up to the point of dismissal, the reasonable and necessary attorneys fees for handling that is 12,200 dollars. If the case is appealed, reasonable fees up to this point is 12,200. If the case is appealed to the Court of Appeals, a reasonable fee for handling the matter at the Court of Appeals would be 8,000 dollars. If a Petion [sic] for Review is filed at the Supreme

> Court, an additional fee of 5,000 dollars would be reasonable for handling the matter of the Petition for Review and our brief or briefs on the merit. Petition granted by the Supreme Court then adds an additional 6,000 dollars. That would be a reasonable fee for handling the matter at that stage.

I am surprised that the Court ignores the gap in Hole's testimony: nowhere does he state an amount of fees actually charged. There is no mention of the amount of time he spent on this case or even his hourly rate.[1] *See Brockie v. Webb*, 244 S.W.3d 905, 909 (Tex. App.–Dallas 2008, pet. denied) ("Generally, the nature and extent of the attorney's services are expressed by the number of hours and the hourly rate."). The trial court was presented, instead, with a statement that $12,200 is a reasonable and necessary fee for "a usual and customary case like this." In no other area of the law would we credit such a statement as "evidence," whether an objection is made or not.

Testimony that a fee is reasonable, without saying it was ever charged, is useless. What if Dr. Garcia incurred only $1,000 in fees, even though a "typical" case like this would involve $12,200? Would the trial court have the discretion to award $12,200? *See Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007) (indicating that the Court favored a theory of jurisprudence that avoided a "windfall" to the injured party). This is why the statute requires evidence that attorney's fees were both reasonable and incurred.

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[1] *Cf. Doctor's Hosp. at Renaissance, Ltd. v. Ramirez*, No. 13-07-00608-CV, 2008 Tex. App. LEXIS 5124, at *8-*9 (Tex. App.–Corpus Christi July 10, 2008, no pet.) (observing that, in another case involving the same attorney representing Dr. Garcia in this case, attorney "testified that he was familiar with the usual and customary terms and fees associated with handling medical negligence cases in Hidalgo County, Texas"; "that he personally worked on this case from the beginning"; "that a reasonable and necessary fee for handling the case up to the point of dismissal was $ 9,840"; and "that in deriving this figure, he charged $ 200 per hour for forty-nine hours of work"); *Martinez v. Miranda*, No. 13-07-00497-CV, 2008 Tex. App. LEXIS 5128, at *8 (Tex. App.–Corpus Christi July 3, 2008, no pet.) (noting that Dr. Garcia's attorney "testified to his qualifications, opining that reasonable attorney's fees from the point of inception until the hearing were $ 35,000 . . . . He outlined the work he performed and the number of hours he had expended in the case.").

The Court holds that "there is some evidence in this case that attorney's fees were both incurred and reasonable." ___ S.W.3d at ___. The Court gives two reasons for that conclusion. First, the record reflects that Dr. Garcia had an attorney and that he filed pleadings on Dr. Garcia's behalf. No one disputes that Dr. Garcia was represented; the question is the amount of fees he incurred. His lawyer did not answer that question. We should not give Dr. Garcia a second chance to satisfy his burden of proof.

Next, the Court relies on our recent decision in *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam); however, such reliance is misplaced. In *Aviles*, we addressed whether a defendant physician "incurred" fees under section 74.351(b), even though an insurance carrier paid the physician's fees. *Aviles*, 292 S.W.3d at 649. We said that the statute did not require as proof that fees were "incurred" that the physician personally paid the fees. *Id.* The physician incurred fees when he first became liable for defense costs and a potential judgment, and the insurer stood in the shoes of the physician when it paid the fees. *Id.*

Aviles is not relevant here. We are not concerned with whether a party "incurs" fees when he or she becomes liable for those fees—the issue we decided in *Aviles*. Instead, we must decide whether there is evidence that fees were incurred at all.[2]

We have repeatedly held that an award of attorney's fees must be supported by evidence. *See, e.g.*, *Torrington Co. & Ingersoll-Rand Corp. v. Stutzman*, 46 S.W.3d 829, 852 (Tex. 2000)

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[2] This was not an issue in *Aviles*. In *Aviles*, proof of reasonable and incurred fees was presented. *See Aviles v. Aguirre*, 292 S.W.3d 697, 702 (Tex. App.–Corpus Christi 2008) (mem. op.) (Vela, J., dissenting) ("Here, there was no claim that the fees sought as sanctions were improperly proven or unreasonable."), *rev'd*, 292 S.W.3d 648 (Tex. 2009) (per curiam).

("Generally, an award of attorney's fees must be supported by evidence."); *Bocquet*, 972 S.W.2d at 21 (noting that it is an abuse of discretion to award fees without sufficient supporting evidence); *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 672 (Tex. 1990) (reversing award of attorney's fees when "[t]he award . . . was based entirely on testimony which should not have been admitted, and when that testimony is excluded, the award cannot stand."); *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966) (holding that attorney's fees in an insurance case must be supported by competent evidence). And, the party seeking the fees carries the burden of proof. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009) (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991)). As our courts of appeals have recognized, although "[a]ttorneys' fees and costs of court are mandatory under the [Texas Medical Liability Act,] . . . nothing in the act modifies the general rule that a party seeking attorneys' fees must present evidence of attorneys' fees." *Brower v. Hearn*, No. 14-07-00967-CV, 2009 Tex. App. LEXIS 3551, at *8-*9 (Tex. App.—Houston [14th Dist.] Feb. 10, 2009, no pet.); *Sandles v. Howerton*, 163 S.W.3d 829, 839 n.9 (Tex. App—Dallas 2005, no pet.); *Doades v. Syed*, 94 S.W.3d 664, 674 (Tex. App.–San Antonio 2002, no pet.) ("[E]ven a mandatory award of attorney's fees [under the Medical Liability Act] must be supported by evidence."); *Estrello v. Elboar*, 965 S.W.2d 754, 759 (Tex. App.–Fort Worth 1998, no pet.) (holding that trial court did not abuse its discretion in denying attorney's fees to health care provider who failed to present evidence of fees).[3]

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[3] *Cf. Dilston House Condo. Ass'n v. White*, 230 S.W.3d 714, 718 (Tex. App.–Houston [14th Dist.] 2007, no pet.) ("Even when an award of attorney's fees is mandatory under an applicable statute, the requesting party is still required to offer evidence to support an award."); *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751-52 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (even though fees are mandatory under the DTPA and Chapter 38 of the Civil Practice and Remedies Code, plaintiffs could not recover fees because they failed to introduce evidence of fees at trial).

The Court comes close to a dispositive concession by acknowledging "there is no evidence of the amount of fees incurred by Dr. Garcia . . . ." That should be the end of it. A party with the burden of proof who fails to produce evidence of attorney's fees, waives his right to those fees. *Intercontinental Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657 (Tex. 2009).[4] An award of zero fees is therefore appropriate. *See Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.–Houston [14th Dist.] 2002, no pet.) ("[A] zero award for attorney's fees [is] proper if the evidence . . . failed to prove (a) that any attorney's services were provided; or (b) the value of the services provided . . . ."). When the party with the burden presents "no evidence" to satisfy it, we do not ordinarily remand the matter to the trial court for a second chance. *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007) (recognizing that we generally render judgment when there is no evidence).

As there is no evidence of fees incurred, I would conclude, as the court of appeals did, that the trial court did not abuse its discretion in refusing Dr. Garcia's request for attorney's fees under section 74.351(b). Accordingly, I would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

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[4] *Cf. Eagle Trucking Co. v. Tex. Bitulithic Co.*, 612 S.W.2d 503, 507 (Tex. 1981) ("Guin had the burden to establish Eagle Trucking's negligence . . . . Guin's total failure to do anything to get a jury finding which compared Eagle Trucking's negligence . . . with his own . . . amounted to a waiver of any complaints to the charge."); *Glenn Falls Ins. Co. v. C.C. Peters*, 386 S.W.2d 529, 531 (Tex. 1965) (holding that failure to request a jury finding, by the party with the burden, waived party's right to any judgment on the pleaded issue).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 27, 2010