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

JUSTICE JOHNSON, dissenting.

I disagree with the Court's holding for the reasons expressed by Chief Justice Jefferson and join his dissent. However, I write to express particular disagreement with the Court's statement that "[a]n attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. . . . The attorney's testimony is not objectionable as merely conclusory because the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and, if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee." ___ S.W.3d at ___.

As to reasonableness of an attorney's fee, in *Arthur Andersen & Co. v. Perry Equipment Corp.*, the Court addressed language in the Deceptive Trade Practices Act[1] allowing recovery of "reasonable and necessary attorneys' fees." 945 S.W.2d 812, 818 (Tex. 1997). In considering whether a contingent fee was a reasonable fee we said:

> Factors that a factfinder should consider when determining the reasonableness of a fee include:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
> > (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
> > (3) the fee customarily charged in the locality for similar legal services;
> > (4) the amount involved and the results obtained;
> > (5) the time limitations imposed by the client or by the circumstances;
> > (6) the nature and length of the professional relationship with the client;
> > (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> > (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.
> > . . . .
>
> A party's contingent fee agreement should be considered by the factfinder, *see* TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b)(8), and is therefore admissible in evidence, but that agreement cannot alone support an award of attorney's fees under Texas Business and Commerce Code section 17.50(d). In other words, the plaintiff cannot simply ask the jury to award a percentage of the recovery as a fee because without evidence of the factors identified in Disciplinary Rule 1.04, the jury has no meaningful way to determine if the fees were in fact reasonable and necessary.

Id. at 818-19 (citation omitted).

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[1] *See* TEX. BUS. & COM. CODE § 17.50(d).

Without saying why, the Court departs significantly from the evidence requirements for determining reasonable fees we set out in *Arthur Andersen*. Here the testimony touched on two of the *Arthur Andersen* factors: the attorney's experience in this type of litigation and a "reasonable and necessary" fee for a "usual and customary case like this." In *Arthur Andersen* the fee was contingent. Here the testimony did not even address the basis of the fee; that is, whether it was contingent, a flat rate through some part of the case, an hourly or per diem charge, a blend of fee types, or some other type of fee arrangement. The attorney's testimony as to experience involved facts. His testimony as to fees, however, was not factual; it was opinion and conclusory. And even assuming it addressed the attorney's own work on this case (the testimony did not specify who worked on the case and pointedly did not address work done on this specific case) it was nothing more than an *ipse dixit* by a credentialed witness.

The court of appeals addressed the *Arthur Andersen* issue and properly determined there was no evidence of a reasonable fee because the attorney's testimony was conclusory. I agree with the court of appeals. Garcia's attorney's testimony is not probative evidence because it does not contain the underlying factual basis on which it rests. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) ("[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."); BLACK'S LAW DICTIONARY 284 (7th ed. 1999) (defining conclusory as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based"). As Chief Justice Jefferson notes, in no other area of the law would such testimony be entitled to probative weight. *See* ___ S.W.3d at ___ (Jefferson, C.J., dissenting).

Further, the rule has long been that whether testimony of a witness is conclusory turns on the testimony itself, not on whether the opposing party or its attorney has knowledge of matters underlying the testimony and examines the testifying witness. *E.g.*, *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839 (Tex. 2010) ("No-evidence challenges to allegedly conclusory expert testimony require us to examine the record on its face to determine whether the evidence lacks probative value."); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) ("When the testimony is challenged as conclusory or speculative and therefore non-probative on its face, however, there is no need to go beyond the face of the record to test its reliability.") (citations omitted); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380-81 (Tex. 1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."). There may be valid reasons for the Court to take the position that an attorney's testimony about the reasonableness of his or her fees is different from other expert witness testimony. But it is hard to see valid reasons for holding that conclusory testimony, which according to long-standing precedent has no probative force, is converted to evidence with probative value because an adverse party has information or knowledge about matters underlying the testimony. In an environment where discovery plays a major part in any lawsuit, only a naive or completely unprepared litigant will lack knowledge of matters underlying the testimony of an opposing expert, especially one testifying about attorney's fees. It distorts the litigation process and burdens of proof to require an adverse party to cross-examine an

opposing party's expert and assist in proving up a case against himself or herself on pain of converting conclusory, legally insufficient evidence into legally sufficient evidence.

With the foregoing comments and for the reasons expressed both by Chief Justice Jefferson and the court of appeals, I respectfully dissent. I would affirm the judgment of the court of appeals.

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Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010