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 MEDINA delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, joined by JUSTICE JOHNSON.

JUSTICE JOHNSON filed a dissenting opinion.

The Texas Medical Liability Act requires that a health care liability claimant serve expert reports on each defendant physician or provider within 120 days after filing suit. TEX. CIV. PRAC. & REM. CODE §74.351(a). We have characterized this requirement as "a threshold over which a claimant must proceed to continue a [health care liability] lawsuit." *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam). If no report is timely served, the trial court must, on motion,

dismiss the claim and award reasonable attorney's fees and costs to the affected physician or provider.[1]

No expert report was served in this case, and the trial court accordingly dismissed it. The court, however, did not award attorney's fees. The court of appeals affirmed, concluding the trial court had not abused its discretion in failing to award attorney's fees because the record contained no evidence of the reasonable fees incurred by the physician in defense of the claim. 286 S.W.3d 445, 449. We conclude, however, that there is some evidence of reasonable attorney's fees and some evidence that the physician incurred attorney's fees. We further conclude that section 74.351(b) mandates an award of attorney's fees and costs, when expert reports are not served timely, and accordingly reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I

Ofelia Marroquin died from a pulmonary embolism following surgery. Her daughter, Maria Gomez, individually and as representative of her mother's estate, sued the hospital and the treating

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[1] The statute provides that when the claimant fails to serve a defendant physician or health care provider with an expert report within 120 days of filing suit:

> [T]he court, on the motion of the affected physician or health care provider, shall, subject to [an extension of time for a deficient report], 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).

physician, Dr. Samuel Garcia. Gomez asserted that her mother had a history of blood clots and that Dr. Garcia had not taken proper precautions to guard against the embolism that caused her death. Specifically, she argues that the standard of care required the doctor to install a blood filter as a preventive measure.

Medical records obtained from Dr. Garcia failed to indicate that he had placed such a filter in her mother's chest cavity during surgery. After filing suit, however, Gomez obtained additional medical records from the hospital, which revealed that a filter had in fact been placed in her mother's chest cavity apparently during some earlier procedure. This new information apparently caused Gomez not to serve expert reports.

After the deadline for serving these reports, Dr. Garcia moved to dismiss Gomez's claim. Gomez did not oppose the dismissal, although she did contest Garcia's right to attorney's fees, arguing that Garcia had in a sense brought the suit on himself by failing to produce the medical records confirming the existence of the blood filter. After a hearing, the trial court granted the physician's motion in part, dismissing the health care liability claim with prejudice, while denying him attorney's fees.[2] Dr. Garcia appeals complaining that he is entitled to an award of attorney's fees.

Dr. Garcia's evidence on attorney's fees came from his counsel, who testified as follows:

> 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

[2] The trial court also dismissed the case against the hospital, but the hospital did not seek attorney's fees and is not a party to this appeal.

> customary case like this these fees for handling it up to the point of dismissal, the reasonable and necessary attorney's fees for handling that is 12,200 dollars.
>
> If the case is appealed to the Court of Appeals, the reasonable fee for handling the matter at the Court of Appeals would be 8,000 dollars. If a Petition 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.

In affirming the trial court's judgment, the court of appeals concluded that this testimony was conclusory and therefore no evidence of the reasonable attorney's fees incurred by Dr. Garcia. 286 S.W.3d at 449. The court further concluded that the attorney's testimony was insufficient because it failed to establish that the physician actually incurred attorney's fees, which the court described as "an essential statutory element." *Id.*

II

An attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. Although rooted in the attorney's experience and expertise, it also consists of the attorney's personal knowledge about the underlying work and its particular value to the client. The testimony is similar to that of a property owner whose personal knowledge qualifies him to give an opinion about his own property's value. *See, e.g., State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 874 (Tex. 2009); *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). 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.

In this case, Garcia's attorney testified briefly about his experience in medical malpractice litigation. He then estimated $12,200 to be a reasonable and necessary fee for representation through dismissal in a case like this one. Finally, he testified about his fees in the event of an appeal and that such fees were also reasonable. Gomez did not cross-examine the witness or present any additional evidence on the issue of attorney's fees. Nor did she question the reasonableness of the amount of any of these fees. While the attorney's testimony lacked specifics, it was not, under these circumstances, merely conclusory. It was some evidence of what a reasonable attorney's fee might be in this case.

Dr. Garcia argues, however, that the attorney's testimony was not only some evidence of his reasonable attorney's fees, but also conclusive evidence on the issue. Generally, the determination of reasonable attorney's fees is a question of fact and "'the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury.'" *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009) (quoting *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)). Dr. Garcia's argument, however, relies on an exception to this general rule, that is, "where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.'" *Ragsdale*, 801 S.W.2d at 882 (quoting *Cochran v. Wool Growers Cent. Storage Co.*, 166 S.W.2d 904, 908 (Tex. 1942)). Because Gomez had the means and opportunity to contest the attorney's testimony on what a reasonable attorney fee would

be in this case, but failed to do so, Garcia concludes that reasonableness was established as a matter of law.

While we agree that Garcia's attorney's testimony is some evidence of a reasonable fee, it is not conclusive. The statute here provides that the trial court is to award "*reasonable attorney's fees and costs of court incurred* by the physician or health care provider" when the claimant fails to serve an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(b) (emphasis added). Under the statute, the fees awarded must be both "reasonable" and "incurred." Id. § 74.351(b)(1). A reasonable fee is one that is not excessive or extreme, but rather moderate or fair.[3] A fee is incurred when one becomes liable for it.[4]

Both the adjective "reasonable" and the verb "incurred" act to limit the amount of attorney's fees the trial court may award. Ideally, they will be the same, such as when the physician has agreed to pay reasonable fees and costs. But a physician may negotiate a fee that is either more or less than a reasonable fee and thus incur, or become liable for, a greater or lesser amount. The statute, however, limits the award to the lesser of the two, that is, the fee to be awarded is the lesser of a reasonable fee or the fee actually incurred. Testimony about reasonable fees then is not necessarily evidence about the fees incurred.

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[3] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 981 (1984) (defining the adjective "reasonable"); *see also* BLACK'S LAW DICTIONARY 1272 (7th ed. 1999). (defining "reasonable" as fair, proper, or moderate under the circumstances).

[4] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 611 (1984) (defining the verb "incur"); *see also* BLACK'S LAW DICTIONARY 771 (7th ed. 1999) (defining "incur" as to suffer or bring on oneself (a liability or expense)).

Although there is no evidence of the amount of the fees incurred by Dr. Garcia, the court of appeals goes further to conclude there is no evidence that Dr. Garcia actually incurred attorney's fees at all. The record reflects, however, that services were performed on the doctor's behalf. The attorney filed an answer, a plea in abatement, a motion to dismiss, and a notice of appeal. The attorney also appeared, argued, and gave testimony regarding the motion to dismiss. While there is no evidence about what Dr. Garcia (or perhaps his insurance carrier) agreed to pay for these services, it blinks reality to assume that the attorney was a volunteer or that Dr. Garcia did not incur attorney's fees for this work. As we recently held in another case involving this statute, a health-care-liability defendant incurs attorney's fees when he is "personally liable in the first instance for both defense costs and any potential judgment." *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam).

Section 74.351(b) requires the award of the reasonable attorney's fees incurred by a physician who is not served with a timely expert report. Because there is some evidence in this case that attorney's fees were both incurred and reasonable, the trial court should have awarded attorney's fees to Dr. Garcia. The court of appeals therefore erred in affirming that part of the trial court's judgment.

III

Gomez argues, however, that Dr. Garcia should nevertheless be denied attorney's fees because he failed to produce the appropriate medical records in a timely manner. Pertinent to this argument is section 74.051(d) of the Texas Medical Liability Act, which provides that all parties are "entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of a written request for such records . . ." TEX. CIV. PRAC. &

REM. CODE § 74.051(d). This provision is part of the section requiring pre-suit notice of a health care liability claim. *Id.* § 74.051. Its purpose is to encourage pre-suit negotiations and settlement and thereby reduce litigation costs. *See De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935, 938 (Tex. 1993) (interpreting similar provision in statute's predecessor). Gomez contends Dr. Garcia waived his right to recover his attorney's fees because he was slow to produce medical records and ultimately failed to produce the critical records which indicated that the blood filter was indeed in place during her mother's surgery. Gomez's argument assumes that Dr. Garcia withheld relevant medical records, but the record in this case does not support that assumption.

Gomez's pleadings asserted that Dr. Garcia was negligent in "not prevent[ing] the formation of a pulmonary embolism by appropriate means," but the pleadings did not expressly mention the critical blood filter. Even assuming the physician understood the filter's significance to Gomez's case, it is not apparent why he would have concealed this exculpatory information. Instead, Dr. Garcia maintains that he produced all relevant medical records in his possession. Moreover, the hospital ultimately produced the records confirming the filter's existence as part of its medical records. Nothing in the record suggests that Dr. Garcia's records also contained this information or that he withheld the information. Gomez fails to explain why she did not seek or obtain these records from the hospital during the pre-suit notice period or why it was Dr. Garcia's responsibility to obtain them for her. Although we can imagine a case in which discovery sanctions might offset an award of fees and costs under section 74.351(b), this is not such a case because the trial court has made no finding of discovery abuse.

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Section 74.351(b) of the Texas Medical Liability Act requires the award of reasonable attorney's fees incurred by a physician in defense of a health care liability claim when expert reports are not timely served. Because there was some evidence of these fees, the trial court erred in failing to make an award, and the court of appeals erred in affirming that part of the trial court's judgment. Accordingly we reverse the court of appeals' judgment, in part, and remand the physician's attorney's fees claim to the trial court for further proceedings. The remainder of the court of appeals' judgment is affirmed.

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David M. Medina
Justice

OPINION DELIVERED: August 27, 2010