

CASE NO. _____

THE 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., and SAVANNAH ROBINSON,
Respondents

ON APPEAL FROM THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI- EDINBURG
CASE NO.13-08-00054-CV

PETITION FOR REVIEW

Ronald G. Hole
State Bar No. 09834200

I. Cecilia Garza
State Bar No. 24041627

HOLE & ALVAREZ, L.L.P.
612 W. Nolana, Suite 370
P.O. Box 720547
McAllen, Texas 78504
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

February 20, 2009

CASE NO. _____

THE 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., and SAVANNAH ROBINSON,
Respondents

ON APPEAL FROM THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI- EDINBURG
CASE NO.13-08-00054-CV

PETITION FOR REVIEW

Ronald G. Hole
State Bar No. 09834200

I. Cecilia Garza
State Bar No. 24041627

HOLE & ALVAREZ, L.L.P.
Water Tower Centre
612 W. Nolana, Suite 370
P.O. Box 720547
McAllen, Texas 78504
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

IDENTITY OF PARTIES AND COUNSEL

Plaintiffs/Respondents and Counsel

Maria Ramirez, Individually and as Representative of the Estate of Ofelia Marroquin, Deceased, Ramona G. Cisneros, Dolores G. Guerrero, Juan G. Marroquin, Ofelia G. Arcelay, and Ezekiel Gonzalez, c/o Savannah Robinson, 1822 Main Street, Danbury, Texas 77534; and

Savannah Robinson, 1822 Main Street, Danbury, Texas 77534.

Defendant/Petitioner and Counsel

Samuel Garcia, M.D., c/o Hole & Alvarez, L.L.P., P.O. Box 720547, McAllen, Texas 78504; and

Ronald G. Hole and I. Cecilia Garza, Hole & Alvarez, L.L.P., Water Tower Centre, P.O. Box 720547, McAllen, Texas 78504.

TABLE OF CONTENTS

Identity of Parties and Counsel ii

Table of Contents iii

Index of Authorities v

Statement of the Case vii

Statement of the Jurisdiction viii

Issue Presented viii

**Is an Award of Attorney’s Fees Pursuant to Section 74.351
Mandatory When a Physician Defendant Provides the Trial Court
with Evidence to Justify an Award?** viii

Statement of Facts 1

Summary of the Argument 2

Argument 2

A. The Issue Raised by this Petition for Review Requires this
Court’s Attention and Guidance and this Court Should Exercise
its Discretion and Hear this Case. 2

B. The Trial Court Ignored the Plain and Unambiguous Language
of Section 74.351(b) in its Failure to Award Petitioner His
Mandated Attorney’s Fees. 4

C. The Thirteenth Court of Appeals Erroneously Applied an
Evidentiary Standard Applicable Only to Motions for Summary
Judgment, in its Holding That Petitioner’s Counsel’s Testimony
Did Not Support an Award of Attorney’s Fees. 5

D. Petitioner Offered Legally Sufficient Evidence to Support an
Award of Attorney’s Fees.. . . . 7

E. Attorney’s Fees Were Incurred by Petitioner. 11

F. Conclusions	12
Prayer	12
Certificate of Service	13
Appendix	14
Index of Appendix	15

Tab 1	Plaintiffs' Original Petition
Tab 2	Defendant Samuel Garcia, Jr., M.D.'s Motion for Dismissal Pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code, filed on October 24, 2007
Tab 3	Order Granting Dismissal With Prejudice entered on December 19, 2007
Tab 4	Transcript of Hearing of November 19 ,2007 (incorrectly titled Request for Temporary Injunction)
Tab 5	Opinion of the Thirteenth Court of Appeals in <i>Garcia v. Gomez</i> , Cause No. 13-08-00054-CV, issued on December 4, 2008
Tab 6	TEX.CIV.PRAC. & REM. §74.351(Vernon Supp. 2005)

INDEX OF AUTHORITIES

Cases

<i>Abilene Diagnostic Clinic v. Downing</i> , 233 S.W.3d 532 (Tex.App.–Eastland 2007, pet. denied)	4
<i>American Transitional Care Ctrs. of Texas v. Palacios</i> , 46 S.W.3d at 873 (Tex. 2001)	4
<i>Arthur Anderson & Co. v. Perry Equipment Corp.</i> , 945 S.W.2d 812 (Tex. 1997)	7,8
<i>Bocquet v. Herring</i> , 972 S.W.2d 19 (Tex. 1998)	4
<i>Diamond v. San Soucie</i> , 239 S.W.3d 428 (Tex.App.–Dallas 2007, no pet.)	10
<i>ERA Realty Group, Inc. v. Advocates for Children and Families, Inc.</i> , 267 S.W.3d 114 (Tex.App.–Corpus Christi-Edinburg 2008, pet. filed)	8,9
<i>Garcia v. Gomez</i> , 2008 WL 5083707 (Tex.App.–Corpus Christi-Edinburg December 4, 2008)	6
<i>Hagedorn v. Tisdale</i> , 73 S.W.3d 341 (Tex. App.–Amarillo 2002, no pet.)	8
<i>Haynes v. City of Beaumont</i> , 35 S.W.3d 166 (Tex.App.–Texarkana 2000, no pet.)	5,6
<i>Prestwood v. Settle</i> , 2008 WL 537159 (Tex.App.–Houston [1 st Dist] February 28, 2008, pet. denied)	11
<i>Ragsdale v. Progressive Voter’s League</i> , 801 S.W.2d 880 (Tex. 1990)	10
<i>Residential Dynamics, LLC v. Loveless</i> , 186 S.W.3d 192 (Tex.App.–Fort Worth 2006, no pet.)	5,6
<i>Sandles v. Howerton</i> , 163 S.W.3d 829 (Tex.App.–Dallas 2005, no pet.)	11

<i>Tibbetts v. Gagliardi</i> , 2 S.W.3d 659 (Tex. App.–Houston [14 Dist.] 1999, pet. denied)	4
<i>Trevino v. Carrizales</i> , 2006 WL 2371350 (Tex.App.–Corpus Christi-Edinburg August 17, 2006, no pet.)	4,11
<i>Vanderwerff v. Beathard</i> , 239 S.W.3d 406 (Tex.App.–Dallas 2007, no pet.)	4

Statutes

TEX.CIV.PRAC. & REM. §38.004 (Vernon 1985)	8
TEX.CIV.PRAC. & REM. §74.351 (Vernon Supp. 2005)	<i>passim</i>
TEX.R.CIV.P. 166a(c)(Vernon 1997)	6

STATEMENT OF THE CASE

The underlying lawsuit was a medical negligence claim filed by the Respondents against Petitioner Samuel Garcia, M.D., among others. The trial court subsequently entered an Order Granting Defendant Samuel Garcia, Jr., M.D.'s Motion for Dismissal Pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code. However, such order failed to award Petitioner his attorney's fees. The order was signed by Judge Arnaldo Cantu, Judge of the County Court at Law No. 5, Hidalgo County, Texas, on December 19, 2007.

Dr. Garcia filed his appeal of the trial court's failure to award attorney's fees to the Thirteenth Court of Appeals. The parties in the Court of Appeals, Thirteenth Judicial District of Texas, Corpus Christi–Edinburg, were Samuel Garcia, Jr., M.D., Defendant in the case below; Maria Gomez, Individually and as Representative of the Estate of Ofelia Marroquin, Ramona G. Cisneros, Dolores G. Guerrero, Juan G. Marroquin, Ofelia G. Aracely, and Ezekiel Gonzalez, Plaintiffs in the case below; and Savannah Robinson, the Plaintiffs' attorney in the case below.

On December 4, 2008, the Thirteenth Court of Appeals affirmed the judgment of the trial court. The Opinion was authored by Chief Justice Valdez, and Justices Yanez and Benavides participated in the decision. The opinion can be found on Westlaw® at 2008 WL 5083707 (Tex.App.–Corpus Christi-Edinburg, December 4, 2008). Petitioner's motion for rehearing *en banc* was denied on January 8, 2009.

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction over this proceeding pursuant to §22.001(a)(2), (3) and (6) of the Texas Government Code because this case presents a conflict between the courts of appeals regarding an evidentiary standard; presents a conflict *within* the Thirteenth Court of Appeals regarding an evidentiary standard; involves the construction of a statute necessary to the determination of this case – Section 74.351 of the Texas Civil Practice and Remedies Code; and because the Thirteenth Court of Appeals has committed an error of law of such importance to the state’s jurisprudence that it should be corrected.

ISSUE PRESENTED

Is an Award of Attorney’s Fees Pursuant to Section 74.351 Mandatory When a Physician Defendant Provides the Trial Court with Evidence to Justify an Award?

STATEMENT OF FACTS

Petitioner affirms that the Court of Appeals correctly stated the nature of the case, with the exception of certain pertinent facts being omitted. In addition to the background noted in the Thirteenth Court of Appeals' Opinion, the following facts are also believed to be pertinent to a determination of this appeal:

On June 19, 2007, Plaintiffs Maria Gomez, Individually and as Representative of the Estate of Ofelia Marroquin, filed Plaintiffs' Original Petition which alleged a health care liability claim against Defendant Samuel Garcia, Jr., M.D., among others. (App. 1). Plaintiffs admittedly failed to serve an expert report and curriculum vitae as to Defendant Garcia within the one hundred twenty day period provided for in Section 74.351(a) of the Texas Civil Practice & Remedies Code. (App. 2, 4). On October 24, 2007, Petitioner filed his Motion for Dismissal Pursuant to Section 74.351(b) of the Texas Civil Practice & Remedies Code, wherein Petitioner asserted that Plaintiffs wholly failed to comply with Section 74.351 by failing to serve Petitioner with an expert report within the one hundred twenty day statutory period. (App. 2). After a hearing on Defendant's Motion for Dismissal, the trial court entered an Order Granting Dismissal with Prejudice on December 19, 2007. (App. 3). Although such order properly dismissed Plaintiffs' causes of action against Defendant Garcia with prejudice, such order failed to award Defendant Garcia his attorney's fees incurred up to the point of dismissal. (*Id.*) Such order also failed to award Defendant Garcia his requested contingent appellate attorneys' fees. (*Id.*).

SUMMARY OF THE ARGUMENT

In its Opinion, the Thirteenth Court of Appeals relied on an inapplicable evidentiary standard and ignored its own precedent, in its determination that Petitioner did not provide sufficient evidence to support an award of attorney's fees. Section 74.351(b) of the Texas Civil Practice & Remedies Code mandates that a trial court dismiss a plaintiff's medical negligence cause of action with prejudice, *and award costs and attorney's fees*, if a plaintiff fails to comply with the statutory deadlines. TEX.CIV.PRAC. & REM. §74.351(b)(Vernon Supp. 2005). Plaintiffs wholly failed to serve Petitioner with an expert report pursuant to Section 74.351(a). Petitioner provided legally sufficient testimonial evidence regarding the attorney's fees and costs incurred. Accordingly, the trial court abused its discretion by failing to award Petitioner the reasonable attorney's fees and costs of court incurred by Petitioner, and the Thirteenth Court of Appeals erred in affirming such denial. Such opinion defies the spirit and intent of Section 74.351.

ARGUMENT

A. The Issue Raised by This Petition for Review Requires this Court's Attention and Guidance and this Court Should Exercise its Discretion to Hear This Case.

This Court should exercise its discretion and grant this petition, as the issue of whether a defendant healthcare provider is entitled to an award of attorney's fees mandated by Section 74.351 of the Texas Civil Practice and Remedies Code is of utmost importance to the state's jurisprudence, and justifies this Court's attention.

Rule 56.1(a) of the Texas Rules of Appellate Procedure contains at least three factors which are applicable to this case.

First and foremost, this case involves a conflict between the courts of appeals as to the evidentiary standard applicable to the award of attorney's fees pursuant to Section 74.351 of the Texas Civil Practice & Remedies Code. In fact, the Opinion directly conflicts with prior opinions from the Thirteenth Court of Appeals, one of which was even authored by Chief Justice Valdez. Additionally, this case involves the interpretation of Section 74.351 as to whether the seemingly mandatory language of Section 74.351(b) is in fact mandatory, or whether the trial court can, utilizing its own discretion, simply refuse to award attorney's fees. The Thirteenth Court of Appeals once again refuses to follow the plain and unambiguous language of Section 74.351. Accordingly, the issue presented in this petition clearly involves the construction of a portion of a statute – specifically Section 74.351 of the Texas Civil Practice & Remedies Code.

Finally, the Thirteenth Court of Appeals has committed an error of law in its Opinion, that is of utmost significance to this state's jurisprudence, such that it requires correction. The legislative intent of Section 74.351 was to curtail the filing of frivolous lawsuits by imposing a mandatory award of attorney's fees. Such intent is widely recognized in this state's jurisprudence. However, Chief Justice Valdez has issued a contradictory opinion, straying far from precedent and from the

unambiguous legislative intent, thus creating absurd results. Accordingly, this issue involves an important question of state law that should be addressed by this Court.

B. The Trial Court Ignored the Plain and Unambiguous Language of Section 74.351(b) in its Failure to Award Petitioner His Mandated Attorney's Fees.

In a health care liability claim, Section 74.351(b) mandates that, upon a plaintiff's failure to comply with Section 74.351(a), the trial court **shall** award reasonable attorneys' fees and costs of court to a successful defendant. TEX.CIV.PRAC. & REM §74.351(b)(Vernon Supp. 2005)(App. 6)(emphasis added); *Tibbetts v. Gagliardi*, 2 S.W.3d 659 (Tex. App.–Houston [14 Dist.] 1999, pet. denied). “Statutes providing that a party ‘shall’ be awarded attorney’s fees are not discretionary.” *Abilene Diagnostic Clinic v. Downing*, 233 S.W.3d 532, 535 (Tex.App.–Eastland 2007, pet. denied)(quoting *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)). If the requirements of Section 74.351(a) are not met, the trial court may not completely deny a duly filed motion for attorney’s fees and costs of court. *Trevino v. Carrizales*, 2006 WL 2371350 (Tex.App.–Corpus Christi-Edinburg August 17, 2006, no pet.)(quoting *Bocquet*, 972 S.W.2d at 20). Furthermore, it is an abuse of discretion for the trial court to refuse to award a defendant attorney’s fees after dismissing the cause with prejudice. *Downing*, 233 S.W.3d at 535 (citing *American Transitional Care Ctrs. of Texas v. Palacios*, 46 S.W.3d at 873, 877 (Tex. 2001)); see also *Vanderwerff v. Beathard*, 239 S.W.3d 406, 409 (Tex.App.–Dallas 2007, no pet.)(holding that attorney’s fees and costs of court are mandatory under the MLIIA

when a claimant fails to file an expert report on a health care liability claim and remanding the case solely for the determination of attorney's fees and costs of court incurred by defendant).

C. The Thirteenth Court of Appeals Erroneously Applied an Evidentiary Standard Applicable Only to Motions for Summary Judgment, in its Holding That Petitioner's Counsel's Testimony Did Not Support an Award of Attorney's Fees.

In its holding affirming the denial of statutorily mandated attorney's fees, the Thirteenth Court of Appeals erroneously utilized an evidentiary standard applicable only to affidavits in support of a motion for summary judgment. Specifically, the Opinion cites *Residential Dynamics, LLC v. Loveless*, 186 S.W.3d 192, 198 (Tex.App.–Fort Worth 2006, no pet.) and *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex.App.–Texarkana 2000, no pet.), for the proposition that testimony concerning attorney's fees cannot be conclusory. However, both cases are inapposite.

In *Residential Dynamics*, the summary judgment evidence at issue was the affidavit of Residential Dynamics' manager setting forth the causes of action against appellee in support of its motion for summary judgment. *Residential Dynamics*, 186 S.W.3d at 197. In *Residential Dynamics*, the issue was whether appellant's affidavit was competent summary judgment evidence. *Id.* The issue for the appellate court's consideration was whether the affidavit of an interested witness constituted competent summary judgment evidence. *Id.* The Fort Worth Court of Appeals relied

on Rule 166a(c), which applies **only** to written summary judgment evidence. *Residential Dynamics*, 186 S.W.3d at 198 (emphasis added); TEX.R.CIV.P. 166a(c)(Vernon 1997). The Fort Worth Court of Appeals found the affidavit to be conclusory because it was not susceptible to being readily controverted, and thus did not constitute competent summary judgment evidence. *Id.* at 197-98.

The Thirteenth Court of Appeals mistakenly cited *Residential Dynamics* for the proposition that “[a] statement is conclusory – and therefore constitutes no evidence – if it does not provide the underlying facts to support the conclusion.” *Garcia v. Gomez*, 2008 WL 5083707 (Tex.App.–Corpus Christi-Edinburg December 4, 2008)(App. 5). However, the Thirteenth Court of Appeals failed to consider the fact that the “conclusory” statements in *Residential Dynamics* were contained within an affidavit governed by Rule 166a(c) pertaining to motions for summary judgment.¹

Likewise, in *Haynes*, the summary judgment evidence at issue was the affidavit of an interested party, again pursuant to Rule 166a(c) of the Texas Rules of Civil Procedure. *Haynes*, 35 S.W.3d 166. However, the standard utilized in the determination of competent summary judgment evidence does not apply to the live testimony of Petitioner’s counsel in the instant case.

¹ Rule 166a(c) provides that no oral testimony shall be received at the hearing. Accordingly, all evidence in support of or in opposition to a motion for summary judgment must be competent, admissible and in compliance with Rule 166a(c) and the Texas Rules of Evidence. TEX.R.CIV.P. 166a(c)(Vernon 1997). Unlike live testimony, since the testimonial evidence contained within an affidavit is not subject to cross-examination, affidavit testimony must be clear, positive, direct and easily controverted.

Petitioner's testimony was not presented in the form of an affidavit. (App. 4, p. 10-11). Petitioner's counsel testified in person at the hearing, prepared for cross-examination, which counsel for Respondents chose not to pursue. (*Id.*). As an attorney, Respondent's counsel also had the ability to, in addition to cross-examining Respondent's counsel, offer evidence or testimony of her own to controvert and/or contradict Petitioner's testimony. Accordingly, to characterize Petitioner's testimony on attorney's fees as uncontrovertible blatantly ignores the record.

D. Petitioner Offered Legally Sufficient Evidence to Support an Award of Attorney's Fees.

Factors which the court may consider in determining the amount of attorneys' fees to award include: 1) the time and labor required, novelty and difficulty of the question presented, and the skill required; 2) the likelihood that acceptance of employment precluded other employment; 3) the fee customarily charged for similar services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer performing the services; and 8) whether the fee is fixed or contingent.

Anderson & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (Tex. 1997).²

²The Opinion seemed to imply that only one *Anderson* factor was addressed. However, all of the applicable *Anderson* factors were addressed. While there was no testimony as to factors (2), (5), (6) and (8), all of those factors are inapplicable (i.e. the employment at issue did not preclude any other employment; there were no time limitations imposed by the client or by the circumstances; there was no special professional relationship with the client; and the fee was neither fixed nor contingent). Also, the other factors were either covered by testimony or within the record or the common knowledge of the Court (i.e. the amount of fees - testimony; the amount in controversy - within the record, specifically the pleadings; the non-novelty of the questions presented - within the common knowledge of participants; the

However, “[t]he court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties.” *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.–Amarillo 2002, no pet.). “[T]here is no rigid requirement that both factors [number of hours and hourly rate] must be in evidence for such a determination to be made.” *Id.* at 354. More importantly, and what the Thirteenth Court of Appeals failed to even consider is that, “[t]he court may take judicial notice of the usual and customary attorney’s fees and of the contents of the case file without receiving further evidence in (1) a proceeding before the court;” TEX.CIV.PRAC. & REM. CODE §38.004(Vernon 1985).

Even more incredible, however, is the fact that the author of the Opinion, Chief Justice Valdez, recently held (in a different opinion, obviously) that an attorney’s *affidavit* **was** legally sufficient to support an award of attorney’s fees even though it only contained allegedly conclusory *statements* that the attorney was licensed, that the attorney was familiar with the usual and customary attorney’s fees, that the attorney had personal knowledge of the services provided and that the services were reasonable and necessary. *ERA Realty Group, Inc. v. Advocates for Children and Families, Inc.*, 267 S.W.3d 114, 120 (Tex.App.–Corpus Christi-Edinburg 2008, pet. filed).

fee customarily charged - testimony; the results obtained - case was being dismissed, doesn’t get much better than that; and the experience, reputation and ability of the attorney involved - common knowledge and testimony). See *Anderson*, 945 S.W.2d 812.

A significant difference between the testimony in the instant case and the affidavit in *ERA Realty Group* was that, in the instant case, counsel for Petitioner testified live in court, subjecting himself to cross-examination (App. 4, pp. 10-11), whereas in *ERA Realty* the evidence of attorney's fees was in the form of an affidavit, not subject to cross-examination. *ERA Realty Group, Inc.*, 267 S.W.3d at 119-120. Another important distinction between the cases is that the Respondents' attorney had the right, means and opportunity to offer controverting testimony at the hearing and chose not to do so (App. 4, p. 10), whereas in *ERA Realty*, no evidence would have been allowed. *ERA Realty Group, Inc.*, 267 S.W.3d 114.

In *ERA Realty*, the Thirteenth Court of Appeal (specifically Chief Justice Valdez) held that "[w]here the testimony of an interested witness, however, 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." *ERA Realty*, 267 S.W.3d at 120. In *ERA Realty*, Chief Justice Valdez continued by noting that "[t]his is especially true where the opposing party had the means and opportunity to disprove the testimony or evidence and failed to do so." *Id.*

In the instant case, during the hearing on attorney's fees, counsel for Petitioner testified that he is a licensed attorney practicing medical malpractice litigation in Hidalgo County since 1984; that \$12,200.00 was a reasonable and

necessary attorney's fee for handling the case for Samuel Garcia, Jr., M.D. through the hearing on the motion to dismiss; that \$8,000.00 is a reasonable and necessary attorney's fee if this matter is appealed to the Thirteenth Court of Appeals; that \$5,000.00 is a reasonable and necessary attorney's fee if a petition for review is filed; and that an additional \$6,000.00 is a reasonable and necessary attorney's fee should the Petition for Review be granted. (App. 4, p. 10-11). Such testimony was clear, direct, positive and free from contradiction, inaccuracies or circumstances tending to cast suspicion on such testimony. Additionally, Respondents did not present any evidence to the contrary, nor did Respondents' counsel even cross-examine Mr. Hole, even though she had the opportunity to do so.³ (*Id.*). Accordingly, the instant case is a departure from Thirteenth Court's own precedent, for which the Opinion offers no rationale or explanation.

"Clear, direct, and uncontroverted evidence of attorney's fees is taken as true *as a matter of law*, especially when the opposing party has the means and opportunity to disprove the testimony." *Diamond v. San Soucie*, 239 S.W.3d 428, 432 (Tex.App.–Dallas 2007, no pet.)(emphasis added)(quoting *Ragsdale v. Progressive Voter's League*, 801 S.W.2d 880, 882 (Tex. 1990)). In dismissing Plaintiffs' causes of action against Petitioner, the trial court, in violation of the statutory mandate, and contrary to the clear and direct evidence presented by

³In fact, the trial court specifically asked Respondents' counsel if she had any questions for Mr. Hole to which she replied, "I do not." (*Id.*)

Petitioner, failed to award attorney's fees, where no controverting evidence was presented. (App. 3). Such a decision was an absolute abuse of discretion. See generally *Trevino v. Carrizales*, 2006 WL 2371350.

E. Attorney's Fees Were Incurred by Petitioner.

Furthermore, the holding that Petitioner's counsel was also required to testify that the reasonable and customary fees for handling this matter were actually incurred, is misguided. See *Prestwood v. Settle*, 2008 WL 537159 (Tex.App.–Houston [1st Dist] February 28, 2008, pet. denied)(affirming an award of attorney's fees pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code where the testimony included experience, reasonableness and necessity of fees without any mention of whether the fees were incurred); *Sandles v. Howerton*, 163 S.W.3d 829, 839 (Tex.App.–Dallas 2005, no pet.)(affirming an award of attorney's fees pursuant to former Article 4590i; where the testimony established the reasonableness and necessity of the fees without mention that the fees were incurred).

Accordingly, the Thirteenth Court of Appeals was simply incorrect in its holding that Petitioner's testimony regarding attorney's fees was conclusory, and in holding that Petitioner failed to establish an essential statutory element. In its erroneous opinion, the Thirteenth Court of Appeals ignores its own precedent and bases its holding on wholly inapplicable case law. Never, during the trial court proceeding, did

Respondent's counsel raise any issue as to whether Dr. Garcia "incurred" the attorney's fees at issue. Any such issue is now waived.

F. Conclusions

Section 74.351 provides that if an expert report has not been served within one hundred twenty days of the filing of Plaintiffs' Original Petition, attorney's fees **shall** be awarded. TEX.CIV.PRAC. & REM. §74.351(b)(Vernon Supp. 2005)(App. 6)(emphasis added). The trial court failed to correctly apply the law when it refused to award Petitioner the reasonable attorney's fees incurred and refused to award Petitioner his reasonable contingent appellate attorneys' fees. Since no expert report was served within the one hundred twenty day period, the trial court had no discretion to do anything but dismiss the case with prejudice to its refiling, **and award Petitioner his attorney's fees**, as was shown by the evidence.

Accordingly, this Court should reverse the order of the trial court, in part, and should render an order that Plaintiffs' causes of action against Petitioner be dismissed with prejudice, and that Petitioner be awarded his reasonable and necessary attorneys' fees incurred through the dismissal of the case against him, together with appropriate appellate fees, as testified to by counsel for Petitioner.

PRAYER

Petitioner Samuel Garcia , Jr., M.D. prays that this Court grant his Petition for Review; and after consideration, reverse the trial court's Order Granting Dismissal with Prejudice, in part, and render an order that dismisses Plaintiff's causes of action

against Petitioner with prejudice; awards Petitioner the attorney's fees he is entitled to recover, as prayed for hereinabove; and that this Court grant Petitioner such other and further relief, at law or in equity, which he may be justly entitled to receive.

Respectfully submitted,

HOLE & ALVAREZ, L.L.P.
P. O. Box 720547
McAllen, Texas 78504-0547
Telephone: (956) 631-2891
Telecopier: (956) 631-2415

By: _____
Ronald G. Hole
State Bar I.D. No. 09834200
I. Cecilia Garza
State Bar I.D. No. 24041627

CERTIFICATE OF SERVICE

I, Cecilia Garza, hereby certify that a true and correct copy of the above Petition for Review has, on this **20th** day of **February 2009**, been sent, **by certified mail, return receipt requested** by depositing it enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the care of the custody of the United States Postal Service, to the following counsel of record:

Attorneys for Plaintiffs

Ms. Savannah Robinson
Attorney at Law
1822 Main Street
Danbury, Texas 77534
CMRRR #7008 0150 0002 7711 5624

I. Cecilia Garza

Appendix

INDEX OF APPENDIX

- | | |
|-------|---|
| Tab 1 | Plaintiffs' Original Petition |
| Tab 2 | Defendant Samuel Garcia, Jr., M.D.'s Motion for Dismissal Pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code, filed on October 24, 2007 |
| Tab 3 | Order Granting Dismissal With Prejudice entered on December 19, 2007 |
| Tab 4 | Transcript of Hearing of November 19 ,2007 (incorrectly titled Request for Temporary Injunction) |
| Tab 5 | Opinion of the Thirteenth Court of Appeals in <i>Garcia v. Gomez</i> , Cause No. 13-08-00054-CV, issued on December 4, 2008 |
| Tab 6 | TEX.CIV.PRAC. & REM. §74.351(Vernon Supp. 2005) |