

CASE NO. 09-0159

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

PETITIONER'S BRIEF ON THE MERITS

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

July 31, 2009

CASE NO. 09-0159

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

PETITIONER'S BRIEF ON THE MERITS

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 viii

Statement of the Jurisdiction ix

Issue Presented ix

Is Uncontroverted, Sworn Testimony Regarding the Reasonableness and Necessity of Attorney’s Fees Sufficient to Support an Award of Attorney’s Fees Mandated by Section 74.351? ix

Statement of Facts 1

Summary of the Argument 2

Argument 3

A. The Refusal to Award Section 74.351 Attorney’s Fees Requires this Court’s Attention and Guidance. 3

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

1. An Award of Attorney’s Fees is Mandatory Pursuant to Section 74.351(b). 5

2. The Thirteenth Court of Appeals Deviated from its Own Precedent and Applied an Erroneous Evidentiary Standard in its Opinion Holding That Petitioner Is Not Entitled to an Award of Attorney’s Fees.. . . . 6

3. Petitioner Offered Legally Sufficient Evidence to Support an Award of Attorney’s Fees.. . . . 9

4.	An Award of Appellate Attorney’s Fees is Also Mandated by Section 74.351.	15
5.	Attorney’s Fees Were Incurred by Petitioner.	16
C.	Conclusions.	17
	Prayer	18
	Certificate of Service	19

INDEX OF AUTHORITIES

Cases

<i>Abilene Diagnostic Clinic v. Downing</i> , 233 S.W.3d 532 (Tex.App.–Eastland 2007, pet. denied)	5,6
<i>American Transitional Care Ctrs. of Texas v. Palacios</i> , 46 S.W.3d 873 (Tex. 2001)	4,6
<i>Arthur Anderson & Co. v. Perry Equipment Corp.</i> , 945 S.W.2d 812 (Tex. 1997)	9,11
<i>Aviles v. Aguirre</i> , 2009 WL 1901637 (Tex. July 3, 2009).	16
<i>Bocquet v. Herring</i> , 972 S.W.2d 19 (Tex. 1998)	5
<i>Collins v. Guinn</i> , 102 S.W.3d 825 (Tex.App.–Texarkana 2003, pet. denied)	9
<i>Diamond v. San Soucie</i> , 239 S.W.3d 428 (Tex.App.–Dallas 2007, no pet.)	15
<i>Doctors’ Hospital at Renaissance, Ltd. v. Ramirez</i> , 2008 WL 2744629 (Tex.App.–Corpus Christi-Edinburg July 10, 2008, no pet.)	6
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238 (Tex. 1985)	5
<i>Elboar v. Estrello</i> , 965 S.W.2d 754 (Tex.App.–Fort Worth 1998, no pet.)	6
<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. denied) . . .	14,15
<i>Garcia v. Gomez</i> , 2008 WL 5083707 (Tex.App.–Corpus Christi-Edinburg December 4, 2008)	8,9

<i>Hagedorn v. Tisdale</i> , 73 S.W.3d 341 (Tex. App.–Amarillo 2002, no pet.)	10,12,13
<i>Haynes v. City of Beaumont</i> , 35 S.W.3d 166 (Tex.App.–Texarkana 2000, no pet.)	7,8
<i>Hoelscher v. Kilman</i> , 2006 WL 358238 (Tex.App.–Austin February 16, 2006, no pet.)	7,12,15,16
<i>Medical Hosp. of Buna Texas, Inc. v. Wheatley</i> , 2008 WL 5978895 (Tex.App.–Beaumont April 23, 2009, pet. filed)	5,10,13,15
<i>Prestwood v. Settle</i> , 2008 WL 537159 (Tex.App.–Houston [1 st Dist] February 28, 2008, pet. denied)	17
<i>Ragsdale v. Progressive Voter’s League</i> , 801 S.W.2d 880 (Tex. 1990)	6,15
<i>Residential Dynamics, LLC v. Loveless</i> , 186 S.W.3d 192 (Tex.App.–Fort Worth 2006, no pet.)	7,8
<i>Sandles v. Howerton</i> , 163 S.W.3d 829 (Tex.App.–Dallas 2005, no pet.)	17
<i>Tibbetts v. Gagliardi</i> , 2 S.W.3d 659 (Tex. App.–Houston [14 Dist.] 1999, pet. denied)	5
<i>Trevino v. Carrizales</i> , 2006 WL 2371350 (Tex.App.–Corpus Christi-Edinburg August 17, 2006, no pet.)	5,6,15
<i>Vanderwerff v. Beathard</i> , 239 S.W.3d 406 (Tex.App.–Dallas 2007, no pet.)	6,15
<i>Walker v. Gutierrez</i> , 111 S.W.3d 56 (Tex. 2003)	5

Statutes

TEX.CIV.PRAC. & REM. §38.004 (Vernon 1985)	10
---------------------------------------------------------	----

TEX.CIV.PRAC. & REM. §74.351 (Vernon Supp. 2005)	2,5,17
TEX. GOV'T CODE ANN. § 311.016(2) (Vernon 1998)	5
TEX.R.CIV.P. 166a(c) (Vernon 1997)	8

STATEMENT OF THE CASE

The underlying lawsuit was a medical negligence claim filed by the Respondents against Petitioner Samuel Garcia, M.D., among others. (C.R. 4-14). The trial court 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. (C.R. 58-59). However, such order failed to award Petitioner his attorney's fees. (*Id.*). The order was signed by Judge Arnoldo Cantu, Judge of the County Court at Law No. 5, Hidalgo County, Texas, on December 19, 2007. (C.R. 59).

Dr. Garcia appealed the trial court's failure to award attorney's fees to the Thirteenth Court of Appeals. (C.R. 60-61). The parties in the Thirteenth Court of Appeals 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. Arcelay, 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 the mandatory nature of the award of attorney's fees pursuant to Section 74.351; presents a conflict *within* the Thirteenth Court of Appeals regarding the evidentiary standard applicable to the award of statutorily mandated attorney's fees; 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 requires correction.

ISSUE PRESENTED

Is Uncontroverted, Sworn Testimony Regarding the Reasonableness and Necessity of Attorney's Fees Sufficient to Support an Award of Attorney's Fees Mandated by Section 74.351?

STATEMENT OF FACTS

Petitioner affirms that the Court of Appeals correctly stated the nature of the case in the Opinion's background, with certain exceptions. Although Petitioner appealed from a final appealable order (Order Granting Dismissal with Prejudice (C.R. 58-59)) pursuant to Rule 26.1(a) of the Texas Rules of Appellate Procedure, the Thirteenth Court of Appeals' Opinion incorrectly characterizes Petitioner's appeal as an accelerated appeal, pursuant to Section 51.014(a)(9) of the Texas Civil Practice and Remedies Code.

Additionally, 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. (C.R. 4-14). 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 and agreed to a dismissal. (R.R. 8). 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. (C.R. 38-41). After a hearing on Defendant's Motion for Dismissal,

the trial court entered an Order Granting Dismissal with Prejudice on December 19, 2007. (C.R. 58-59). 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, ignored its own precedent and ignored applicable case law in affirming the denial of an award of attorney's fees pursuant to Section 74.351. 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)(emphasis added). Plaintiffs wholly failed to serve Petitioner with an expert report pursuant to Section 74.351(a).

Petitioner provided legally sufficient testimonial evidence, subject to cross-examination, regarding the attorney's fees and costs incurred. (R.R. 10-11). However, 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 ignores the

statute's plain and unambiguous language, well-settled case law and defies the intent of Section 74.351. Thus, this erroneous opinion requires this Court's correction.

ARGUMENT

A. The Refusal to Award Section 74.351 Attorney's Fees Requires this Court's Attention and Guidance.

This Court should exercise its discretion and grant Samuel Garcia, Jr., M.D.'s Petition for Review, as the issue of whether a defendant healthcare provider is entitled to the 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 underlying Opinion directly conflicts with prior opinions from the Thirteenth Court of Appeals, one of which was actually authored by Chief Justice Valdez, the author of the Opinion in the instant case. 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 has refused 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 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. *American Transitional Care Ctrs. of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001).

Such intent is widely recognized in this state's jurisprudence. However, Chief Justice Valdez has authored a contradictory opinion, straying far from precedent and far from the unambiguous legislative intent, resulting in an absurd outcome. Accordingly, this issue involves an important question of state law which should be addressed by this Court.

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

An abuse of discretion standard of review applies to a trial court's decision to dismiss a case under Section 74.351 of the Texas Civil Practice & Remedies Code. *Palacios*, 46 S.W.3d at 878. "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or

principles.” *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)).

1. An Award of Attorney’s Fees is Mandatory Pursuant to Section 74.351(b).

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 attorney’s fees and costs of court to a successful defendant. TEX.CIV.PRAC. & REM §74.351(b)(Vernon Supp. 2005)(emphasis added); *Tibbetts v. Gagliardi*, 2 S.W.3d 659 (Tex. App.–Houston [14 Dist.] 1999, pet. denied). The term “shall” imposes a mandatory duty on the trial court. See TEX. GOV’T CODE ANN. § 311.016(2) (Vernon 1998). Accordingly, “[s]tatutes 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)).

“Like dismissal under section 74.351, an award of costs and attorney’s fees under section 74.351 is not discretionary.” *Medical Hosp. of Buna Texas, Inc. v. Wheatley*, 2008 WL 5978895 (Tex.App.–Beaumont April 23, 2009, pet. filed). Accordingly, 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 *Palacios*, 46 S.W.3d at 877); *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.)

2. The Thirteenth Court of Appeals Deviated from its own Precedent and Applied an Erroneous Evidentiary Standard in its Opinion Holding that Petitioner is Not Entitled to an Award of Attorney’s Fees.

The Thirteenth Court of Appeals has previously held, in connection with a dismissal pursuant to former Article 4590i, Section 13.01, that “[a]lthough the trial court has discretion to set the amount of reasonable attorney’s fees, the court may not, in circumstances such as these, completely deny a duly filed motion for attorneys fee’s [sic] and costs of court.” *Doctors’ Hospital at Renaissance, Ltd. v. Ramirez*, 2008 WL 2744629 (Tex.App.–Corpus Christi-Edinburg July 10, 2008, no pet.)(quoting *Trevino v. Carrizales*, 2006 WL 2371350).

Petitioner agrees that, in order to recover the mandatory attorney’s fees, a party generally must put on some evidence. See *Elboar v. Estrello*, 965 S.W.2d 754, 759 (Tex.App.–Fort Worth 1998, no pet.). “Evidence of attorney’s fees that is clear, direct, and uncontroverted is taken as true as a matter of law, especially where the opposing party had the means and opportunity of disproving evidence but did not.” *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990). “In such instances, **appellate courts will reverse a denial or minimization of attorney’s**

fees and render judgment for attorney's fees in the amount proved." *Id.* (emphasis added); *Hoelscher v. Kilman*, 2006 WL 358238 (Tex.App.—Austin February 16, 2006, no pet.).

In its Opinion affirming the denial of the statutorily mandated attorney's fees, the Thirteenth Court of Appeals ignored these well-settled legal principles and 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 the affidavit of an interested witness constituted competent summary judgment evidence. *Id.* The Fort Worth Court of Appeals, relying only on Rule 166a(c)(which applies **only** to written summary judgment evidence), 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). 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.

Petitioner’s testimony was not presented in the form of an affidavit. (R.R. 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, Respondents’ 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

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.

contradict Petitioner's testimony. Accordingly, to characterize Petitioner's testimony on attorney's fees as uncontrovertible blatantly ignores the record.

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

The Thirteenth Court of Appeals held that courts are to consider the following factors 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. *Garcia*, 2008 WL 5083707 (quoting *Arthur Anderson & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)).

The Opinion noted that only one *Anderson* factor was addressed. However, at least one court of appeals has held that *Anderson* applies to determining an attorney's fees award when contingency fee agreements are in place and does not address the facts that a trial court should consider in awarding attorney's fees based on an hourly contract. *Collins v. Guinn*, 102 S.W.3d 825, 836 (Tex.App.–Texarkana 2003, pet. denied).

Because the *Anderson* factors address contingency fee agreements, and this case involves attorney's fees incurred on an hourly basis, at least four factors ((2),

(5), (6) and (8)) are inapplicable in the instant case. The employment at issue did not preclude any other employment; there were no time limitations imposed by the client or by the circumstances; and there was no special professional relationship with the client. “The 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.” *Wheatley*, 2008 WL 5978895 (quoting *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.–Amarillo 2002, no pet.)). Furthermore, there is no rigid requirement that the number of hours and hourly rate must be in evidence for such a determination to be made. *Hagedorn*, 73 S.W.3d 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).

During the hearing on Defendant’s Motion for Dismissal held on November 19, 2007, Ronald G. Hole, counsel for Petitioner, testified that he is experienced in medical-malpractice litigation, practicing since 1984. (R.R. 10). He testified that he is familiar with the usual and customary attorneys’ fees for handling medical negligence cases. (R.R. 10). He testified further that a reasonable and necessary fee for handling this matter through the hearing on Defendant’s motion for dismissal was \$12,200.00, 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. (R.R. 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. It is also clear that, notwithstanding the fact that Plaintiffs' attorney also had the opportunity to cross-examine Mr. Hole, she chose not to. (R.R. 10-11).

Accordingly, with the testimony of Petitioner's counsel, the record and the common knowledge of the participants and the Judge, the trial court had not only sufficient, but also substantial, evidence before it to justify the mandatory award of attorney's fees in connection with dismissal pursuant to Section 74.351. Petitioner's counsel testified to the amount of the fees, which are customary in medical negligence cases in the area. (R.R. 10). The amount in controversy is contained within the pleadings on file. (C.R. 4-14). The non-novelty of the questions presented are within the common knowledge of counsel and the court. The case was dismissed; therefore, the results obtained were favorable. (C.R. 58-59). The experience, reputation and ability of the attorney involved is within the common knowledge of the Judge as well as the testimony of Petitioner's counsel. (R.R. 10). See *Anderson*, 945 S.W.2d 812.

The Austin Court of Appeals has held similar testimony to be clear, direct and positive. *Hoelscher*, 2006 WL 235238 p. 4. In *Hoelscher*, the evidence of attorney's fees was that the attorney had been practicing law for approximately 15 years. *Id.* The evidence also included the attorney's hourly rate of \$140.00 per hour and the total legal expenses of \$8,680.00 were reasonable and necessary. *Id.* As with the instant case, the opposing attorney did not offer any evidence to refute such testimony and did not cross-examine appellee's attorney. *Id.* Accordingly, the Austin Court of Appeals found that appellees established the amount of attorney's fees *as a matter of law* and the trial court's decision to reduce the amount of the award was "arbitrary and without reference to any guiding rules or principles." *Id.* (emphasis added).

Similarly in *Hagedorn*, the evidence as to attorney's fees included the length of time that counsel had been practicing law, his board certification, the total amount of legal fees, the attorney's hourly rate and that such fees were reasonable and necessary. *Hagedorn*, 73 S.W.3d at 353. Upon questioning by the trial court, counsel testified that he obtained the total amount of attorney's fees by multiplying the time each individual in the firm worked on the case by such individual's hourly rate. *Id.* The Amarillo Court of Appeals held that the trial court had testimony on the total fees claimed, the amount of time spent on the case as well as the hourly rate charged by each individual working on the case. *Id.* at 354. The Court of Appeals further noted that "while the court did not have the total number of hours spent on

the case by each person who had devoted time to it, it still had some means to determine the approximate number of hours spent.” *Id.*

In *Wheatley*, the evidence of attorney’s fees was offered through an affidavit. *Wheatley*, 2008 WL 5978895 at 7. The affidavit was made on personal knowledge, demonstrated the affiant’s competence as an attorney who found the fees to be reasonable based upon his education, his experience in defending health care providers in similar cases and his training.” *Id.* As in the instant case, *Wheatley* presented no evidence to controvert the affidavit. *Id.*

The testimony in the instant case is strikingly similar to the evidence in *Hoelscher*, *Hagedorn* and *Wheatley*, which was considered sufficient to support an award of attorney’s fees. However, in a departure from the holdings of the Austin, Amarillo and Beaumont courts of appeals, the Corpus Christi Court of Appeals upheld the erroneous denial of attorney’s fees.

Furthermore, and of utmost importance to this petition for review, is the fact that the Thirteenth Court of Appeals failed to follow its own precedent. In an Opinion recently authored by Chief Justice Valdez, the author of the underlying Opinion, the Thirteenth Court of Appeals held 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. denied).

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, 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. Additionally, the Respondents’ attorney had the right, means and opportunity to offer controverting testimony at the hearing and chose not to do so, 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) in allowing the attorney’s fees affidavit as competent evidence of attorney’s fees 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.*

Notwithstanding *ERA Realty*, Respondents and the court of appeals focus on what Mr. Hole did not testify about, instead of his actual testimony, which counsel for Respondents did not controvert, even though she had the ability and opportunity to do so. (R.R. 10-11). 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*, 801 S.W.2d at 882). 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 Petitioner, failed to award attorney's fees, where no controverting evidence was presented. Such a decision was an absolute abuse of discretion. See generally *Wheatley*, 2008 WL 5978895; *Vanderwerff*, 239 S.W.3d at 409; *Trevino v. Carrizales*, 2006 WL 2371350.

4. An Award of Appellate Attorney's Fees is Also Mandated by Section 74.351.

The language in Section 74.351 is not only clear and unambiguous, but it is also mandatory. Therefore, the trial court is not vested with any discretion in its determination of whether appellate attorney's fees should be awarded. *Hoelscher*, 2006 WL 358238 p. 5. In *Hoelscher*, counsel for appellees testified that reasonable and necessary attorney's fees for an appeal to the court of appeals were \$3,000.00;

fees for responding to a petition for review were \$2,500.00; and an additional \$2,500.00 should a petition for review be granted. *Id.* The trial court failed to award any appellate attorney's fees. *Id.* The Austin Court of Appeals found such failure to be an abuse of discretion, since the evidence was sufficient and uncontested. *Id.*

In this case, Petitioner's testimony regarding appellate fees during the hearing on Defendant's Motion for Dismissal was that \$8,000.00 would be a reasonable and necessary attorney's fee if this matter was appealed to the Thirteenth Court of Appeals; \$5,000.00 would be a reasonable and necessary attorney's fee if a petition for review was filed and an additional \$6,000.00 would be a reasonable and necessary attorney's fee should a Petition for Review be granted. (R.R. 10). As with the evidence presented in *Hoelscher*, Respondents did not cross-examine or controvert the amounts testified to by Petitioner. (R.R. 11). However, the trial court erroneously failed to award any appellate attorney's fees. (C.R. 58-59). Such failure was arbitrary, without reference to any guiding rules or principles and a clear departure from the prior opinions of its sister courts of appeals. Accordingly, this Court should grant this petition for review in order to correct the erroneous opinion of the Thirteenth Court of Appeals.

5. Attorney's Fees Were Incurred by Petitioner.

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, as this issue has already been resolved by this Court. *Aviles v. Aguirre*,

2009 WL 1901637 (Tex. July 3, 2009)(reversing the Thirteenth Court of Appeals and holding that attorney's fees and costs of court are incurred by the healthcare defendant even when paid by the insurance carrier); *see also 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, this is yet another erroneous holding contained within the Thirteenth Court of Appeals' Opinion, which requires this Court's attention and correction.

C. 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)(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.

The Thirteenth Court of Appeals was simply incorrect in affirming the denial of Petitioner's statutorily mandated attorney's fees. In its ill-advised opinion, the Thirteenth Court of Appeals ignores its own precedent, the precedent set by various courts of appeals, including this Court's, and bases its holding on wholly inapplicable case law.

Accordingly, this Court should reverse the order of the trial court, in part, and should render an order that Respondents' 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 **31st** day of **July 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 8458

I. Cecilia Garza