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Supreme Court of Texas.
Ford Motor Company

v.
Richard H. Garcia.

No. 10-0953.

December 8, 2011.

Appearances:

Michael Eady of Thompson, Coe, Cousins & Irons, LLP, for Petitioner.

Isaac Tawil of Garcia Quintanilla & Palacios, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0953, Ford Motor Company v. Richard Garcia.

MARSHAL: May it please the Court, Mr. Eady will present argument for the Petitioners. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL EADY ON BEHALF OF THE PETITIONER

ATTORNEY MICHAEL EADY: May it please the Court, this case represents an opportunity for this Court to conform Texas practice to the straightforward language and homage of Rule 173 governing the employment and compensation and guardian ad litem. Every day throughout this state, Texas state courts appoint guardian ad litem in connection with the settlements and personal injury cases. This case is very typical in that regard. Ford Motor Company reached a settlement with the Plaintiffs. In connection with that settlement, there was a potential conflict in the division of the proceeds between the Next Friend and the Ward.

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me ask you. Do you think that there was any significance to the fact that the trial court labeled this ad litem as an attorney ad litem as opposed to a guardian ad litem?

ATTORNEY MICHAEL EADY: No, Your Honor, we do not. There is a lot of confusion out there and you see that in this case too, but I think this case falls within the same situation as what happened in the Brownsville Medical Center case that this Court decided and there in the opinion, this Court noted that there was some con-

fusion amongst the lawyers and the trial court and in fact, in a footnote, the Court says that, the trial court's improper designation in the ad litem is not of controlling import. Same reasoning applies here for several reasons. Number one, the judgment awards the fees to the guardian ad litem. Number two, during the transcript, during the hearing itself for determining the fee amount, questions were asked. The very second question was asked of the ad litem, were you not appointed as the guardian ad litem, to which he answered yes I was and we see that throughout the hearing transcript itself and we see it throughout the briefing in the case. If you go through all the briefing at the court of appeals' level, you will see that the ad litem refers to being appointed as the guardian ad litem and in fact, you even see it in this Court until the brief on the merits and if you're going through the brief on the merits, you'll see the reference to guardian ad litem changed to attorney ad litem except until you get to the prayer on page 22, which the relief request is to affirm the award of fees to the guardian ad litem.

JUSTICE DAVID M. MEDINA: Where's the abuse of discretion here in the trial court? I mean there is some evidence it appears as written by Justice Benavides to support the trial court's decision. So where's the abuse of discretion here?

ATTORNEY MICHAEL EADY: An abuse of discretion occurred, Your Honor, because the rule was not complied with. The guardian ad litem here was appointed in connection with the division of a conflict that arose in the division of the proceeds.

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY MICHAEL EADY: It was a very limited appointment. Under Rule 173, the terms provide that when an ad litem is appointed in that situation, they have the limited duty to determine and advise the court where the settlement is in the party's best interest. It's a limited duty. Now-

JUSTICE DAVID M. MEDINA: Does a trial judge, is he or she to consider the extent of the injury? Is it more than saying this is a good deal, sign off on it? Isn't there a little more to it than that?

ATTORNEY MICHAEL EADY: Oh, it's a lot more. The trial judge is going to look at, he's looking to this person who's been appointed as an officer and advisor to the court to assist the court in protecting the interest of the ward. In connection with that, that officer and advisor is going to look at certain information and they're going to look at, for example, in determining who the players are, what's the settlement, what's the split of the settlement, what's the attorneys fees, how's that being calculated and then they're going to go back and advise the court whether or not the court should approve the settlement under Rule 44. Now, which you run into the problem is if the ad litem goes outside that scope and starts doing other things like in this case doing such things as reviewing the motion of transfer of venue. Well, the reviewing the motion of transfer of venue had nothing to do with the division of the settlement proceeds. Looking at the response to the motion of transfer of venue. Receive and review correspondence passing the hearing on the motion of transfer of venue. Receive and review correspondence relating to a motion to admit an attorney for pro hoc purposes. Notices of additional counsel. Receive and review answers of not only Ford Motor Company but Cooper Tire. Receive and review Cooper Tire's response on the motion to transfer venue.

JUSTICE DEBRA H. LEHRMANN: Excuse me, but isn't really it difficult to draw that line because the guardian ad litem's duty is to determine not only whether the settlement is fair, but also under the participation and litigation a must participate in any proceeding to determine whether a settlement of the party's claim is in the party's best interest and so to do all of that, isn't it very difficult to determine exactly what needs to be reviewed and what doesn't and where would we draw that line?

ATTORNEY MICHAEL EADY: It should not be that difficult. Clearly, these things are outside the scope. Clearly, certain things are within the scope. Looking at the settlement agreement is within the scope. Looking a meeting with the client or not the client here, but meeting with the ward or meeting with the next friend, there are some things that the guardian ad litem must do. The rule says, you must participate in the hearing to approve

the settlement and that's actually one of the things the ad litem in this case didn't do. That was delegated to someone else so even though he was appointed to be the guardian ad litem, he didn't even do that. There's really a checklist of things you can go down and you can also go down and you can look at what was submitted on this bill and things like receive and review the client's authorization to recycle paper material, okay. If you use a baseball analogy, that one is not crossing the plate. If you look at receive and review written discovery, receive and review the vehicle inspection report, again, it doesn't match with what the rule provides. Go to Rule 173, drop down to comment number three. Now, Rule 173 is a backdrop and really contemplates the appointment of a guardian ad litem in two situations. Okay, scenario one is the scenario where there's a potential conflict and the responsibility is to advise the court is there a conflict between the ward and the next friend. Scenario two, that's the more common situation. That's this situation. We have a settlement that's proposed. Now in this situation, comment three says, in that situation, the responsibilities of the guardian ad litem is very limited. No reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery of the litigation filed except to the limited extent that it may bear upon the division of the settlement proceeds. The comment ends by stating that the guardian ad litem may, of course, choose to do these things, choose to attend hearings, but they cannot receive compensation for it, but it's to look at things that bear upon the issue that they are appointed to advise the court on and that's in the division of the proceeds of the settlement.

JUSTICE DAVID M. MEDINA: What about the solvency of a party that's funding a settlement, is there a duty to look into that?

ATTORNEY MICHAEL EADY: Beg your pardon?

JUSTICE DAVID M. MEDINA: Solvency of a party that is funding a settlement.

ATTORNEY MICHAEL EADY: No, Your Honor, I would think that is the responsibility of the plaintiff's counsel who is representing both the next friend and the ward. In that situation, that would be their responsibility. Now, just looking at a unique situation here where the plaintiff's counsel cannot represent both parties in connection with this division. They can't do that and so in that situation, you're going to the court and you're asking the court to approve the settlement, but the court is saying well this is a conflict. I need someone to advise me whether or not this is in the best interest of the ward and in that situation, guardian ad litem fulfills a very important role, but it's just limited that situation and when you go beyond that situation, you're really encroaching upon the role of the claims counsel. Interestingly enough, in this case, the plaintiff's counsel owes a one-third, two-thirds split. So one-third should go to the next friend of the proceeds of the settlement and two-thirds should go to the ward, proposed settlement division, and that's the way it stays all the way through the entire sequence of events. The ad litem doesn't make any changes to the settlement documents and ultimately that's what the trial judge approves, that split.

JUSTICE PAUL W. GREEN: If somebody wants to be guardian ad litem in their case or has asked to serve as one, do they have to charge an hourly rate?

ATTORNEY MICHAEL EADY: Do they have to charge an hourly rate?

JUSTICE PAUL W. GREEN: The old way of doing things, of course, is that a lawyer would work on a file and look at the work that he or she had done and arrive at what they thought was a fair fee for what work was done. The statute says, the rule says, under the 173.6, the guardian ad litem, if requests compensation, may be paid a reasonable hourly fee for necessary service performed. It doesn't say anything about any other type of fee like a just a pick a number.

ATTORNEY MICHAEL EADY: Well, the Land Rover case makes clear that anything that's outside just a reasonable hourly rate times the number of hours and necessary services spent performing duties within the scope of the ad litem's role, I mean that's how you calculate it and anything outside of that is disallowed.

JUSTICE PAUL W. GREEN: Okay, so my father, for example, used to go through a file and he was a lawyer and he would go through a file at the end of the case and go through the file to see what he had done and then charge the fee to the client for that amount so he couldn't qualify as a guardian ad litem under this rule. He couldn't be paid for it?

ATTORNEY MICHAEL EADY: No, not doing it that way. He's going to have to list what the service is and he's going to have to list them and he's going to have to list exactly what was done and how long it took and that's one of the huge problems with this particular case because if you look at the guardian ad litem's invoice here, I mean, it starts to look like that old-time invoice that says, for services rendered, number 28, 260 on the front and then when you start flipping it open, you say well what are the services rendered? What did it take? Who did it? How long did they take to do it? We can't find that information.

JUSTICE PAUL W. GREEN: It's like a CPA bill.

ATTORNEY MICHAEL EADY: Right, you run through it and you say I--

JUSTICE PAUL W. GREEN: So they have to break down by category of allowable expense and by hourly fee in order to get a guardian fee in your view.

ATTORNEY MICHAEL EADY: Yes, Your Honor, and this makes very practical sense. It makes practical sense because if there's not an agreement reached on the fee issue, then the guardian ad litem has to file an application. It must be verified and the application will list those things and then that allows the party who's probably going to get taxed with those costs to go down the list and say this is within, this is without. We agree on this. We don't agree on that. You can go into the court and you can say, we disagree on the hourly rate and in fact, we're going to offer testimony on hourly rate and you should know about that beforehand and we disagree on these particular items. So if you agree with that those items were outside the scope, well the total is this. If you agree they're within, the total is this.

JUSTICE PAUL W. GREEN: So you're not really focusing on the amount. You don't have a big dispute over the amount. It's just what the time was spent on, am I correct?

ATTORNEY MICHAEL EADY: And that directly affects the amount. There's certain things that are definitely within-

JUSTICE PAUL W. GREEN: If they were doing all the things that were within the terms of the statute you can get a fee for and it added up to \$28,000, you wouldn't have a complaint here?

ATTORNEY MICHAEL EADY: Well, Your Honor, it's hard to imagine ever coming up with \$28,000 in fees for just doing looking at the settlement and advising the court on whether or not that settlement is in the best interest of the minor or ward.

JUSTICE DAVID M. MEDINA: I guess it depends who's doing the looking.

ATTORNEY MICHAEL EADY: Well, if the person that's doing the looking is charging \$1000 an hour and the court concludes that that \$1,000 an hour is reasonable, then that's a different issue.

JUSTICE DAVID M. MEDINA: Does the magnitude of the case have an impact on what a reasonable fee may be?

ATTORNEY MICHAEL EADY: No. Absolutely not.

JUSTICE DAVID M. MEDINA: Experience of the lawyer, for example, if you have a retired judge making this analysis as opposed to a first-year associate. Does that impact anything?

ATTORNEY MICHAEL EADY: That's one of those factors that's listed in the Anderson factors and it's the one that seems to almost like a magnet. Everything draws to that. The quality of the person that has been appointed to fill the job and which brings up an interesting question is, you know, why do we see so many state Senators being appointed for this. There's lots of really good lawyers out there who charge \$200 an hour that could do the same kind of job and it's not a situation where it's a willing buyer, willing seller. No one comes to Ford Motor Company and says, you're about to be taxed to the costs here. Do want to go out and negotiate and find an ad litem who'll agree to be appointed here? What happens is--

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me ask you something. You're not contending that all of his time is invalid are you?

ATTORNEY MICHAEL EADY: Your Honor, we're not contending that all of it's not compensable.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY MICHAEL EADY: What we're saying is most of it is not. There are some entries at the very end that are, but you can never figure out what would be the correct compensable fee to award here because there's no time associated with it or provision.

JUSTICE DEBRA H. LEHRMANN: But at most, shouldn't we remand so that the court of appeals can look at this and suggest a remittitur?

ATTORNEY MICHAEL EADY: There's two options here. Ford Motor Company would request that the Court reverse and render the judgment that the trial court should have rendered and that was a fee of zero for this reason. Based upon the invoice that was submitted, that didn't support a fee of \$28,260. Secondly, based upon the invoice and the testimony, you could not construct what would be a proper fee because you can't determine how much time was spent on any of the compensable acts or even who did it because his testimony, the guardian ad litem's testimony was that he did not do all of these things that other people did.

JUSTICE DEBRA H. LEHRMANN: But you admit that he did something? He's entitled to something if it were not for the manner in which it was presented, right?

ATTORNEY MICHAEL EADY: He did compensable things, but he had his shot too. He had the burden of proof at that hearing to come forward and he introduced the invoice. He introduced his testimony and that was it and now it's really coming back and saying all right, some of the stuff's not good. I want a third chance. Now this is someone who's an ex-judge, \$500 an hour and come back a third time and say, well, let's go back and recalculate this stuff, which he even says, when you read the transcript that he doesn't know how he could do that, go back and figure out how long the meeting with the next friend took or how long the meeting with the ward took. It's not a situation where he kept those kind of records. So there's two scenarios, Ford Motor Company requests the reverse and render, but alternatively, we see this in a lot of cases that it is reversed and remanded with instructions that the fee be properly calculated in accordance with the rules announced by this Court and that is the alternative relief Ford Motor Company requests.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Tawil will present argument for Respondents.

ORAL ARGUMENT OF ISAAC TAWIL ON BEHALF OF THE RESPONDENT

ATTORNEY ISAAC TAWIL: May it please the Court, good morning. Let me begin my time by saying it's an honor for me to get to be here. This is my first time in this room and it has been an enlightening experience. I have enjoyed my morning very much, so--

JUSTICE DAVID M. MEDINA: Wait until you finish and see if you have the same feeling.

ATTORNEY ISAAC TAWIL: I have the utmost respect for the bar and I am confident that I will respect whatever decision is made in this and all the cases the Court heard today. You know, good conflicts always have to have two interpretations and I have to disagree with the role that the Petitioner says that, the guardian was or the ad litem was appointed to fill in this case and that the role was not as limited in scope as Ford Motor Company contends.

JUSTICE DEBRA H. LEHRMANN: Let me ask you about that. You seem to make a pretty big deal about this difference between whether the attorney was appointed as an attorney ad litem or a guardian ad litem. Now when you look at the case law that deals with this distinction, a real distinction between the two really tends to lie upon that issue of whether or not a client has the capacity to direct counsel and the duty of the attorney to either advocate what the client wants, what the client can direct or what's best for the client, correct? I mean that's really the distinction between the two and so why are you making such a big deal about it when probably in this context, it was just a matter of confusion as far as the term, that was used?

ATTORNEY ISAAC TAWIL: I appreciate the comment of Your Honor and I would say that I make an issue of it because there could be a situation where, as you point out, the role of the guardian versus the attorney would be different. In this case, I don't think it was and in this case, I don't think that the ad litem participated in the litigation as counsel for Ford Motor Company has suggested. The litigation was completed by the time the file got to his office. There was literally ten days, I think, between the time he was given the file and the time that the hearing was held to determine whether the settlement would be approved or not. In that time, the guardian was delivered cases of documents and it was his duty to figure out what was in those boxes, what was relevant to the settlement and what was not relevant to the settlement and the Rule 173.4(c) is clear that the guardian's duty is to advise the court whether the settlement is in the best interest of the party, not limited to a division, a split between the ward and in this case, his next friends.

JUSTICE NATHAN L. HECHT: What do you make of comment three?

ATTORNEY ISAAC TAWIL: I think that comment three is what it is and it certainly suggests that the lawyers should not participate in the litigation for discovery.

JUSTICE NATHAN L. HECHT: It says, the responsibility regarding the ad litem is very limited and no reason exists to participate except to review the file to a limited extent that it may bear on the division of settlement proceeds and then cites our [inaudible] and decision.

ATTORNEY ISAAC TAWIL: Correct and I don't disagree with that, but in order to determine whether the split of the settlement proceeds is equitable as between the parties, how can a lawyer make that determination without knowing the relevant facts of the case without knowing whether the ward was--

JUSTICE NATHAN L. HECHT: Because it doesn't make it, what difference does it make whether it's a product's liability or it's a tire case, rollover case, it's a med mal case. The only thing that a guardian needs to know is as between the next friend and the ward is each getting their appropriate share.

ATTORNEY ISAAC TAWIL: Well, and how do you determine what the appropriate share is is the question I would ask the court. Without looking at the file and without knowing whether there was traumatic brain injury,

whether the ward is going to need lifelong care, what are the needs of that ward and without, you know, looking to see whether those interests were protected through the litigation and whether those interests are being protected in the division of the settlement and the settlement itself, how can the guardian make the recommendation that the code requires that the settlement is in the ward's best interest?

JUSTICE PHIL JOHNSON: How does a review of a motion to transfer of venue when the case has already been settled and charging for that relate to the decision you just discussed?

ATTORNEY ISAAC TAWIL: It doesn't, but in this-

JUSTICE PHIL JOHNSON: But that's what charged for here it looks like.

ATTORNEY ISAAC TAWIL: Well, and again, what's charged for is the time it took the lawyer, Judge Garcia, to make that determination. In this case, Judge Garcia testified--

JUSTICE NATHAN L. HECHT: To make what determination?

ATTORNEY ISAAC TAWIL: His recommendation to the court.

JUSTICE NATHAN L. HECHT: But the question is, why did he need to review the motion of transfer of venue? You just said, he didn't.

ATTORNEY ISAAC TAWIL: He didn't need to review it in the context that it impacted the settlement, but it occupied his time in delving through a file that was delivered to him with no reference.

JUSTICE DALE WAINWRIGHT: How much time?

ATTORNEY ISAAC TAWIL: If he had 10 hours down for that, would you agree that that's just improper?

ATTORNEY ISAAC TAWIL: I would not. If he had five minutes down for that or two minutes down for that, I would think that was reasonable. Again, -

JUSTICE DALE WAINWRIGHT: But 10 hours you would agree is improper.

ATTORNEY ISAAC TAWIL: Ten hours for reviewing a motion to transfer venue in a case that had already settled?

JUSTICE DALE WAINWRIGHT: Yes.

ATTORNEY ISAAC TAWIL: I would believe that is inaccurate.

JUSTICE DALE WAINWRIGHT: But there's no time here so we have no idea, right? We don't know if it's five minutes or it's 10 hours.

ATTORNEY ISAAC TAWIL: That's correct.

JUSTICE DALE WAINWRIGHT: And your client had the burden of establishing a reasonable fee. Without a time on here, we don't know what, how much time you spent for any of these matters. Do you believe that the guardian ad litem has to provide hourly time records?

ATTORNEY ISAAC TAWIL: I don't. I think that the ad litem has the burden to provide a reasonable records to justify the fee that he charged and breaking every minuscule act that he performed down to, you know, there

was a motion to transfer venue in the file and I looked at it for 30 seconds and I set it aside. It's going to take more time to make a record of having done that than it's worth charging for, but certainly looking to verify what discovery was done, the context of the discovery is not participating in the discovery process. It is not propounding questions to the, in this case, Ford, but it is looking at those things to determine that the ward's counsel and the ward's next friend advanced to litigation sufficiently enough so that the settlement can be justified.

JUSTICE DALE WAINWRIGHT: Now there's different ways to prove up a reasonable hourly fee as the rule says. The best practice is probably to have daily and hourly time records with what you did. Would you agree?

ATTORNEY ISAAC TAWIL: I would agree that that is a good practice, but as this Court said, in its decision in Hinojosa that there are other factors for the Court to consider in awarding the fee.

JUSTICE DALE WAINWRIGHT: But you agree it makes it difficult if you go the other direction and just have for services rendered and an amount with no description?

ATTORNEY ISAAC TAWIL: I agree it makes it more burdensome on the trial court to determine whether the fee was reasonable.

JUSTICE DALE WAINWRIGHT: And then there's some documentation for fees that are submitted that just cannot be proven as reasonable if you don't have enough information to evaluate it because the burden's on the guardian ad litem to establish the reasonable fee, which means supporting the fee.

ATTORNEY ISAAC TAWIL: And I believe that the guardian through his testimony at the hearing--

JUSTICE DALE WAINWRIGHT: I'm not talking about this case. I'm talking about the ways of proving them up. Just conceptually, if the guardian ad litem does not support the amount of the fee submitted, then it's unreasonable to award that fee.

ATTORNEY ISAAC TAWIL: I believe that as a general principle, support is necessary to warrant the award of the fee, but I do not believe that the only way to demonstrate the reasonableness of a fee is through an hourly time record. This Court has articulated in Anderson and then again in the Land Rover case, eight standards, eight factors that the trial court can consider in awarding the fee.

JUSTICE DALE WAINWRIGHT: But back to the specifics of this case, on the bill that was submitted, how do we know that the guardian ad litem did not spend ten hours reviewing the motion to transfer venue?

ATTORNEY ISAAC TAWIL: I think that the-

JUSTICE DALE WAINWRIGHT: I'm sorry, let me phrase it differently. What in the record establishes that the amount of time spent reviewing the motion to transfer venue was not ten hours?

ATTORNEY ISAAC TAWIL: I think the Court needs to look at and consider the abuse of discretion standard that this case is reviewed under and the evidence that was before the trial court at the time he made his decision.

JUSTICE DALE WAINWRIGHT: And what was that evidence about review of the motion to transfer venue?

ATTORNEY ISAAC TAWIL: I don't know that a specific question was asked of him, you know, and I do not recall the entire record off the top of my head and I do not recall if a specific question was asked of him of how much time did you spend reviewing a motion to transfer venue. I do know that counsel for Ford at that hearing did have an opportunity and did specifically ask questions about how much time was spent on things and why time was spent on things and so I think there was justification provided to the trial court at that time for him to base the award of the fee.

JUSTICE DAVID M. MEDINA: How much latitude do we give the trial court in that decision? I mean trial court obviously is going to use some common sense and hopefully come to the conclusion that it wasn't ten hours spent on a motion to review because that certainly wouldn't be appropriate, but how much latitude should we give the trial court on this abuse of discretion where it's hard to determine what the fee is and the situation with perhaps Justice Green's father, a great lawyer in his own right, would have gotten paid because of great work he did and he just submitted a bill?

ATTORNEY ISAAC TAWIL: Well, I would like to think that as officers of the court, all of use our best guidance in making decisions about what we do as a unit of, a legal body. I think that there was evidence provided to the trial court and the abuse of discretion standard requires there be no evidence in order to find that the court, the trial court erred. Here, the court, you know, was a lawyer. The judge was a lawyer. He practiced. He has experience. He's been on the bench. He was on the county court at law before he served as a state district court judge and I am sure that based on the evidence that was introduced at the hearing and the judge's experience, which the standard requires the judge to consider, that that he based his decision on the reality in which he lives and practices.

JUSTICE PHIL JOHNSON: Counsel, let me go back to this. Justice Wainwright mentioned this statement here. This statement, I presume, was prepared so for presentation to the court to substantiate the award of fees, is that correct? Was that the purpose for this or was there something else in the record?

ATTORNEY ISAAC TAWIL: The fee invoice was in the record and the ad litem testified at the hearing and so his testimony is part of the record as well.

JUSTICE PHIL JOHNSON: The see invoice shows that, it shows an activity and then it has the initials RHG after each activity.

ATTORNEY ISAAC TAWIL: Correct.

JUSTICE PHIL JOHNSON: And that would be Mr. Garcia?

ATTORNEY ISAAC TAWIL: That would be a designation on that fee. From a practical standpoint, since I practice at the firm, that designates the lawyer who's in charge of the file.

JUSTICE PHIL JOHNSON: Who's in charge of the file?

ATTORNEY ISAAC TAWIL: Yes, Your Honor.

JUSTICE PHIL JOHNSON: Is that clear in the record and the reason I'm wondering is this. We have opposing counsel's representative, there's a fee charged here RHG \$300 an hour for attending the hearing, but yet someone, the ad litem, Mr. Garcia did not actually attend the hearing.

ATTORNEY ISAAC TAWIL: It is clear in the record, Mr. Garcia testified at the hearing that he, his staff and other lawyers in his office participated in reviewing this file and preparing his recommendation.

JUSTICE PHIL JOHNSON: The question was Mr. Garcia, who was appointed ad litem, as I understand opposing counsel's representation and you may clarify it for the record, does the record reflect whether Mr. Garcia, the ad litem who's appointed as counsel, attended the hearing.

ATTORNEY ISAAC TAWIL: The record does reflect. I believe I was there along with another lawyer from Mr. Garcia's office.

JUSTICE PHIL JOHNSON: But he was not?

ATTORNEY ISAAC TAWIL: He was not available the day of the hearing.

JUSTICE PHIL JOHNSON: Because the record reflects, for example, who met with Ramona Gonzalez as set out here in this--

ATTORNEY ISAAC TAWIL: Mr. Garcia's testimony at the hearing set forth that he met with her on a number of occasions. I believe, I believe--

JUSTICE PHIL JOHNSON: Okay, well, here's only one entry here for meeting with Ramona Gonzalez that I can see.

ATTORNEY ISAAC TAWIL: I believe his testimony was that he met with her more than once.

JUSTICE PHIL JOHNSON: Okay, so is there any, going back to what Justice Wainwright again was talking about without any time here, is there any way anyone can tell here who did these activities, which ones they did?

ATTORNEY ISAAC TAWIL: I believe that the court relied on Mr. Garcia's representation at the hearing as to what his participation was and what he delegated his staff to complete for him.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, is there anything in the record that has to do with the amount that the guardian ad litem for the children was paid?

ATTORNEY ISAAC TAWIL: Other than objectionable comment from Ford's counsel, I do not believe that there is.

JUSTICE NATHAN L. HECHT: Is there a reason why Mr. Palacio's fee was so much smaller?

ATTORNEY ISAAC TAWIL: I can't speak to what Mr. Palacio's based his fee on. I had no conversation with him and there was no testimony adduced from him as to the basis for the fee that he charged. I do not know. But I do believe that Rule 173, although, well, getting back to the first question I was asked and that is the distinction and I don't know that in this case there is a distinction between the role that a guardian ad litem would have played and an attorney ad litem would have played. I think Petitioner's concern in this case is that Mr. Garcia participated in the litigation and I think the record is clear that he did not. He did not propound discovery. He did not attend depositions. He could have attended mediation had he been appointed at that time. He was not so obviously he did not.

JUSTICE DALE WAINWRIGHT: So let me make sure I understand you on that point. The order in 2008 appointing Mr. Garcia says that, he would serve as Attorney ad Litem in this litigation as Independent Counsel for the benefit of Plaintiff, Jesus Gonzalez, in connection with effectuating Plaintiff's settlement with Defendant Ford Motor Company.

ATTORNEY ISAAC TAWIL: That is the verbatim language of the order, yes, Judge.

JUSTICE DALE WAINWRIGHT: That sounds different from the responsibilities set out in our Rule 173. This says, attorney ad litem and we've talked about whether there's a distinction there or not. We can put that to the side for now, but he's to serve as Independent Counsel for the benefit of plaintiff, Jesus Gonzalez, effectuating the settlement as opposed to evaluating the allocation. Is there a difference there in your mind is that significant?

ATTORNEY ISAAC TAWIL: Well, I think the work effectuating was probably a poorly chosen word. To effectuate the settlement could mean physically, you know, making sure that the next friend signed off on the settlement agreement, but I think Mr. Garcia would have been derelict in his duty and frankly, to his duty to court and his client in limiting his role to making sure that the settlement that had been proposed was actually fulfilled. I think effectuating the settlement and appointing him as independent counsel necessarily assumed that he would fulfill the requirements in Rule of Civil Procedure 173 and recommend to the court and I think that's important to consider is this case was not tried and so all of the facts in the lawyers' files, in the case files would not be known to the trial judge and so without Mr. Garcia taking the time to familiarize himself with the dispute with the injury, with the needs of the ward for the remainder of his life, without knowing that, without reviewing the file, he could not make a recommendation to the court. I think it would be impossible. I don't think any lawyer proud of what he does or she does.

JUSTICE DALE WAINWRIGHT: Assuming all of what you just said, is accurate, do you believe that under Rule 173 that the appellate court should ensure that what's done is reasonable and the time that's used to do it is also reasonable and that the documentation, the evidence from the trial court should establish that for the appellate court because all, if it's not in the record, it didn't happen as far as the appellate court's concerned.

ATTORNEY ISAAC TAWIL: That's correct and I think that's a very difficult question to answer because a case of traumatic brain injury is going to be very different from a minor involved in a little rear-end accident, you know, where people were injured, but we're not talking about lifelong injury and so to the extent that there are nuances in the various types of litigation that these appointments present themselves in, it almost in my mind is a case-by-case scenario where you know, you can't say that, you know, ten days reviewing a file in a case where there is traumatic brain injury is justified or unjustified, but in the situation where you know have an auto accident and you can't even find damage on the vehicles and spend the same amount of time on an ad litem fee in that case. So I think it's very difficult to draw a big black bold line.

JUSTICE PHIL JOHNSON: Chief, may I ask one more question?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE PHIL JOHNSON: Counsel, pardon my concern in asking what the initials were on this statement was whether or not someone was misrepresenting something to the court quite frankly, the trial court. On this statement, you said, it shows the billing attorney, that's Mr. Garcia's initials as the billing attorney. It does not reflect, it is not intended to reflect, I take it, who actually attended the hearing.

ATTORNEY ISAAC TAWIL: That is correct.

JUSTICE PHIL JOHNSON: And then what would be the reason for putting his billing hour after that then RHG \$300 per hour? Why would you have the billing attorney and his hourly rate there if it's not some type of representation? Could you clarify that, please?

ATTORNEY ISAAC TAWIL: I can only clarify it in that it is the system I use in my and the system at least from the computer I work from has limitations in that it posts on the invoice, for example, a case I'm working on my initials and my hourly rate and if somebody else works on the file and makes an entry, because I am the attorney in charge, it posts my initials and my rate. At the hearing, Mr. Garcia clearly testified to the court that he did not do all of the work that was set out on that invoice and that he relied on his staff, other lawyers in his office to do some of the things that were on that invoice. It was not intended and I think he made clear by his testimony, it was not intended to mislead the court in any way.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

ATTORNEY ISAAC TAWIL: Thank you.

REBUTTAL ARGUMENT OF MICHAEL EADY ON BEHALF OF PETITIONER

ATTORNEY MICHAEL EADY: Justice Johnson, I'd like to start with your last set of questions, which go directly to the invoice. When you start looking at that invoice at kind of that 30,000-foot level and you see that there's 65 entries there. 56 of them are receive and review entries and you see under each one them, it says, RHG \$300 an hour and that was, the assumption was that that was billings he did. Now during the course of the testimony, he was asked did you do all of these hours and he said, me being my office did and then he says, no, did you do all of those hours and the answer is no and he did not attend the one thing that he was required to do, which was attend the hearing on the proving the settlement. That's a must participate under Rule 173. All right, this raises another set of questions. There's other people who have done this work that these fees are being taxed against Ford Motor Company. All right, who are these other people? Is it a paralegal? What's their reasonable rate? How long did it take them to do that? Is that reasonable for them to do that task? Was it a junior attorney? Was it a senior attorney? What is their reasonable rate for that task? Now simply having the ad litem come in and say my office did it all and well to make this fair, I'll just drop my rate from \$500 to \$300 an hour and that should take care of it. It really doesn't. The verified application is essential in this process and I can't insist upon that enough or make that point strong enough because you have to have that. You have to know who's doing the work, who was appointed, how long it took them to do it and exactly what they were doing with sufficient detail to determine whether or not it's compensable under Rule 173. Justice Lehrmann, to answer your question with respect to the ad litem fee for the ad litem appointed in the wrongful death portion of the case, the record reflects that the number was 5000 and that's coming from counsel representing that to the court and that was an agreed-upon number. I mean, obviously, we're not here if that number is a lot less, but you have to have an invoice that gives you the information that you can look at the invoice so you can show up at the hearing, have sufficient information to cross-examine the guardian ad litem if you disagree with it, sufficient information which you communicate to the trial judge why it's outside the scope of the role of the ad litem and you have to have sufficient information on the reasonable hourly rate in case you have to offer your own testimony from your own experts on that issue.

JUSTICE DEBRA H. LEHRMANN: Might one distinction be between the attorney for the child and the attorney for the ward who lacks capacity be that there was no need to determine future need in the sense that you would of the ward, that is in the sense in determining what the injuries were that gave rise to the lack of capacity.

ATTORNEY MICHAEL EADY: I agree, Your Honor, they're different. They're advising the court in connection with two different types of claims. The wrongful death claims that are of a completely different nature. This whole process of received and reviewed is something that comes up in the invoices themselves and according to the ad litem in his testimony is, if it crosses my desk, I received it and I bill for it and I should be paid for it and there's been no challenge to that by the trial court or the 13th Court of Appeals either and that's simply not the case because if we drill down on the comment in Rule 173, comment three, it talks about reviewing things and things that are in the litigation file and clearly motions to transfer of venue, pro hoc motions, motions to appoint additional counsel, motions to the answers that are filed, written discovery and some of this stuff is just really kind of unrelated. If you set down and you try to look at it and make sense of it, you can't, but it says, you could review these things, but unless it's related to the division of the settlement proceeds, you can't get compensated for it and that's the situation that we have here. A lot of this stuff you can't get compensated for and there should have been no compensation. The bigger problem is the few things that are at the bottom of the invoice that would be compensable, you can't determine what amount would be fair based upon what's listed because there's no time associated with any of those items. Again, this is like attending the hearing. Now assuming that you can delegate that and that's a separate question of whether or not that someone who is appointed by a court to be an advisor, an officer of that court to assist that court can turn around and go back to their office and delegate that to someone else to do or if that's just the responsibility that they have to do themselves. Ford Motor Company, again, requests that the judgment be reversed and if there be a entry of review [inaudible] or alternatively that it be sent back to the trial court for the duration and in accordance with the dictates of this Court on what would

be a proper fee. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel, that concludes the argument and all arguments for today. The Marshal will adjourn the Court.

MARSHAL: All rise.

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