For docket see 10-0490

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Supreme Court of Texas.
El Apple I, Ltd.
v.
Myriam Olivas.
No. 10-0490.

September 15, 2011.

Appearances:

Joseph L. Hood, Jr., of Windle, Hood, Alley, Norton, Brittain & Jay, LLP, for Petitioner.

John P. Mobbs, Attorney at Law, 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- 0490 El Apple v. Myriam Olivas.
MARSHAL: May it please the Court, Mr. Hood will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JOSEPH L. HOOD, JR. ON BEHALF OF THE PETITIONER

ATTORNEY JOSEPH L. HOOD: May it please the Court, an attorney who bills his or her client on the basis of an hourly fee, in private practice generally is required to do two things: keep accurate time records that describe number one, the tasks and the services that the lawyer provides; and number two, the amount of time spent performing those specific tasks and services.

JUSTICE EVA M. GUZMAN: Is that as important in a contingent fee case though or not?

ATTORNEY JOSEPH L. HOOD: Well, the problem with the contingent fee case is is that the contingency here was grafted on to the lodestar calculation, but the fees were awarded on the basis of an hourly rate.

JUSTICE EVA M. GUZMAN: I understand the legal question, but just in terms of keeping accurate time records, etc. If you take on a contingency fee case, can you reasonably be expected to have done that?

ATTORNEY JOSEPH L. HOOD: I don't see why not, Justice Guzman. I mean, I, for example, take on contingency work. I actually represent some plaintiffs in employment discrimination cases admittedly more on the defense side of the docket more often than not, but a reasonable attorney is going to keep time records showing what he or she did and how much time she spent.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is that really true? I mean it's different when you're billing by the hour and getting paid by the hour and I think one of the benefits of the plaintiff's side of the docket is you're not filling out timesheets every day.

ATTORNEY JOSEPH L. HOOD: Well, but the irony here is that you're relieving them of the burden of doing that, but rewarding them by basing their fee not on the contingency that they contracted for. Had that been the case here, the fee probably, well, I don't know what the exact fee would have been, but it would have been less than $100,000 because that was the amount that Ms. Olivas recovered. Instead, you compensated the attorney not on the basis of the contingent risk that he or she took on, but here the risk, pardon me, the fee was based upon an hourly calculation. And if you were going to do that, logic and fairness seem to dictate that there be some record describing what the attorney did and how much time he or she spent doing that.

JUSTICE DAVID M. MEDINA: Why can't we leave that to the sole discretion of the judge to make an evaluation based on his experience? We do that in so many other cases.

ATTORNEY JOSEPH L. HOOD: I don't think you can, Justice Medina, and this case is a good example. The lawyer here claimed to have worked over a multi-year period of time. He admitted he had no time records describing what he did when he did it and yet he claimed to have expended 700 hours of time in this case.

JUSTICE DAVID M. MEDINA: As an officer of the court, are you assuming that he's lying?

ATTORNEY JOSEPH L. HOOD: Well, I don't know that he's lying, but I will suggest this --

JUSTICE DAVID M. MEDINA: You apparently don't believe him.

ATTORNEY JOSEPH L. HOOD: --that whenever you make an estimate like as that was done in this case, you run the risk of error and you increase the risk of error, particularly the longer the case goes on. And all you have to do to see that is measure that against the time that was kept by defense counsel, which was one-third of that.

JUSTICE EVA M. GUZMAN: So it was over 700 over five years. How many hours per year? Did you make that calculation?

ATTORNEY JOSEPH L. HOOD: It wasn't broken down.

JUSTICE EVA M. GUZMAN: Well, I know, but if you've got 700 hours over five years, how many hours per year would that be on this case?

ATTORNEY JOSEPH L. HOOD: I went to law school rather than accounting school, but it would break down -- I don't think you could do it and I don't think that it would be a meaningful calculation and here's why because by definition, in litigation such as this, you're doing different things and spending different amounts of time at different points in the case. You're obviously going to spend more time at the end of the case preparing and trying the case.

JUSTICE EVA M. GUZMAN: But regardless, is it so unreasonable to have spent over five years, 365 days a year, 700 hours on a matter that you're going to litigate before a jury?

ATTORNEY JOSEPH L. HOOD: Yes.

JUSTICE EVA M. GUZMAN: So-- what I guess--

ATTORNEY JOSEPH L. HOOD: I think it is when you have to compare to that estimate and it was admittedly nothing more than an estimate, a contemporaneous time record by the other side showing that 266 hours of attorney time were spent on the very same case.

JUSTICE EVA M. GUZMAN: Of course, they had the burden to prove their case.

ATTORNEY JOSEPH L. HOOD: Well, as a practical matter, that is not necessarily true. I can tell you having represented employers in front of a board or juries, that the reality is is that the defendant bears the burden of going in and proving to the jury that what they did was fair. Both sides bear the burden of preparing the case and advocating it in front of the jury, but again, you go back to the issue of how do you test the reasonableness of that fee? The Supreme Court tells us that you can't foist on your adversary a fee that you could not bill to your client. So how do you test that?

JUSTICE DAVID M. MEDINA: Can you envision at any time when a judge can use his or her sound discretion and help determining what a reasonable fee should be?

ATTORNEY JOSEPH L. HOOD: Well, there are certain instances were statute allows that. Chapter 38, for example, in non-jury matters allows the judge to take judicial notice of what a reasonable fee might be.

JUSTICE DAVID M. MEDINA: What about on sanctions?

ATTORNEY JOSEPH L. HOOD: In sanctions, again, I can see where there might be some instance where that could be done, but I would suggest that in virtually every instance in which you are going to award fees, again, based on an hourly rate, that there ought to be some underlying demonstration of what the hours were that are claimed and what was done for those particular hours. For example, is it really reasonable to spend 10 hours preparing a two-page motion for sanctions? I think most clients would tell you if they were forced to pay that bill that the answer to that question is, no. The problem with not requiring documentation of hours when you are awarding fees on the basis of an hourly rate is that neither the trial court, the appellate courts or the defendant have any way of testing whether or not there has been any excessiveness, whether or not there has been any redundancy or whether or not any unnecessary work has been performed. You've got to remember, in these cases because there is an award of fees to the prevailing plaintiff at the end of the case, plaintiff's counsel understand that they are going to have their bill paid by their adversary. There's no incentive for them to reduce the amount of time spent on these cases. It's just not there. And yet they're required to exercise billing judgment just as hourly counsel are on the defense side because they are asking to be compensated and will be compensated on the basis of an hourly rate. The other problem with the absence of documentation is that you have no way of determining whether or not time was spent on unsuccessful claims as occurred here. I thought you had a question, Justice Guzman.

JUSTICE EVA M. GUZMAN: Well, I was just going to say that your discussion leads though, to the overarching issue, I guess, should we look to state or federal law in calculating the attorney's fees under the TCHRA sine the burdens are so different. I think this general discussion supports the analysis, but would you discuss, please, the legal precedents.

ATTORNEY JOSEPH L. HOOD: I think it makes sense to apply federal precedent in these cases largely because as this Court has recognized many times federal precedent guides the construction of how this Court decides TCHRA cases. It makes no sense to have one rule in a state court and one rule in a federal court when you are essentially litigating the same issue of discrimination. Was I discriminated against on the basis of my gender when my pregnancy resulted in my pay being cut?

JUSTICE EVA M. GUZMAN: Do you think that the Legislature expressly intended to incorporate this federal procedure for assessing attorney's fees under the TCHRA and if so how did they do that?

ATTORNEY JOSEPH L. HOOD: I think that you have to presume that they did because when they enacted the act originally in 1983, Hensley v. Eckerhart was already on the books as was Blum v. Stenson, which applied in the Federal Civil Rights context. Those decisions have been held to apply to Title VII actions. When the act was substantially amended in '93 following the 1991 Civil Rights Act, that directive again was repeated. It seems to me that the Court must presume that with that body of federal case law on the books for a period of almost 30 years, that the Legislature had to have intended that Texas trial judges would essentially do the same thing as federal judges did when looking at a fee application following the successful litigation of an employment discrimination claim.

JUSTICE DEBRA H. LEHRMANN: Let me try and kind of switch gears here a little bit. You've argued that the lodestar should be discounted to reflect the plaintiff's lack of complete success. That is you know she didn't prevail on a discriminatory action that she did on the retaliation. And so is that really true, given the fact that these claims arose out of the same set of facts basically?

ATTORNEY JOSEPH L. HOOD: Well, if I may address the latter point first. I think the evidence reflects that they did not necessarily grow out of the same incident. It's not as though you had one incident and two claims coming out of that. You had an action, which resulted in the reduction of her pay and a charge of discrimination for pregnancy discrimination. You then had different things that happened to her at work over a one- year period of time in March, June and November of 2003, I believe.

JUSTICE DEBRA H. LEHRMANN: But there's certainly a large overlap. If the one had not happened, the other would not happen.

ATTORNEY JOSEPH L. HOOD: Well, I think there may be a cause-and-effect relationship and I think you have to presume that in light of the jury's finding that she was subjected to retaliation.

JUSTICE DEBRA H. LEHRMANN: And isn't it sort of hard to divide those two because of that overlap.

ATTORNEY JOSEPH L. HOOD: I don't know that it is. It's definitely hard when you're looking at it on appeal and there are no time records that you could go back to to determine how much time was spent, for example, discussing the case with a witness who would be in a position to testify only to the pregnancy discrimination claim and a witness who was in a position to testify only to the retaliation claim. Again, the two dovetailed. Without contemporaneous time records showing in sufficient detail the tasks that were performed and the amount of time spent on those tasks, you run the risk of being unable to separate that as the Texas Association of Business pointed in their amicus brief that they submitted. In essence, without contemporaneous time records, the defendant has no way at all of rebutting a plaintiff's counsel's allegation that all or most of the time that I spent was devoted to the successful claim. How do you rebut that? You can cross-examine him and he says, all the time was spent on a successful claim. You have nothing objective that you can look to to test that assertion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Hood, you are complaining about appellate fees and saying that they should be remanded to the trial court at the conclusion of the appeal. Can you point out in the record where you objected to the submission of appellate fees or made the same argument about remand that you're making here?

ATTORNEY JOSEPH L. HOOD: The -- Mr. Pierce, trial counsel, pointed out that appellate fees were being requested and at the hearing itself on that, the trial judge himself specifically raised the issue of whether or not it would be appropriate to award appellate attorney's fees because he didn't know how much time would be spent

on the appeal. Now I recognize that the traditional rule, Mr. Chief Justice, in other cases is that we have appellate fees decided conditionally, sometimes by a jury, sometimes by a judge and they're awarded following the appeal. TCHRA cases like Title VII cases in federal court are somewhat different. The attorney's fees are assessed as part of the costs and are, therefore, decided by the court at the end of the case when he or she decides who has prevailed. The same analysis should apply with respect to appellate attorney's fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did you ask the trial court to defer ruling on appellate fees until remand or no?

ATTORNEY JOSEPH L. HOOD: We did not, Your Honor. We did not. We raised the issue in the Court of Appeals and the Court of Appeals addressed the issue and rejected it. We think that that was error and we believe that this Court should notwithstanding Varner and the cases that arise in the Chapter 38 context treat TCHRA cases differently. And if you have a proper fee application, it's simply not that difficult. It's simply a matter of remanding the case back to the trial court to look at the fee application submitted by appellate counsel documenting the hours that were spent on the appeal. It happens all the time in the Fifth Circuit. The Fifth Circuit has a specific rule, I believe it's Rule 77, that talks about that and says, you have to document your time if you're going to be getting appellate fees. There is nothing inherently hard about sending a case back for an assessment of appellate attorney's fees, just as there should be nothing hard about reciting the amount of trial fees when you have a properly documented fee application. I'd like to use my remaining two minutes if I could to address the issue of enhancement because it relates to your initial question about contingent fee in the case. The Supreme Court has made clear that enhancements to the lodestar should be rare and only awarded in exceptional cases. The court has also in Dague, as we discuss in our brief, clearly said that, use of a contingency modifier is not appropriate in determining an enhancement. It's simply not a factor that should be counted twice. There is no reason to, in effect, reward the plaintiff's counsel twice for taking a case on a contingent fee basis.

JUSTICE EVA M. GUZMAN: Do you think that when you conceded to the multiplier of two that those limitations that you put into your concession before the trial court limit that initial concession that two is an appropriate multiplier?

ATTORNEY JOSEPH L. HOOD: Well, first, I don't believe that that was a natural concession, Justice Guzman. I think that was more in the nature of a discussion about if you were going to do this, then this is what you could do, but no, I don't think that it does. I mean what's the rationale for doubling the fee rather than selecting some other number such as 10%, 20%, 30% or somewhere in between. As the Supreme Court pointed out in Dague, when you use the contingency as a factor for enhancing a fee, the fee calculation becomes more arbitrary and as this case demonstrates, is likely to result in greater litigation. We think that there was no basis for enhancement of the fee and we think, for example, that you couldn't go back to a client afterwards and say I had a great result; I should, therefore, get twice the fee that I charged you. A lawyer charging an hourly rate cannot after the fact double his or her hourly rate. The trial court, in effect, should not be allowed to do that either.

JUSTICE EVA M. GUZMAN: If we applied state law, then this Dague precedent is not necessarily instructive if we analyze this under state law, correct?

ATTORNEY JOSEPH L. HOOD: Well, that state precedent consists of three cases out of the El Paso Court of Appeals and if you apply that, that is correct. They decided that in the Dillard's case that they could enhance the fee. They repeated that in West Telemarketing and they repeated that in this case.

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

MARSHAL: May it please the Court, Mr. Mobbs will present argument for the Respondent.

ORAL ARGUMENT OF JOHN P. MOBBS ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN P. MOBBS: May it please the Court, good morning. I'd like to begin with the issue of appellate attorney's fees recognizing there may be a waiver issue here, but because I think that analysis of that issue really illuminates the flaws in the Petitioner's approach today. Texas well established black letter laws at Texas trial courts in our one final judgment and after a plenary power expires, they lose the jurisdiction to alter that judgment. That principle has been applied specifically to attorney fees and specifically to appellate attorney fees. Federal law is different. Federal courts under Rule 54 can enter multiple final judgments disposing of discrete parts of a case and they can assess attorney fees at any later date after having entered a final judgment disposing of the rest of the case, including another later judgment deciding appellate attorney fees if those fees are warranted. That just reflects a different balancing of the interests between the state court system and the federal court system. There's no reason why we couldn't amend the Texas Rules of Civil Procedure to grant the trial courts continuing jurisdiction to award attorney's fees at some later date after a case is decided and to award appellate attorney fees after an appeal has been resolved and there would be a benefit to that. The benefit would be that there would be greater precision in the measurement of appellate attorney fees, but there would also be a cost to that. The costs would include that the amount of a judgment would be uncertain, the date of finality of a judgment would be uncertain, an issue that we've had a lot of history of difficulty within Texas. It would extend the litigation. It would result in multiple appeals in cases that should be appealed once. And this Court I think balanced those considerations in Varner v. Cardenas to say we decline the invitation to allow two trials on attorney's fees when one will do. It just simply reflects a different balancing of the relative interests involved in the state court system as compared to the federal court system. And the federal court's balancing of those interests and decision to allow appellate attorney fees to be awarded later after a judgment or after an appeal is not based on anything to do with Title VII or discrimination cases, in particular. It's just federal procedure and it's the same federal procedure that's applied in all cases in federal court when attorneys fees may be awarded.

JUSTICE DEBRA H. LEHRMANN: Can I ask you when there's -- just looking at the attorney's fees generally -- when there's little to no evidence on the attorney's fees and there's no itemized statement, then how can a court determine and you're not following also a regular contingency fee formula, then how can a court determine whether or not it's reasonable?

ATTORNEY JOHN P. MOBBS: Well, the way Texas courts have traditionally done so is that attorneys present testimony as to what a reasonable fee would be and that can be in terms of either a flat amount -- and we're talking about trial attorney fees, I assume?

JUSTICE DEBRA H. LEHRMANN: Yes, at the trial court.

ATTORNEY JOHN P. MOBBS: That could either be a flat amount as in Texas Commerce Bank v. New, this Court held sufficient evidence in an attorney's affidavit stating that a certain amount was a reasonable fee for a case or it could be a multiple of hours times an hourly rate.

JUSTICE NATHAN L. HECHT: Let me ask you about that. The total was 569,500. Is that right?

ATTORNEY JOHN P. MOBBS: Judge, I'll take your word for it. I have 464 for trial attorney fees and there were additional contingent appellate fees.

JUSTICE NATHAN L. HECHT: Well, the 464. Would 500,000 - is that about right, here?

ATTORNEY JOHN P. MOBBS: On this record, I think that would be about the maximum. I mean that- these fees-

JUSTICE NATHAN L. HECHT: Well, but if a lawyer got up and said, Your Honor, this is, you know I did all this work and then $600,000 I think would be a reasonable fee. Would that be, could the judge do that?

ATTORNEY JOHN P. MOBBS: Well, if the evidence before the trial court was that 600,000 was a reasonable fee based on a certain number of hours and a certain hourly rate and a certain enhancement, sure.

JUSTICE NATHAN L. HECHT: In this case. In this case.

ATTORNEY JOHN P. MOBBS: In this case, the evidence before the trial court was at a certain number of hours and a certain hourly rate and a certain enhancement, and the multiple of that is what the trial court granted. The trial court found the testimony before him to be credible.

JUSTICE NATHAN L. HECHT: But he didn't find a certain number of hours. He said, about 700, right? Do you do hourly billing with clients?

ATTORNEY JOHN P. MOBBS: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Do you send any client a bill for about $700, about 700 hours times $250 an hour?

ATTORNEY JOHN P. MOBBS: No, of course not, of course not.

JUSTICE NATHAN L. HECHT: And they're not going to pay it. You're going to be looking for a different cli ent.

ATTORNEY JOHN P. MOBBS: But many, many plaintiff's attorneys who work on contingency contracts do not maintain hourly time records. And even --

JUSTICE NATHAN L. HECHT: So that's why I was confused a little bit. If the issue is not the actual number of hours, if it's just -- is it just whether that's a reasonable number of hours? Or is it the actual? If it's the actual number, we don't have any evidence.

ATTORNEY JOHN P. MOBBS: Well, I respectfully disagree, Your Honor. I believe that the attorney testified that that was the number of hours he expended in the case.

JUSTICE NATHAN L. HECHT: 700?

ATTORNEY JOHN P. MOBBS: Now, he didn't have hourly time records to accumulate to get to that number, but he testified that he expended 700 hours in the case. Any time--

JUSTICE NATHAN L. HECHT: So it strikes me as being a little conclusory.

ATTORNEY JOHN P. MOBBS: Your Honor, I think this Court addressed that issue very recently in Garcia v. Gomez and explained that attorney testimony as to fees is different from other types of expert testimony.

JUSTICE NATHAN L. HECHT: If we're looking at a reasonable number of hours, I noticed that you all were good enough to give the trial judge quite a few cases on attorney fees and the awards in various different cases. Were any of them as high as this?

ATTORNEY JOHN P. MOBBS: I believe compared to the figures that were included in the fee application, this was the highest.

JUSTICE NATHAN L. HECHT: I'm sorry?

ATTORNEY JOHN P. MOBBS: Compared to the cases that were included in the fee application, this was the

highest number of -- the highest fee requested.

JUSTICE NATHAN L. HECHT: And with respect to the amounts of recovery in those cases, were any of them four or five times the recovery in the case?

ATTORNEY JOHN P. MOBBS: I don't know the answer to that, Judge, except from the argument by Petitioner's counsel at the fee hearing was that the amounts recovered in those cases was comparable to the amounts of attorney's fees in those cases. But again, I mean that's I think a fairly minor consideration. This Court has written that in Hoover Slovacek v. Walton that awards of attorney fees exceeding the damages recovered by a client are not uncommon, particularly when you have a case like this, which is certainly an important case and a very important case to Ms. Olivas, but one where her actual damages are smaller and it's a situation where she didn't lose her job. She was retaliated against in the workplace and it was a hostile work environment-type retaliation case.

JUSTICE DALE WAINWRIGHT: Her actual damages here were around $100,000.

ATTORNEY JOHN P. MOBBS: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: And the attorney's fee was around $600,000.

ATTORNEY JOHN P. MOBBS: Including fees through appeal, yes.

JUSTICE EVA M. GUZMAN: Without the multiplier. Go ahead, Counsel.

JUSTICE DALE WAINWRIGHT: Thank you Counsel. Hasn't the U.S. Supreme Court said, in Webb in 1985 that contemporaneous recorded time sheets are the preferred practice?

ATTORNEY JOHN P. MOBBS: Sure.

JUSTICE DALE WAINWRIGHT: And the Fifth Circuit has said that, part of the applicant's ability to meet his burden includes maintaining billing time records in a manner that would enable the review in court to identify distinct claims. That was a 1990 case. These aren't recent cases or surprises.

ATTORNEY JOHN P. MOBBS: I think that's. I'm sorry, I thought you were finished.

JUSTICE DALE WAINWRIGHT: Go ahead. Please respond.

ATTORNEY JOHN P. MOBBS: I think it's an exaggeration to say that federal courts always require contemporaneous time records or timesheets or detailed billing records.

JUSTICE DALE WAINWRIGHT: Well, let's focus on the Fifth Circuit then.

ATTORNEY JOHN P. MOBBS: Sure, I've got a Fifth Circuit case and I apologize, this is not cited in my brief because I came across it in looking at the argument made by amicus in this case. The style is Wegner v. Standard Insurance Company the citation is 129 F.3d 814. The rule on the Fifth Circuit is that some documentation is required. It doesn't have to be hourly timesheets, but there has to be some documentation and that documentation can even be sparse. In Wegner, the evidence actually consisted of nothing more than a list of the attorneys who had worked on the case, the number of hours each attorney had worked and their hourly rate and then multiplied out by attorney and totaled. The lead counsel for the parties submitted an affidavit stating that all those hours were reasonably and necessarily incurred. And the Fifth Circuit pointing specifically to the district court's familiarity with the case and the proceedings in the case held that that was sufficient to support the fee award. There was some documentation, albeit sparse documentation that allowed the fees to be awarded.

JUSTICE DALE WAINWRIGHT: Now, apply that to this case. There were no time records in this case and no documentation of the work submitted. There was the testimony by affidavit or verbal of the attorneys. For the fees recovered for their legal assistans. The evidence didn't show the names of who they were or what their qualifications were. So isn't Wegner, doesn't Wegner provide a barrier for your recovery because there's, was there any documentation here besides the testimony of the lawyers? No--

ATTORNEY JOHN P. MOBBS: No. There was no documentation besides the testimony of the lawyers; however, the lawyers' testimony did describe what they had done, how many hours did it take and why it had taken so many hours and the trial court believed that. The trial court with its knowledge and familiarity with the case found that credible.

JUSTICE DALE WAINWRIGHT: Well, it certainly might be possible to recover attorneys fees legitimately that are more than the award of actual damages. But isn't the better practice to have documentation so that we can test it, especially if it lasts over several years where memories fade and we don't know who did what when and they can be cross examined?

ATTORNEY JOHN P. MOBBS: Sure. And I think that gets back to the balancing of interest between the state and the federal system. Sure, we would have more precise awards of attorney's fees if we required hourly billing by every attorney in every case. Just -- you have to maintain those records, it's a new state bar rule and you have to use them if you want to recover attorney's fees in any case. But the cost of that is the cost to attorneys of keeping those records who right now frequently do not, the cost of judges of reviewing those records, the cost of appellate courts of reviewing those records and then balancing those interests, Texas courts have traditionally found that it's enough to have an affidavit from an attorney stating a reasonable fee or a reasonable number of hours and a reasonable rate from which the fee may be multiplied.

JUSTICE EVA M. GUZMAN: But here the attorney's fee though, didn't the attorneys, didn't they talk about the extensive discovery in the documents exchanged in the pleadings that were filed--

ATTORNEY JOHN P. MOBBS: Yes.

JUSTICE EVA M. GUZMAN: -- and was that part of the testimony that accompanied the request?

ATTORNEY JOHN P. MOBBS: Yes, I mean the affidavits were not one-page affidavits stating what a reasonable fee would be. They did describe what they'd done, discovery they'd been through, the amount of time it took, the reasons they thought this was a difficult case. I mean they were lengthy, extensive affidavits describing the services that they performed on behalf of their client.

JUSTICE EVA M. GUZMAN: Trial courts take judicial notice of their files. I imagine this file and the extensive amount of back and forth that had taken place was part of that court, the information before the court in looking at and evaluating the credibility of the testimony of the attorneys, right?

ATTORNEY JOHN P. MOBBS: Sure. I think it's implicit in Garcia v. Gomez and made explicit in several other decisions that courts can look to the record of the proceedings before them in determining a reasonable fee. This is not like trying a case to a jury because or an attorney's fees issue to a jury because the trial judge knows what happened in the case. The trial judge is familiar with how this case has been handled from day one and I think that is also--

JUSTICE NATHAN L. HECHT: But following up on that, the lawyers were good enough to testify basically that they spent 17-1/2 hours a day eight days of trial, which when you're in trial you work pretty long hours. So you subtract that out and then the principal trial lawyer testified to 50 additional hours getting ready for trial and if the other lawyer spent that much, that's certainly a reasonable time to get ready for trial. But when you take

all that out, that leaves over 400 hours in a case to do everything but get ready for trial and try it, in a case that involved three depositions and 1200 pages of documents. That seems a lot.

ATTORNEY JOHN P. MOBBS: Between 1200 and 2500 pages of documents.

JUSTICE NATHAN L. HECHT: 2500 pages of documents.

ATTORNEY JOHN P. MOBBS: You know, there's time reviewing those documents. There were a dozen witnesses who were interviewed. Just because they weren't deposed doesn't mean the attorneys did not spend time. But--

JUSTICE NATHAN L. HECHT: It doesn't strike you that 400 hours is a lot for that, for three depositions and 2500 pages?

ATTORNEY JOHN P. MOBBS: It doesn't strike me as a lot and--

JUSTICE EVA M. GUZMAN: Is that all that's necessary to get ready to try a case? That may be what comes up in trial, but don't you have to, I mean what type of work is involved in getting ready to try a case?

ATTORNEY JOHN P. MOBBS: We know there were numerous motions to compel and discovery battles in this case. We know there were interviews of witnesses and other types of investigative tests undertaken. I mean-

JUSTICE EVA M. GUZMAN: What type of legal-

ATTORNEY JOHN P. MOBBS: You can't just walk in the office and say get ready for trail, let's go.

JUSTICE EVA M. GUZMAN: What was the novelty of the legal issues that were presented in this case that might have required additional investment of resources?

ATTORNEY JOHN P. MOBBS: There was one particularly novel legal issue at the time the attorney took on the case, which was whether this retaliatory conduct was actionable at all. The attorney took on the case prior to the United States Supreme Court's decision Burlington Northern and Santa Fe Railway v. White. Prior to that time, there was a circuit split among the federal circuits on what-- source of conduct could lead to a claim for retaliation. What could be an adverse employment action sufficient to support a retaliation claim? The Supreme Court in the White case accepted a more lenient standard that allowed this case to go forward. If the United States Supreme Court had sided with Burlington Northern in that case, there would have been no case here.

JUSTICE EVA M. GUZMAN: And, if it's in the record, what was the testimony by defense counsel about the total of their fees? How much did that amount to? For defending -- is it in the record or do you know?

JUSTICE EVA M. GUZMAN: I'm sure it's in the record, Judge. I think he said, he had 262 hours. His bills were submitted in camera. That may or may not be in your record. I know I have seen them.

JUSTICE EVA M. GUZMAN: So 262 hours over five years to defend.

ATTORNEY JOHN P. MOBBS: Right.

JUSTICE PHIL JOHNSON: And you billed maybe twice that much to prove your claim over five years, including preparing for trial. Is that right?

ATTORNEY JOHN P. MOBBS: Fairly, Judge, it was about three times as many when you count the time of both lawyers, yes.

JUSTICE PHIL JOHNSON: Well, to be fair, you didn't bill that much. No one had any records of how much time was spent.

ATTORNEY JOHN P. MOBBS: They expended that much time according to the affidavits. You're right, they didn't bill that much.

JUSTICE EVA M. GUZMAN: I mean, you--

JUSTICE PHIL JOHNSON: Well, you mentioned that there was a lot of cost involved in this. How much time ordinarily would it take to at the end of the day for a lawyer to just put down a cursory manner what was done that day and how much time was spent?

ATTORNEY JOHN P. MOBBS: Judge, it does take time and it--

JUSTICE PHIL JOHNSON: Well, but you know going into these cases that you're going to be requesting the other side to pay your attorney's fees, you're going to have to prove them up. If a lawyer doesn't know that, maybe he or she should not be taking the case to start with. So I mean this is not a secret that at the end of the case we're going to be talking about attorney's fees, is it?

ATTORNEY JOHN P. MOBBS: Well, Judge, it's also no secret that a Texas law that currently stands allows an attorney to do that by affidavit without timesheets.

JUSTICE PHIL JOHNSON: We're talking about the lawyer going in.

ATTORNEY JOHN P. MOBBS: Right.

JUSTICE PHIL JOHNSON: The lawyer going in knows that at the end of the case there's going to be a question of attorney's fees if the lawyer is successful.

ATTORNEY JOHN P. MOBBS: And if the case proceeds that far.

JUSTICE PHIL JOHNSON: And if the -- sure.

ATTORNEY JOHN P. MOBBS: Right.

JUSTICE PHIL JOHNSON: So but that's part of, one of the elements that you go in proving and we're talking about preparing a case. We're talking about the time to prepare a case, prepare your witnesses, that's, isn't that simply an element of your case almost attorney's fees, if I prevail I'm going to have to prove them up.

ATTORNEY JOHN P. MOBBS: Truly, it's an element of the case.

JUSTICE PHIL JOHNSON: So it's just another matter of putting some time into one of the elements of your case to keep track of, so you can explain that. That would be one way of looking at it.

ATTORNEY JOHN P. MOBBS: I suppose that's one way of looking at, but the proposed rule would require attorneys to do that in every case that comes in the door regardless of whether there's ever going to be a fee application in that case. In other words, we would require attorneys to create volumes of documentary evidence for those small percentages of cases [inaudible] --

JUSTICE PHIL JOHNSON: A car wreck case, a car wreck case, a tort case, you're not going to necessarily have to do that would you?

ATTORNEY JOHN P. MOBBS: You're right, that's correct.

JUSTICE PHIL JOHNSON: Okay, so when we say in every case we would have to keep those records, that's not being fair to the broad spectrum of cases.

ATTORNEY JOHN P. MOBBS: And every employment case and every contract case and every [inaudible] practices case--

JUSTICE PHIL JOHNSON: You shift, it takes a statute to shift attorney's fees.

ATTORNEY JOHN P. MOBBS: Right.

JUSTICE PHIL JOHNSON: Okay, so you know going in what the basis of your case is.

ATTORNEY JOHN P. MOBBS: Sure.

JUSTICE DALE WAINWRIGHT: Can you address the segregation issue?

ATTORNEY JOHN P. MOBBS: Yes, Your Honor. I'll skip over the preservation issue. I think that's adequately briefed. I think it's interesting that this is the only area where the petitioner seems to want to apply state standards and avoid federal standards. But the state standard is very well established that attorney's fees, attorneys must segregate between the time they spend successfully and time expended on unsuccessful claims. The exception to that rule is also very well established that when discrete legal services advance both recoverable and nonrecoverable claims then that time need not be segregated. There's a, I think, a very simple application of those principles in again Varner v. Cardenas where an attorney was awarded fees for defending a counterclaim. The court held that those fees did not have to be segregated because the party had to overcome that counterclaim in order to prevail on the merits of its own claim. That to this case, in order to establish her retaliation claim on which she was successful, Ms. Olivas had to, although she didn't have to obtain a favorable verdict on the discrimination claim, she had to at least present evidence of the discrimination claim sufficient to demonstrate that a reasonable person in her position would have believed that the claim was discriminatory or that the action she complained of was discriminatory. And so it makes sense in that context and numerous courts have applied in the context of combined retaliation discrimination claims that time expended on proving discrimination is also necessary to establish and prevail on the retaliation claim. The affidavit testimony before the trial court was that all of the time, which the attorneys expended in the case was necessary to the successful result they obtained. With that evidence before the trial court and with that explanation that was provided for the trial court, I think the trial court did not abuse its discretion in not requiring further segregation of the fees.

JUSTICE EVA M. GUZMAN: What is the single most important factor that would support the fee multiplier of two, this enhancement?

ATTORNEY JOHN P. MOBBS: The concession of the trial court. The--

JUSTICE EVA M. GUZMAN: But I mean assuming that--

ATTORNEY JOHN P. MOBBS: The issue that was discussed that - to the greatest extent from the trial court was the contingent nature of the attorney's fee.

JUSTICE EVA M. GUZMAN: If you want to characterize it as a concession, I suppose you could, you did in your brief. But that was limited to 175,000 not to, which - and a lower amount of hours. So really outside of that, let's ignore that, what else supports this fee multiplier?

ATTORNEY JOHN P. MOBBS: Well, we have the contingent nature of the fee, I'm sorry I'm over time.

CHIEF JUSTICE WALLACE B. JEFFERSON: You can answer the question.

JUSTICE EVA M. GUZMAN: 100 days is not enough.

ATTORNEY JOHN P. MOBBS: But under, well I think under state law is sufficient. We have the fact that this was a risky case again based on the fact that it predated Burlington Northern v. White and that made it a special and different case and harder to pursue [inaudible].

JUSTICE PAUL W. GREEN: So essentially you're saying that we should defer to the trial court's determination of this fee?

ATTORNEY JOHN P. MOBBS: Yes.

JUSTICE PAUL W. GREEN: Okay, at what point do we no longer have to defer? How far out do we go with this?

ATTORNEY JOHN P. MOBBS: Well, when there's evidence to support the trial court's calculation and the trial court's decision is reviewed by an abuse of discretion standard, I think it's going to almost always be entitled to deference from an appellate court. Now if the trial court had said, well, you asked for 700 hours, but you guys did such a great job, I'm going to use 2,000 hours that would be abuse of discretion.

JUSTICE PAUL W. GREEN: But we have -- once the number had been thrown out there, and the lawyer in an affidavit says, about 700 hours, we have to accept that?

ATTORNEY JOHN P. MOBBS: I think if the trial judge finds that credible based on his knowledge of the case and his experience with the case, and if the trial judge accepts it in his role as finder of fact then, yes, I think an appellate court cannot overturn that.

JUSTICE PAUL W. GREEN: If the number was 7,000 hours and the trial judge said, you have to accept that, do we have to accept that too?

ATTORNEY JOHN P. MOBBS: I think that any fact finding that is supported by the evidence before the fact finder has to be respected by the appellate courts.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Mobbs.

CHIEF ATTORNEY JOHN P. MOBBS: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF JOSEPH L. HOOD, JR. ON BEHALF OF PETITIONER

JUSTICE DAVID M. MEDINA: Could you help me out here and point me to the rule that requires that the plaintiffs' lawyers in these type of cases have a specific time billed for you to cross examine?

ATTORNEY JOSEPH L. HOOD: I'm sorry. Is there a specific rule that requires that?

JUSTICE DAVID M. MEDINA: Yes.

ATTORNEY JOSEPH L. HOOD: No.

JUSTICE DAVID M. MEDINA: Is there a rule that requires them to segregate their fees?

ATTORNEY JOSEPH L. HOOD: The rules essentially are the same in state and federal court.

JUSTICE DAVID M. MEDINA: I'm talking about the state court here. This is Texas.

ATTORNEY JOSEPH L. HOOD: This Court's decisions particularly in the Tony Gullo Motors case I think make that clear that you are required to segregate between claims that you are entitled to fees on and claims that you are not entitled to fees on.

JUSTICE DAVID M. MEDINA: But on the first part, so you want us here by judicial fiat say that retrospectively, you have to go back and supply a detailed billing record.

ATTORNEY JOSEPH L. HOOD: I think there is nothing inherently unfair about that, Justice Medina as Justice--

JUSTICE DAVID M. MEDINA: Just that they had no notice [inaudible].

ATTORNEY JOSEPH L. HOOD: Well, I believe they did because as Justice Wainwright pointed out, federal precedent requiring this has been on the books for more than 20 years. And in addition to that, let us assume this case has been removed --

JUSTICE DAVID M. MEDINA: Excuse me, wait a minute, I'm going to ask you a question.

ATTORNEY JOSEPH L. HOOD: Oh I'm sorry. I apologize, Your Honor.

JUSTICE DAVID M. MEDINA: Thank you. We're in a state Supreme Court, right?

ATTORNEY JOSEPH L. HOOD: That's correct.

JUSTICE DAVID M. MEDINA: Okay just want to make sure; this is not a federal--

ATTORNEY JOSEPH L. HOOD: Not a federal court.

JUSTICE DAVID M. MEDINA: Right. Okay.

ATTORNEY JOSEPH L. HOOD: But you are applying a law that the Legislature has told you, - look to federal law to apply. And part and parcel of that I submit to you are the requirements for proving and recovering attorney's fees. And there's nothing unreasonable about requiring attorneys to maintain time records.

JUSTICE DAVID M. MEDINA: Well, that would be very prudent. I mean, I think it's probably prudent going forward, but you want us to make this decision retrospective and for all cases that are coming up the pip line involving these type of issues.

ATTORNEY JOSEPH L. HOOD: I think that you should and I think that everybody's had fair notice of that. I'll cite the Court to a recent case in the Second Circuit. It's Scott v. New York City 643 F 3d 56. It involved the noted lawyer, Tom Puccio, who is a respected criminal defense lawyer. He undertook a Fair Labor Standards case on a class action. He maintained no time records in the case. The Second Circuit rule like the Fifth Circuit rule says that, you have to have contemporaneous time records. The trial judge awarded him $512,000 in attorneys' fees based upon his perception of Mr. Puccio's performance at trial. The Second Circuit in their opinion said, no, you can't do that and why is that? Well, it unfairly penalizes some body like Joe Hood, who may not be

as well known as Thomas Puccio, but who might have done just as good of job, but didn't maintain records either. And what they said, in that case was you can award him fees, but only based upon contemporaneous records. What sort of records might those be? Courts keep records of how much time attorneys spend in court; and they said that, was time that can be compensated. I'll suggest to you there are other ways of doing that. Deposition transcripts state when the deposition began, when it ended. You can award time based upon that. It is a contemporaneous record.

JUSTICE EVA M. GUZMAN: Can you assume that they prepared to take that deposition?

ATTORNEY JOSEPH L. HOOD: Yes, Justice Guzman, but did they prepare for an hour, five hours or ten hours and is ten hours reasonable for a particular deposition? That's the problem with trying to award a fee without an underlying time record showing how much time you spent on a particular task. I mean, it's the same issue with respect to the multiplier. Essentially what happened here was the trial court after the fact said, in addition to awarding fees at the upper end of the hourly rates claimed by the lawyers, $25 an hour more in Mr. Gonzales' case, which I'll submit to you reflects the novelty of the issue and is subsumed within the lodestar in effect doubled the lodestar fee. Justice Green's questions point out the problem with practice as it exists today. In essence, you are required to accept anecdotal, take-my-word-for-it evidence. This Court and appellate courts across the state don't accept that sort of testimony as sufficient evidence in any number of cases, particularly involving other experts. For an award of attorney's fees in which the prevailing party is asking his, her or its adversary to pay their fees based upon an hourly rate, it should be unacceptable as well. If you allow the El Paso court's decision to stand in this case, you are in essence saying that awards of attorney's fees are different and are in effect unreviewable.

JUSTICE EVA M. GUZMAN: And as a practical manner in a contingency fee case, time records aren't necessarily an unreasonable expectation. Your client may fire you after you put in hundreds and hundreds of hours and so even to protect the lawyer, it's not unreasonable. I guess the question becomes whether they should be required in a case where the lawyer chose not to keep them.

ATTORNEY JOSEPH L. HOOD: Well, let us assume -- and this happens not infrequently. The case is removed to federal court; on the basis of either diversity of citizenship or by accident, they throw in a claim that in addition to Title Tech where there was a violation of Title VII or the ADA; that happens. Across the street trying the very same case, they're clearly going to be required to maintain those records. I see my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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