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Supreme Court of Texas.
Lauri SMITH and Howard Smith, Petitioner,
v.
Patrick W.Y. Tam Trust, Respondent.
No. 07-0970.

November 13, 2008.

Appearances:
Robert D. Ranen, Gunter, Texas, for Petitioner.
Scott E. Hayes, Vincent Moye, P.C., Dallas, Texas, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated, please. The Court is ready to hear argument now in 07-0970 Lauri Smith and Howard Smith v. Patrick W.Y. Tam Trust.

SPEAKER: May it please the Court. Mr. Ranen will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT D. RANEN ON BEHALF OF THE PETITIONER

MR. RANEN: Mr. Chief Justice, may it please the Court. Today, I will address the following four issues. First, attorney's fees need to be reasonable under the criteria established by the Supreme Court in Arthur Andersen v. Perry Equipment Corporation. Second, precedential authority of the Texas Supreme Court is -- like in Arthur Andersen, is lost when lower courts no longer adhere to controlling Supreme Court decisions. Third, the trial court is the appropriate venue for determining the amount of fees, if any, to be awarded. And fourth, evidence of attorney's fees need to be properly proven up, although even when proven up, the fees must still be reasonable under the criteria established in the Arthur Andersen decision.

JUSTICE WAINWRIGHT: Could you start by explaining how in your opinion of the lower court did not adhere to our precedent?

MR. RANEN: Your Honor, the lower court, in its opinion in this case, did not discuss Arthur Andersen at all. Arthur Andersen has been

the controlling law on the award of attorney's fees since its decision in 1997. An important aspect of Arthur Andersen is that it also -- it incorporated eight specific factors for the fact-finder to take into account when evaluated the award of attorney's fees. And these factors are taken directly from Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, and this reflects a mirroring of not only legislative but also judicial doctrines. That's why we believe these factors are so important, and by failing to consider them, that's where the Fifth Court of Appeals failed to adhere to Supreme Court precedent.

JUSTICE WAINWRIGHT: Do you think the court -- the Fifth Court properly interpreted and applied Ragsdale?

MR. RANEN: Your Honor, I believe that they properly considered Ragsdale, but Ragsdale is not the controlling law on this issue. The controlling law is Arthur Andersen. That's not only -- not only can we see that from the Arthur Andersen decision itself, but we also look at two recent decisions of this Court in Barker v. Eckman and Young v. Qualls, which specifically incorporate and discuss Arthur Andersen, in particular, the results obtained factor in both of those decisions.

JUSTICE HECHT: Do you think Ragsdale was wrongly decided?

MR. RANEN: Judge, it's not for me to decide Ragsdale was wrongly decided.

JUSTICE WAINWRIGHT: We know that, but what's your opinion?

MR. RANEN: I believe that the Arthur Andersen opinion is a better opinion and that it purposely redefined and provided for more detail in objectivity rather than the criteria initially established in Ragsdale. Now, in the --

JUSTICE BRISTER: But why in Arthur Andersen then? I mean, the doctor -- when the doctor gets on the stand and says, "We charged $50,000 for the surgery and is reasonable and necessary," the doctor doesn't have to say what the risks were in the surgery, what other people in the community charge, how many hours were involved in the surgery. They just say bottom line this is it. Why is Arthur Andersen so sacred that we have all these hoops you got to go through for attorneys?

MR. RANEN: Well, your Honor, I can't speak why --

JUSTICE BRISTER: We said it, but why do we have -- why -- what's the big deal? If the guy just gets on the stand and says -- he says, "Yes, he should go into the details," of course, somebody maybe ought to cross-examine him about the details, but the parties don't want to fight over how many hours were involved. When one just says is this many thousand, the other one says nothing-- doesn't object or anything. Why isn't that good enough?

MR. RANEN: Well, your Honor, this -- there's a specific language in Arthur Andersen that says, "That the mere fact that a party and a lawyer have agreed to a particular fee does not mean that fee agreement in and of itself is reasonable for shifting the burden to the defendant --

JUSTICE BRISTER: I agree, but we've got more here than the attorney gets on the stand and says, "It's reasonable." He did not say just, "My client agreed to it. It's outrageous." He saying, "It's reasonable."

MR. RANEN: The reasonableness, your Honor, also comes not -- first of all, the attorney has to prove up those fees, but even if they are proven up, they still must be reasonable in light of the results ultimately obtained. Otherwise, your Honor, what we're getting into is an issue where attorney's fees could potentially become a new form of punitive damages, which is explicitly within the province of the

legislature.

Now, in this case, your Honors, the Fifth Court of Appeals did not look to Arthur Andersen at all, and they arbitrarily ruled for unreasonable attorney's fees, which equaled to 72.9% of the ultimate damages that were awarded. Now, this award is contrary to the jury's verdict, the trial court's order and the Supreme Court precedent, not only of Arthur Andersen but also in subsequent decision, most recently in Barker v. Eckman and Young v. Qualls.

JUSTICE HECHT: Would you be complaining if the -- if the plaintiff had recovered all they were seeking?

MR. RANEN: If the plaintiff had recovered all they were seeking, which, of course, they didn't in this case --

JUSTICE HECHT: Right. But if they had?

MR. RANEN: If they had, your Honor, then that -- then the fees that they are seeking and which were awarded by the court of appeals are much more in line with the established criteria of Arthur Andersen, it still though is incumbent upon the plaintiff to actually -- to actually go through and prove up the attorney's fees. So, if the attorney's fees are properly proven up with the -- and had the respondent recovered what they are -- the full amount of what they were actually seeking. In that circumstance, then, yes, the fees could be considered reasonable under the Arthur Andersen criteria --

JUSTICE HECHT: I know. But would you say the court of appeals could award them or does the court of appeals have to send to it back to the trial court?

MR. RANEN: Well, the trial court is the -- is the proper venue for determining these attorney's fees. And that is one of our points here today, what began with the Supreme Court precedents in Great American Reserve v. Britton and has continued throughout Ragsdale v. Progressive Voters League, Arthur Andersen, Barker, and Young, is that the trial court is the appropriate venue to determine these attorney's fees. Ragsdale -- the decision in Ragsdale --

JUSTICE BRISTER: The court in general, the jury in particular.

MR. RANEN: Well, the reasonableness of attorney -- actually, Judge, your Honor, the issue of attorney's fees is a question for the trier of fact. So, it would depend on whether it was a bench trial, of course, or a jury trial --

JUSTICE BRISTER: This -- but in this case, it was a jury.

MR. RANEN: It was a jury trial, yes, your Honor.

JUSTICE BRISTER: And the jury said, "Zero."

MR. RANEN: Yes, your Honor.

JUSTICE BRISTER: You don't disagree that can't be right.

MR. RANEN: Your Honor, the jury was the one who actually examined all of the evidence and the jury in this case --

JUSTICE BRISTER: But if the -- if the -- if we are talking about somebody who broke an arm in a car wreck and went to see the doctor and got it set, all this stuff. And doctor says, "It's $5000," and jury said, "Zero, yes, you're liable. You ran the red light, but the reasonable damages from your broken arm is zero." There's no question in the Texas Law, that's wrong and we're going to have to do it again.

MR. RANEN: Your Honor, in a situation like that, you would have to consider all of the evidence that --

JUSTICE BRISTER: I am. I just gave you all the evidence. They got a broken arm and had to go to the doctor and get it fixed. And if jury says, "Zero," that answer is unacceptable. We're going to have to have them or another jury try harder.

MR. RANEN: And if that -- then if that's the case, Judge, under

Cain v. Bain, a trial court or an appellate court can overturn a jury's verdict if it's overwhelming -- if it's contrary to the overwhelming weight of the evidence.

JUSTICE BRISTER: And same thing would be true here. There's -- I mean, there's no evidence these people could have come into court and won their case with zero attorney's fees.

MR. RANEN: Well, that goes to the --

JUSTICE BRISTER: That's just -- that's just flat wrong.

MR. RANEN: And, your Honor, that goes to the issue of the degree to which the attorney's fees are actually proven up. The Dilston House decision clearly states that when present -- a party seeking to have attorney's fees award --

JUSTICE BRISTER: [inaudible] didn't know anything about Arthur Andersen in this case.

MR. RANEN: They -- that is correct, your Honor.

JUSTICE BRISTER: What procedural ground would they have decided, "Not proven up enough, therefore, zero"?

MR. RANEN: Well, your Honor, they could look at, for example, the testimony that was presented, which was their lone witness was Mr. Hayes, respondent's counsel, who testified for the work not only of himself but of six other lawyers who were not present at trial. He also testified and submitted billing for the work done by his co-counsel at trial who chose not even to testify. Under -- the jury was given -- the jury was given no evidence from Mr. Hayes' testimony as to what his hourly rate was, what his co-coun--what his second chair's hourly rate was. We didn't -- the jury did not hear the motions that Mr. Hayes wrote, the -- they did not hear how many hours he put in, what hearings he attended, they were given general statements of -- a general statement of reasonableness. For him --

CHIEF JUSTICE JEFFERSON: What are the -- what are the legal bills? Was there a detail on the legal bills about hourly rate and -- and what the work was done for and that sort of thing?

MR. RANEN: The -- there was, your Honor. It is our position though that those legal bills were not -- the proper predicate was not laid to establish those legal bills as an exception to the hearsay rule.

CHIEF JUSTICE JEFFERSON: The jury had that information. They --

MR. RANEN: They did have that information, your Honor, yes. Yes.

JUSTICE GREEN: You say the jury was not charged on the Andersen factors?

MR. RANEN: They were not charged under the Andersen facts, your Honor. I -- I don't know if that has been -- if it's been common place to charge, but it might be -- to charge the jury with that, but it might be after this decision is written.

JUSTICE JOHNSON: Was there an objection to the failure to so charge the jury?

MR. RANEN: No, your Honor, there was not. There was an objection, however, given to the -- given to the records when they were offered. And it is our position that that -- that objection should've been sustained.

JUSTICE WAINWRIGHT: You mean the legal bills?

MR. RANEN: To the legal bills, yes, your Honor.

JUSTICE WAINWRIGHT: Now, the court of appeals in citing Ragsdale did take off the factors, at least many of them that you call -- that are referred to as the Arthur Andersen factors: nature and complexity of the case, nature of the services provided, the time required for trial, amount of money involved, client's interest at stake, responsibility imposed upon the counsel's skill and expertise required,

what is deficient about those factors in light of Arthur Andersen?

MR. RANEN: Well, for example, your Honor, they are -- the Arthur Andersen incorporates not only the amount involved which is what Ragsdale discusses but it talks about the amount involved and the results obtained. Another important distinction between Arthur Andersen and Ragsdale has to do with Arthur Andersen adds a component of the fee customarily charged in the locality for similar circumstances. Nothing like that is present in the Ragsdale criteria. Ragsdale also talks about the time required for trial but Arthur Andersen actually is more -- is more specific on that. That's the time -- the time and labor involved, the novelty and difficulty of the questions covered. It focuses more on just the trial itself.

JUSTICE GREEN: So, if it goes back to trial, and you get a jury charge on the Arthur Andersen factors, and the jury comes back to $47,000, you're okay with that?

MR. RANEN: Your Honor, I'm not -- your Honor, we would not be okay with it because again, the -- the fees still have to be reasonable in light of the results obtained.

JUSTICE GREEN: That's your -- if the jury thought so.

MR. RANEN: I understand -- I understand that, your Honor. If the jury -- if the jury thinks -- if the jury thinks that though, it is -- it is incumbant upon the appellate courts to actually -- to actually -- to examine -- to examine the evidence to see if it is contrary to the overwhelming weight of the evidence which is what's been discussed as -- as Cain v. Bain. The same -- the same factors that would govern the overturning of jury verdict of zero could also overturn a jury verdict of $47,438.75. It would be the same standard.

JUSTICE JOHNSON: What if the jury is charged on Arthur -- Arthur Andersen factors and there is no evidence of two or three of those factors?

MR. RANEN: If there is no evidence of two or three of those factors, your Honor, then it is our position that those fee -- that the fees should not be upheld. While an attorney does not need to testify to all of the Arthur Andersen factors, the Arthur Andersen factors still need to be satisfied to -- for the proper recovery of those fees.

JUSTICE BRISTER: Well, then, they are not factors, they are prerequisites. The difference in factors and prerequisites is factors are these things you think about in kind of way -- some kind of way and kind of come up with the feeling about the answer, prerequisite is you got to have this one and this one and this one and this one and this one. Your position is they are prerequisites?

MR. RANEN: Well, respectfully, your Honor, they cannot all be prerequisites because one of them is the amount involved and the results obtained which has been critical not only for this case but also the decisions of Barker v. Eckman and Young v. Qualls. We're never going to know what the results obtained are until after the -- after the verdict has come back. So, by the very language -- by that very language, they cannot be -- they cannot be prerequisites, but it is our position that they do need to comply with the Arthur Andersen factors.

JUSTICE WAINWRIGHT: Do you believe that the attorney's fees can ever be reasonably awarded in an amount that exceeds what's requested in damages?

MR. RANEN: Your Honor, you would have to take into account all of the Arthur Andersen factors, and there is even case law that allows for the -- for the recovery of attorney's fees when little or no damages are awarded. For example, under the Uniform Declaratory Judgment Act, however, those fees still must be properly proven -- proven up. There

must be -- and they must be considered -- they must be considered reasonable under the Arthur Andersen factors.

JUSTICE WAINWRIGHT: I understand. You're on the jury now. And you're a juror. The -- there's -- all the factors are proven up and the attorney's fees of all of your colleagues on the jury, in their opinion that $50,000 is reasonable, the amount in attorney's fees and the amount recovered was $40,000. Do you join the verdict or do you not?

MR. RANEN: Well, I suppose -- I suppose, your Honor, if I'm looking at reasonableness in light of the results obtained, I personally might not think that -- that $50,000 might -- might be reasonable, but I would have to -- I would have to have all -- I would have to have all the evidence in front of -- in front of me.

JUSTICE WAINWRIGHT: But it's possible that a $40,000 recovery with $50,000 in attorney's fees could be reasonable if, for example, the other side was really outstrippers, you have to fight tooth and nail, lots of discovery unnecessary, you tried to fight all the way through that -- to get your client's $40,000 recovery. Those kinds of factors might sway you toward concluding that attorney's fees award could, under certain circumstances, exceed the actual damages?

MR. RANEN: Your Honor, the only time that I've seen -- that I've seen that would be in something like the Uniform Declaratory Judgment Act where statutes specifically cites that all of the other -- all of the other decisions that I'm familiar with on this issue, for example, in Barker v. Eckman, this Court actually remanded that issue back to the trial court when the attorney's fees did ultimately exceed the actual results obtained. What we're -- what we're asking for -- what we're asking for is that the fees continue to be reasonable in light of the results obtained and in light of the decisions in Arthur Andersen, Barker, and Young.

JUSTICE O'NEILL: So, what does the trial court do as a practical matter? Does the trial court then say, "Jury, y'all hang on, let me -- let me see what I'm going to do with attorney's fees because I've gotten the result here. It is kind of weird." And you're going to another phase of trial where you -- you say you have to award something and consider these factors or do you just let them go and have a new trial with a new jury on attorney's fees?

MR. RANEN: Your Honor, I suppose the issue of attorney's fees could -- could actually -- could actually be bifurcated. And have a -- just -- you know, just like -- just like exemplary damages are, that's not anything that's actually been, I'm not aware of any case law that does actually addressed the issue but I suppose that could be a possibility.

JUSTICE O'NEILL: But presume they're not. Just as a practical matter every day in the courts across Texas, do they then just impanel a new jury to decide the attorney's fee issue?

MR. RANEN: No, your Honor. I -- I would tend -- I would tend to think that for purposes of judicial economy and also for the same jury -- I think for purposes of judicial economy and consistency, you would want to have the same jury who watched the attorneys throughout the entire trial actually be the ones that -- that consider an award of attorney's fees.

JUSTICE O'NEILL: The trial court would say, "I'm throwing out your attorney's fee award, come back and try again." Understand if we can't have this, what's the court to do in this situation?

MR. RANEN: I -- I think under the hypothetical that you've present -- that you've presented, your Honor, the -- the jury would come back -- the jury would come back on the issue -- on the issue of attorney's

fees. The judge then has the -- it would then be up to the judge to determine if the jury's verdict is contrary to the overwhelming weight of the evidence, it's --

JUSTICE O'NEILL: What if in this case it's zero? So, the trial court throws that out and says go back in and award some?

MR. RANEN: Well, in -- in that case -- in that case, your Honor, under the case law, the judge would be able to go through and put in an amount that he or she feels is reasonable which is exactly what the trial judge did on this case and put an amount of $7500 when initially, he thought --

JUSTICE O'NEILL: I understand that but if everybody agreed that the judge was the fact-finder, we wouldn't be here. Somebody wants the jury to decide it.

MR. RANEN: All right.

JUSTICE O'NEILL: And so, what I'm just trying to figure out is what a judge is to do in that situation?

MR. RANEN: I think what the judge is to do in that situation, your Honor, is to listen to the jury verdict on attorney's fees, evaluate the evidence if it is contrary to the overwhelming weight of the evidence, then the judge can go through issue his or her -- his or her own decision on that. And then it can -- and then like any other post-judgment motion, it could be considered by the appropriate appellate court.

JUSTICE GREEN: What if they've had additur procedure? Judge -- judge says, "We're going to award this amount or we're going to grant a new trial." You got a choice.

MR. RANEN: Excuse me, your Honor?

JUSTICE BRISTER: It's an additur, you can do that in Louisiana but not Texas.

MR. RANEN: Okay. I never practice law in Louisiana, your Honor.

JUSTICE BRISTER: It's all different.

MR. RANEN: I'll take your word for it. In a situation -- in a situation like that, your Honor, the trial -- the trial judge could grant a new trial with respect to attorney's fees which was actually offered to the respondent in this case and -- and declined.

CHIEF JUSTICE JEFFERSON: I see there are no further questions. I think we are ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Hayes will present argument for the respondent.

ORAL ARGUMENT OF SCOTT E. HAYES ON BEHALF OF THE RESPONDENT

MR. HAYES: May it please the Court. The court's charge in this case as to attorney's fees is only consistent upon what is a reasonable fee for necessary services of Tam's attorneys which is the respondents -- the respondent in this case -- in this case. That was the entirety, there were no instructions regarding any factors. There were no -- no instructions requested by either party. There were no objections filed, whatsoever. This Court in its -- the Osterberg v. Peca case stated that the courts charge not some other identified law measures the sufficiency of the evidence when there has been no objection.

JUSTICE BRISTER: But if -- if the jury awarded the $47,000, everything you asked for in the verdict, it goes up on appeal and appellate court cuts substantially the damages award under Barker v.

Eckman, they would be required to reverse that and send it back for another jury trial, right?

MR. HAYES: Your Honor, in a situation of -- of a Ragsdale-type situation --

JUSTICE BRISTER: I mean, we've just written on this. Barker says, "Jury gives an award of $100,000 and -- and the jury -- and attorney fee of $47,000, and if it goes up on appeal and the court of appeals cuts half of the actual damages -- I mean, we explicitly said unless the court of appeals is certain that the jury would've awarded exactly that same amount of attorney's fees that they didn't matter what the amount of damages was, then the right result is reverse and do a jury trial again.

MR. HAYES: But, your Honor, in this -- in this case you don't -- you do not have any difference in the damages award. The court of appeals has done nothing with the damages award. At trial --

JUSTICE JOHNSON: In -- in Barker, did they instruct us to the results obtained being one of the factors? In this case, you did. I know in your case you just said what's the reasonable attorney's fees.

MR. HAYES: Yes.

JUSTICE JOHNSON: Did Barker just -- submitted on a global instructional like that or do you recall?

MR. HAYES: I do not recall, your Honor. I do not recall. Again, many of the cases again cited reference when there's a damage award where the court of appeals cuts that then you do go look at the issue of the results obtained. In this case, you -- that did not occur at the court of appeals. There's $65,000 damage awarded by the jury and that issue, while appealed on several other grounds, the specific number was not modified, that was not changed.

JUSTICE BRISTER: Right, but actual damages was.

MR. HAYES: But actual damages --

JUSTICE BRISTER: The attorney's fees was changed a lot because the jury said zero.

MR. HAYES: Yes.

JUSTICE BRISTER: And as the court of appeals decided now, we think $47,000 is better. Isn't that exactly the same, it's -- I understand it's not actual damages it's attorney's fees but the court of appeals is just changing the verdict. Can they do that without the jury?

MR. HAYES: Under the Ragsdale v. Progressive, going through that scenario again when there is no cross-examination, you -- you go to those elements that there's no cross-examination --

JUSTICE BRISTER: But I'm just -- I'm troubled by Ragsdale. If this was the doctor bill of $100,000 and the jury said zero, and it comes up to court of appeals, the court says no that's against the great weight and preponderance. The court of appeals couldn't say $100,000. Great weight and preponderance reversal requires a new trial. If it was lost profits and the jury said zero. Against the great weight of preponderance, reversal, new trial. How come -- is -- is attorney's fees the only area where if the jury says zero, the court of appeals can just substitute its judgment for the jury?

MR. HAYES: From my understanding, it -- it is, your Honor, by the nature of attorney's fees and I'm not sure --

JUSTICE BRISTER: What is it about the nature? Is it because we're all attorneys? Is there anything other than that is the reason why we get a different rule from everybody else?

MR. HAYES: I don't know. My personal opinion is, at times it may still be that certain jurors in some way have something against attorneys so they're going to get paid money --

JUSTICE BRISTER: I agree with that.

MR. HAYES: I don't know what it is but it is --

JUSTICE BRISTER: I agree to that. I've never seen juries cut damages more than they do on attorney's fees. But the question is, is that enough reason to say that juries don't have the right at the first instance to say what attorney's fees are?

MR. HAYES: With the -- yes, but with the protection that Ragsdale states and that it essentially says if the jury amount is incredible, and it used these various words free from internal contradictions, inaccuracies, or suspicious circumstances, so it does obviously protect. If an attorney goes in and ask for a million dollars on a $10,000 contract, that the trial court or court of appeals has -- has some degree, can come in and say this is out of the realm of any kind of reality. We're going to step in or -- or send this back to a jury.

JUSTICE BRISTER: Send that back to the jury. So, if the court of appeals just thinks -- personally, we think you asked for too much, then you get a new jury. But if we personally think that looks reasonable, then we just enter the award. That sure does look like substituting a court of appeals judgment for jurors.

MR. HAYES: Well, again, I guess I'll still go back to the -- I don't know if I call -- safety net or ceiling that this Court in Ragsdale said if it reaches some level of being incredible, they're going to jump in but otherwise, that then the -- again, because the -- you know, the Ragsdale situation, the other side had again ample opportunity to cross-examine, to put on expert witness and for whatever reason, they chose to do nothing which we again -- that may be a factor of -- they chose to take that act unless it comes in incredible --

JUSTICE GREEN: But it's not entirely free of -- of inconsistency if -- if the evidence comes in, in the context of -- of a damage claim of multiple times the attorney's fee. And then, you know, once the court of appeals is now looking at this, it says well, is it free of any kind of inconsistency here now in light of the jury's decision on -- on actual damages or does Ragsdale even then apply?

MR. HAYES: Ragsdale would still apply, however, the -- if -- if the court in some way viewed the -- the Andersen factors and said, "We're going to still look at almost the incredible -- incredible side of it, the -- this was $10,000 damage award and a million dollars in attorney's fees, and I think under the Ragsdale language of suspicious or incredible, the court of appeals at that point could say one of the factors to view is this -- an incredible result is the comparison of the results obtained as opposed to the attorney's fees sought. So, I think there's still, under Ragsdale, there is protection from this situation apart from that situation occurring.

JUSTICE WAINWRIGHT: Maybe a concern with Ragsdale is in the -- it does say what you says -- say it says that the evidence in that case and in this case was uncontradicted on attorney's fees. There's no evidence of any other amount or that the amount should be zero but maybe what Ragsdale doesn't consider is that the jury doesn't have to believe the witness. What -- and then that takes us back to the examples about actual damages for, let's say, bodily injury where the jury may not believe the witness but you got to concede that it costs something to get where you got. What do you think happens in that situation? Do we modify Ragsdale or do we say for attorney's fees unlike other areas that if you don't challenge the attorney's fees and that's the only evidence of that amount of attorney's fees in the record, that the court can just enter that amount?

MR. HAYES: Respondent would contend that in the situation of

attorney's fees because the -- the law is clear that a case that goes to trial and that side's the prevailing party that obviously there were some reasonable and necessary attorney's fees. So, you get to that particular level and then apply. And then under Ragsdale, they didn't put on -- they didn't attempt to challenge this whatsoever, and if it is not beyond the incredible realm, then those fees will be awarded. If not, then the trial court becomes the -- the solution or -- where that would go, then the trial court, essentially becomes in every instance where they zero award of attorney's fees the fact-finder on attorney's fees.

JUSTICE BRISTER: But your argument is not limited to zero. If the jury had awarded 40,000 here instead of 47, but the only evidence uncontested is 47, it sounds to me like your argument is under Ragsdale every time we give 47. It didn't matter what the jury does. If it gives us half, if it gives 80 percent, if it gives us zero, if it's uncontested, we get it all.

MR. HAYES: Or if it's $7500?

JUSTICE BRISTER: That is -- that is your position, right?

MR. HAYES: That would be my position under Ragsdale and for the readings that's been developed, and I guess the problems in doing it another way. That's --

JUSTICE BRISTER: And the exception in Ragsdale is just as troubling to me. If the deal is if it's beyond the -- I forget -- what do you say the language was at this --

MR. HAYES: Well, there's --

JUSTICE BRISTER: -- that it's beyond belief, let's say. You get -- so you get 100 percent of what you ask unless it's beyond belief, but in a state when we're electing judges on the local trial level, this is usually going to be a campaign contributor and a judge making that call, and that's just going to look -- whatever he decides or she decides, that's just going to look terrible, that the person who contributed to your last campaign either is always beyond belief or not beyond belief. I mean, a state where we elect judges, that's one of the main reasons we want the juries to decide everything because it's just going to look bad when the attorneys contribute to campaigns. What's your response to that?

MR. HAYES: Certainly, the -- in the zero answer, we know what the response is. If, in fact, the jury comes out with some, I guess, potentially reasonable matter, reasonable number, then potentially that -- that number sticks. But again, with this situation being a -- a zero amount and the law as it stands on this, I guess, it's still a -- it's a trial tactic issue that the other side chooses in attorney's fees cases, then I'm just not going to contest it. And I'll be -- even in the damages case, where you're left with that is -- that -- well, it's -- you know, is it beyond some realm or beyond something that wasn't proven? In this particular case, it's --

JUSTICE BRISTER: Did you all have any conversation with the judge or each other before or after the jury came back with this verdict, about why don't we just waive the jury and submit this to the judge?

MR. HAYES: No, we did not.

JUSTICE BRISTER: Why is it everybody in federal court does that and nobody in state court does that? Can you tell me that from a practitioner's standpoint? I've never heard of a federal judge trying it to a jury. Everybody waives it and tries it to the judge. Are they just more trusted than our state district judges are?

MR. HAYES: My answer is, if I was a defendant in state court, I would always want the jury -- the attorney's fees to go to a jury

because all I can do really is -- is go down from -- hopefully they go down from what they're asking.

JUSTICE BRISTER: 'Cause they're not going to like lawyers, so they're going to cut it.

MR. HAYES: Unfortunately, that's my general opinion.

JUSTICE BRISTER: Maybe to you.

CHIEF JUSTICE JEFFERSON: There's -- there is an underlying question here and that is, should we overrule Ragsdale and -- so that in all these cases whether -- no matter how it's instructed to, the -- the jury, no matter what the court's charge say -- says, if there's evidence of attorney's fees from one side and they say it's reasonable and necessary, and the jury awards zero damages, that those -- always are remanded for a new trial to a new jury. And so, my question to you is, why should we -- should we overrule Ragsdale, and if not, why not?

MR. HAYES: In this -- in this type of situation with a -- a defense to attorney's fees that might promote no response ever to attorney's fees and just hope that this kind of situation comes in where they come in with a small amount of fees, where there's not a concern if they don't fight it, then they're not going to be -- maybe bad word is stuck with what the other side proves up. Again, I think a large component of this is they have taken the position, we're not going to contest this whatsoever, didn't even question me as to any of the work that was done in the case.

CHIEF JUSTICE JEFFERSON: But you're saying, in effect, in -- in a number of cases the -- the lawyers agree, the attorney's fees that are requested are basically reasonable. Why cross-examine this person -- that evidence is okay, and the jury is probably going to find that and what we're really talking about is the underlying damages or liabilities. And if we've got a problem, then we can, as you say, cross-examine as for the Andersen factors to be submitted, make a bigger contest of it.

MR. HAYES: Certainly, in -- in this case, and again, I would contend that this entire issue has been waived by the fact that case on a side, and the fact that there was no instructions requested or objections to the particular question, certainly was -- was evidence presented on the question that's asked, so you don't get to the particular factors. But again, if the -- the factors you know are there, then arguably, you could say in that situation, if there's no evidence that is presented, then the defense just sits there and argues the factors that are -- or that are there, and they didn't meet this, didn't meet this, didn't meet this. Not saying that necessarily overrules Progressive, but that's -- again, that's not the facts of this particular case.

JUSTICE WAINWRIGHT: Well, there's another alternative. Opposing counsel could listen to the examination of a witness and -- on attorney's fees or any other matter and conclude, well, they have the burden of proving up the basis for recovery, and opposing counsel may conclude they didn't get there. If I get up and cross-examine, I'm going to alert the other side to some things potentially, so I'm going to let it go, 'cause I'm going to win on appeal. That's a strategic decision opposing counsel may make which would then result in, if correct, position like petitioners take in that you just didn't get there at trial. It should be reversed, sent back perhaps for a new trial on it, but you didn't get there the first time. That -- that's another possibility as well.

MR. HAYES: That's an absolute possibility. Again, it's -- it's a decision for the opposing side on attorney's fees that -- that you know

they're making that they may win on some other ground.

CHIEF JUSTICE JEFFERSON: But if Ragsdale were the law, that would be based on the idea that this is preposterous or -- I forgot all the other adjective you used -- the exceptions to the court's ability to -- to find an amount. And under this, I don't see that in this record. I mean, at least there's no suggestion that this is just out -- you know, pulled from thin air, this amount that was testified to.

MR. HAYES: Yes. Again in this situation, the -- the entirety of the failed fee bills were provided that did have detailed entries. There was a cover sheet that had the particular hours at the rates of the various attorneys. So, that again, that was a situation where it was -- you know we believe it was fully and properly proven up.

In conclusion, it's the respondent's position that, number one, the -- the entire issue now would be waived to go in and -- because there was not an objection to that to fight this particular issue when at the trial court level, there was no objection to these other criteria even being applied. And following that under the -- Ragsdale, which I believe the petitioner contends was -- was properly applied based upon the evidence in this case -- was properly applied that the standards were met that -- or the three prongs that wasn't incredible, the evidence was direct, clear, and concise in that situation with a zero result, then the trial court, you know, abused its discretion by giving any number, but zero --

JUSTICE BRISTER: Well, I'm curious because Rule 295 in the Rules of Procedure provides for correcting a verdict while the jury is still there. If the jury doesn't answer one of the questions or in this case answers a question with an unacceptable verdict, the trial judge can instruct them in writing and send them back in to try harder, and why -- why wasn't that done? I mean, everybody knew when you got the zero, that's not right, then we're going to have to do something about it. We could've fixed this right at the moment by written instructions, the jury -- "Ladies and gentlemen, that says some amount, and you can't put zero. So put something in there." That would've fixed it, right?

MR. HAYES: I don't have an answer other than that wasn't done. That wasn't done. In conclusion, again, the respondents would --

JUSTICE O'NEILL: Well, I mean it's pretty clear what that wasn't done. Jury orders you zero, you don't want to go back and try again.

JUSTICE O'NEILL: They're going to give you $2.

MR. HAYES: I didn't mean to sound flippant. They had the rule in front of me. Yes, it was not done, and it --

JUSTICE BRISTER: But -- but, you know, that's -- that's the bad thing and the good thing about the jury system. They can do whatever they want, right? Now, what we got here is the jury wanted one thing and the court of appeals just did something else. That's a bit of a problem if you have a right to jury trial on attorney's fees, isn't it?

MR. HAYES: Well, the -- in this situation, we contend that the court of appeals did what, at that point, that there was no other choice, anything the jury came back with what would have to have been the particular number the court of appeals awarded.

JUSTICE WAINWRIGHT: Why don't we agree with the trial judge? You said $7,500 was proper.

MR. HAYES: Under Ragsdale, the trial court judge at that point would -- would not have -- would be abusing his discretion to do anything but award the --

JUSTICE WAINWRIGHT: Amount of the --

MR. HAYES: -- reasonable attorney's fees that were uncontested and proven, direct, clear, and concise. Again, it goes back to the

question, I guess the alternative is, in cases like this, you then just make for the trial court judge the finder of fact and going back to Ragsdale and cases following that, that's not the way it has been done, and again, it's -- it's uncontested, clear, concise evidence.

JUSTICE WAINWRIGHT: But again, at least as you interpret Ragsdale, it does not allow the jury to disbelieve parts of the testimony of the amount of attorney's fees. Its whole [inaudible] so long as that testimony is uncontested.

MR. HAYES: [inaudible]

JUSTICE WAINWRIGHT: You may look at the bills and say the attorney said this is the amount I expended and it's reasonable and necessary, but the jury may say, you know, he billed 26 hours in this day or may see some reasons to make deductions but --

MR. HAYES: I think that's right. The safety net again is the -- if the defendant wants to make that kind of argument or present something to the contrary, then --

JUSTICE WAINWRIGHT: -- then they have to do it on cross-examination or -- or contrary evidence --

MR. HAYES: Or contrary evidence because, again, we're -- we are --

JUSTICE WAINWRIGHT: It would have been.

MR. HAYES: -- talking about expert testimony in this particular case and that's kind of -- the Ragsdale, obviously is prefaced on with expert testimony at certain times got to live with it if -- if A, B, and C occur.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

JUSTICE BRISTER: This has been a summary judgment and they put on the affidavit 47,000 attorney's fees and you all put on nothing. You can enter summary judgment for 47,000, right?

REBUTTAL ARGUMENT OF ROBERT D. RANEN ON BEHALF OF THE PETITIONER

MR. RANEN: Depending on the adequacy of the affidavit and the ultimate results obtained, then, yes, your Honor, that could -- yes, your Honor, that could be proper.

JUSTICE BRISTER: Why shouldn't we do the same thing for people that don't bother to do any cross-examination or call their own expert or anything else?

MR. RANEN: Well, respectfully, your Honor, in this case Mr. Hayes was cross- -- cross-examined, and after the cross-examination and the evaluation of all of the evidence, the jury chose apparently not to believe -- not to believe Mr. Hayes.

What I'd -- what I'd like to do is start by addressing the issue of the fees as being incredible in the hypothetical that Mr. Hayes discussed in his presentation. The fees in this case, we would argue were incredible. The trial judge himself in the -- in the post judgment hearing referred to the respondent's attorney's fees as huge. They don't normally get this high, and it was the trial judge's opinion that $5,000 was normally what he considered to be a reasonable fee for a suit on a guarantee. Well, he did ultimately award 7,500, the trial judge, still in his discretion in evaluation of the evidence including the results obtained felt that -- decide what a reasonable fee would be. So, when we're discussing the issue of what fees are incredible, that does apply to the respondent's fees on a case like this.

With respect to, Justice Brister's discussion, the doctor analogy,

what we -- what we're looking at is the situation of fee -- of fee shifting as it's discussed in Arthur Andersen and the mere fact that a lawyer and a client have agreed to a particular fee is not sufficient to shift that burden over to a third party. We see this with respect to the doctor analogy all the time. A patient and a doctor may agree on a certain fee. The patient then submits it to its insurance company, who doesn't feel that those fees are reasonable and actually worth less.

JUSTICE MEDINA: They usually don't feel any fees are reasonable.

MR. RANEN: Your Honor, that's -- that's a different conversation for a -- for a different day. There's been a lot of discussion during respondent's presentation about Ragsdale. Ragsdale is not -- Ragsdale was a first step but Arthur Andersen, this Court has made clear is the controlling law on this issue. It's not just the Arthur Andersen opinion itself, we have to -- we can look at the recent opinions of Barker v. Eckman and Young v. Qualls.

JUSTICE JOHNSON: Let me ask you Barker v. Eckman, were the Arthur Andersen factors included in the instruction to the jury or do you recall that?

MR. RANEN: The -- they were -- your Honor, seven of the eight factors were presented to the jury [inadible].

JUSTICE JOHNSON: That was different then your case here because you didn't submit it.

MR. RANEN: They were not submitted in this case, your Honor, but just because they're not submitted does not mean that those factors are -- even though the factors were not submitted --

JUSTICE JOHNSON: What -- what -- is your position --

MR. RANEN: -- they still do need to apply.

JUSTICE JOHNSON: Is it your position that we ignore what the jury has told to use as the law in reaching a result?

MR. RANEN: No, your Honor, I'm not saying that.

JUSTICE JOHNSON: Is the jury supposed to follow that law?

MR. RANEN: The jury -- the jury -- the trial court judge and the appellate court justices should follow the law.

JUSTICE JOHNSON: Okay. So, is -- the trial court then bound by what he instructed to the jury?

MR. RANEN: I don't believe the trial court is bound by -- bound by what he instruct -- instructed the jury even if he properly instructed the jury under Cain v. Bain --

JUSTICE JOHNSON: We presume he properly instructed the jury, don't we? He told the jury just to consider what's reasonable and necessary. He did not give the factors --

MR. RANEN: That's correct.

JUSTICE JOHNSON: Okay. And so, your position is, even though he told the jury to do that, he then can later -- he and the court of appeals later should consider other factors and second-guess the jury using other factors that the jury was not given, and there was no objection to the failure to give those to the jury.

MR. RANEN: There -- there was no objection to the charge on that issue, your Honor; however, even after -- even after the verdict is given, you can't -- the trial court judge and -- can't go through and consider the results obtained factor until after the verdict has already been given.

JUSTICE JOHNSON: The jury was not told to consider this case anyway. So, why should the trial judge consider in saying -- in reviewing what the jury did why would the trial judge consider something he or she did not tell the jury to consider? It seems to me like you're asking the jury to do something and then you're looking at

it on some other factors and second-guessing what the jury did on other factors if we -- if we -- we do it that way.

MR. RANEN: Ultimately, your Honor, in this case I feel that -- that the jury verdict -- that the jury verdict should not be disturbed on a question and issue of attorney's fees when it's a jury trial. The jury is the fact- finder and the deference should be given to the jury. May I have just a brief concluding sentence, your Honor?

CHIEF JUSTICE JEFFERSON: Sure.

MR. RANEN: Your Honors, for the reasons that we've discussed fairness, demands, and a law that requires, that the judgment of the court of appeals be reversed.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted.

That concludes the arguments for this morning and the marshal will now adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas, now stands adjourned.

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