**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 94-40551

(Summary Calendar)

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DENISE POLK GARRETTE, individually and as administratrix obo Joseph John Garrette Estate, Jr., Et Al.,

Plaintiffs-Appellants-Cross-Appellees,

versus

ALFRED LEVI BURNS, Et Al.,

Defendants,

W.E. GARY, Et Al.,

Intervenors-Defendants-Appellees-Cross Appellants.

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Appeal from the United States District Court
For the Western District of Louisiana
(6:91-CV-244)

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(June 8, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

After Denise Garrette settled her wrongful death claim for $1,000,000, she requested that the district court reduce the contingency fee she had agreed to pay her attorneys, Willie E. Gary

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and Glenda August. The district court reduced the fee from $400,000, 40 percent of the settlement amount, to $333,333, 33 1/3 percent of the settlement amount. Both parties now appeal from the district court's judgment. Finding no reversible error, we affirm.

I

Denise Garrette's husband was fatally injured when a tractor-trailer rear-ended the car in which he was riding as a passenger. Following her husband's death, Garrette obtained the services of attorneys Willie Gary and Glenda August on a contingency fee basis for the purpose of filing a wrongful death claim against the driver of the tractor-trailer. Pursuant to their contingency fee agreement, Garrette agreed to pay Gary and August 33 1/3 percent of any recovery up to $1,000,000 before the filing of an answer, and 40 percent of any recovery up to $1,000,000 after the filing of an answer, regardless of whether the lawsuit settled or went to trial.

Gary and August filed Garrette's wrongful death claim in federal court, and the named defendants filed an answer in which they denied liability. The parties ultimately settled Garrette's claim before trial for $1,000,000.

The contingency fee agreement entitled Gary and August to 40 percent of the settlement amount, or $400,000. However, Garrette obtained new counsel and requested that the court review the reasonableness, under Louisiana law, of Gary and August's fee.[1]

After holding an evidentiary hearing to evaluate the

[1] The parties agree that Louisiana law governs our interpretation of the contingency fee agreement and the reasonableness of the fees.

reasonableness of Gary and August's fee, the district court reduced the fee from $400,000 to $333,333. Both parties now appeal from the court's judgment. Garrette argues that the district court should have reduced the fee further, while Gary and August contend that the district court should not have reduced the fee at all.

II

The Louisiana Rules of Professional Conduct prohibit attorneys from charging unreasonable, or "clearly excessive," fees, *see* La. Rev. Stat. Ann. tit. 37, ch. 4 app., art. XVI, Rule 1.5(a) ("Rule 1.5(a)"), and this prohibition extends to fees due under contingency fee contracts, *Pharis & Pharis v. Rayner*, 397 So. 2d 1295, 1296 (La. 1981); *Davidson, Meaux, Sonnier, McElligott & Swift v. Brodhead*, 613 So. 2d 1038, 1041 (La. Ct. App.), *writ denied*, 616 So. 2d 703 (La. 1993); *Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless, Inc.*, 517 So. 2d 222, 224-25 (La. Ct. App. 1987).[2] If a court finds that a fee is clearly excessive, it may set aside the amount called for under the contract and recalculate a reasonable fee. *Pharis & Pharis*, 397 So. 2d at 1296; *Drury v. Fawer*, 590 So. 2d 808, 810-11 (La. Ct. App. 1991), *writ denied*, 592 So. 2d 1304 (La. 1992); *see also Teche Bank & Trust Co. v. Willis*, 631 So. 2d 644, 646-47 (La. Ct. App. 1994) (finding attorneys fee award called for under clause of promissory note clearly excessive and calculating reasonable fee). Rule 1.5(a) establishes the following

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[2] A fee is clearly excessive if, "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee . . . is in excess of a reasonable fee." *Louisiana State Bar Ass'n v. Gross*, 576 So. 2d 504, 507 (La. 1991).

factors to guide a court's determination of whether a fee is clearly excessive and its calculation of a reasonable fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

Rule 1.5(a); *Davidson, Meaux*, 613 So. 2d at 1041-42; *Teche Bank*, 631 So. 2d at 647.

A

Gary and August contend first that the district court erroneously found that their fee was clearly excessive. We review the district court's finding for clear error. *See* Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . ."). The clearly erroneous standard does not entitle us to reverse the finding of the district court simply because we are convinced that we would have decided the case differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," we may not reverse. *Id.* at 573-74, 105 S. Ct. at 1511.

Gary and August restate their argument in the trial court on

appeal, contending that their original fee was not clearly excessive.[3] They have not, however, demonstrated that the court's finding was "clearly erroneous." The court based its finding on (1) the fact that the case was neither difficult nor novel, (2) the minimal time and labor required to settle the case (approximately 320 billable hours), and (3) the fact that the fee exceeded the fee customarily charged in the locality. We hold that the district court's finding that Gary and August's fee was clearly excessive is "plausible in light of the record viewed in its entirety," *id.*, and consequently, we affirm the district court's finding.[4]

B

Garrette argues that the district court erroneously balanced the Rule 1.5(a) factors in its determination of a reasonable fee. We review the district court's calculation of a reasonable fee for abuse of discretion. *See Fourchon Docks, Inc. v. Milchem Inc.*, 849 F.2d 1561, 1568 (5th Cir. 1988) (reviewing for abuse of discretion district court's calculation of reasonable attorneys' fee under Rule 1.5(a)); *see also Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 689 (5th Cir. 1991) (reviewing for abuse of discretion district

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[3] In their brief, Gary and August state, "The question therefore presented to the court is whether the fee is `clearly excessive'. It is submitted that it is not."

[4] Gary and August also contend that the district court erroneously relied on the fact that the case settled for $1,000,000 in finding that the case was neither difficult nor novel. The court stated: "But in all seriousness, this case was not that difficult nor that novel. The very fact that it was settled for a million dollars is some proof of that." Although the amount of recovery may not necessarily constitute a measure of the difficulty and/or novelty of a case, Gary and August have not demonstrated that the district court's finding, that the case was neither complex nor novel, was clearly erroneous. In fact, they do not even contend that the case was in fact complex.

court's calculation of reasonable attorneys' fee under "Louisiana attorney's fees guidelines"). Garrette contends that the district court should have attached less weight to one factor and more weight to others; that is, that it should have exercised its discretion differently. She has not demonstrated, however, that the court *abused* its discretion, and after reviewing the district court's reasons for reducing the fee, we have found no basis for concluding that it did so.[5]

C

Both parties contend that the district court improperly took judicial notice that 33 1/3 percent was the customary contingency fee percentage in the locality. A district court may take judicial notice of any adjudicative fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

We do not decide whether the district court's judicial notice of the customary contingency fee in the locality was improper because we hold that the court's error, if any, was harmless. *See* Fed. R. Civ. P. 61. In *Southern Pacific Transportation Co. v.*

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[5] Garrette also contends that the district court erred by considering her consent to the contingency fee in its determination of a reasonable fee. The court asked Garrette's counsel at the evidentiary hearing, "Don't you have a problem with the fact that she agreed to pay forty percent? Isn't that the hugest problem you face in this?" We have found no evidence in the record, however, that the court based its determination of a reasonable fee on Garrette's consent to a contingency fee of forty percent. When the court recited the considerations that governed its determination of a reasonable fee, Garrette's consent was not among them.

*Chabert*, 973 F.2d 441 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1585, 123 L. Ed. 2d 152 (1993), we held that in an appeal following a bench trial, the erroneous admission of incompetent evidence warrants reversal only "if all of the competent evidence is insufficient to support the judgment, or if it affirmatively appears that the incompetent evidence induced the court to make an essential finding which it otherwise would not have made." *Id.* at 448; *see also Figgs v. Quick Fill Corp.*, 766 F.2d 901, 903 (5th Cir. 1985) (holding that district court's allegedly erroneous admission of evidence, if error, was harmless because other competent evidence supported district court's judgment). Applying that principle here, we hold that even if the court's decision to take judicial notice of the customary contingency fee in the locality was erroneous, the error was harmless because (1) ample competent evidence exists in the record to support the district court's judgment, and (2) the court's finding regarding the fee customarily charged in the locality was not essential to its determination of a reasonable fee.[6]

III

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

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[6] *See Gordon v. Levet*, 643 So. 2d 371, 372-74 (La. Ct. App. 1994) (finding contingency fee of 40 percent excessive and reducing fee to 33 1/3 percent without reference to fee customarily charged in locality), *writ denied*, 648 So. 2d 394 (La. 1994); *Northshore Ins. Agency, Inc. v. Farris*, 634 So. 2d 867, 870-71 (La. Ct. App. 1993) (finding contingency fee of 25 percent excessive without reference to fee customarily charged in locality); *Scott v. Neal*, 506 So. 2d 1313, 1318 (La. Ct. App. 1987) (finding contingency fee of 25 percent excessive and reducing fee to 15 percent without reference to fee customarily charged in locality).