

CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER
STONE, individually and as next friends
of CHRISTOPHER JAKE STONE

Plaintiffs,

vs.

ANTONIOS PAGOURTZIS and ROSE
MARIE KOSMETATOS

Defendants.

§ COUNTY COURT AT LAW
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§ GALVESTON COUNTY, TEXAS
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§ COURT NO. 3

**THE TENNESSEE DEFENDANTS’ OBJECTION AND RESPONSE TO PLAINTIFFS’
AMENDED APPLICATION FOR ATTORNEYS’ FEES AND COSTS**

Defendants LuckyGunner, LLC (“LuckyGunner”), Red Stag Fulfillment, LLC (“Red Stag”), Mollenhour Gross, LLC (“MG”), Jordan Mollenhour, and Dustin Gross (collectively, the “Tennessee Defendants”), by their undersigned attorneys and without waiver of any Special Appearances and subject to Tex. R. Civ. P. 91a.7-8, file this objection and response to Plaintiffs’ Amended Application for Attorneys’ Fees and Costs (“Am. App.”). For the reasons that follow, the Tennessee Defendants request the Court either deny or greatly reduce any award.

1. Plaintiffs collectively seek \$152,165.57 in attorneys’ fees and costs for “each stage of litigating the Rule 91a motion.” (Am. App. at ¶ 22.) This amount is neither reasonable nor necessary under the applicable standard.

2. Plaintiffs were initially awarded attorneys’ fees and costs under a proposed order tendered with their brief in opposition to the Rule 91a motion. The Court signed that proposed order on March 18, 2021, without the benefit of Tennessee Defendants’ arguments against such an award.

3. Under Texas Rule of Civil Procedure 91a.7 (eff. Sept. 1, 2019), “the court *may* award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court.” (Emphasis added.) The 2019 amendments changed the fee shift provision from mandatory to discretionary. (See Supreme Court of Texas’s Order Amended Texas Rule of Civil Procedure 91a.7, attached as Exhibit A.) Because the “civil action” against the Tennessee Defendants was “commenced” after the 2019 amendments to Rule 91a.7 became effective, an award of attorneys’ fees and costs is not “[r]equired.” (Exhibit A at p. 3.) Rather, it is left to the trial court’s discretion.¹

4. Plaintiffs’ proposed order did not advise the trial court that an award of fees is discretionary rather than mandatory. Instead, the proposed order merely stated, “Plaintiffs, as the prevailing party, *are* entitled” (Am. App. at Ex. A) (emphasis added.) Thus, it is unclear from the record whether the Court was aware it had discretion to award or deny fees.

5. Regardless, the March 18, 2021 order did not award Plaintiffs fees/costs for “each stage” of the proceedings, including through appeals. Under the circumstances, the Court can and should deny the Plaintiffs’ application outright or, in the alternative, greatly reduce any award.²

6. Plaintiffs’ requested award is permeated with (and based on) duplication, overlap, and work unrelated and unnecessary to the merits of the Rule 91a motion. The Tennessee Defendants’ Rule 91a motion focused on the immunity provided by the Protection of Lawful Commerce in Arms Act (“PLCAA”). One law firm – Everytown Law – led the preparation of the

¹ The *Yarbrough* plaintiffs’ lawsuit was filed in 2020. While the *Yanas*, *Beazley* and *Tisdale* plaintiff-groups’ lawsuits were filed against the shooter and his parents in 2018, their case against the Tennessee Defendants began via amended petitions filed in 2020.

² Plaintiffs’ original application, filed on April 16, 2021, sought approximately \$75,000, an amount that was also unreasonable under the circumstances. The Tennessee Defendants did not have an opportunity to challenge that application before the Parties agreed to stay all trial court proceedings via a Rule 11 agreement pending resolution of a motion to stay in the Texas Supreme Court.

opposition briefs on behalf of all of the Plaintiffs (the *Yanas, Hart, Beazley, Tisdale* and *Yarbrough* plaintiff groups).³ One Everytown lawyer argued on behalf of all of the Plaintiffs at the Zoom hearing on March 10, 2021.

7. It is unreasonable for the entire contingent of lawyers representing Plaintiffs to seek approximately \$50,000 for piggybacking off Everytown’s work. This is especially true in light of the fact that their application affirmatively states that Everytown “took a leading role in responding to the motions[.]” (Am. App. at 6, n. 9.) The other lawyers’ general review of briefing and silent participation at oral argument should not be compensable as “necessary” under Rule 91a.7. Recovery for what amounts to obvious and significant duplication and overlap should be rejected. While Plaintiffs and their many lawyers and law firms can expend resources as they see fit, there is simply no requirement that the Tennessee Defendants pay for it all under Rule 91a.7.⁴

8. With respect to billing rates, the requested recovery for three of the Plaintiffs’ lawyers is not reasonable. Mr. Todd’s rate of \$750 per hour (for *Hart*) and Mr. Apffel’s rate of \$700 per hour (for *Beazley*) far exceed what other lawyers in the case say is reasonable. And Mr. McGuire’s rate of \$500 per hour (for *Yanas*) is unreasonable under the circumstances. Here is why: Everytown’s affidavits (submitted by the New York-based lawyers who actually prepared and argued the Plaintiffs’ Rule 91a arguments) say the reasonable rate for this work is \$450 per hour or less, including for lawyers in the “Houston-area with similar skills, experience and

³ Indeed, the Plaintiffs’ opposition briefs, filed on February 10, 2021, are all nearly verbatim duplicates of each other.

⁴ The “evidence” submitted to support an award, *i.e.*, the Plaintiffs’ lawyers’ affidavits, also show significant duplication and overlap among the many law firms, and entries for work not on the merits of the Rule 91a motion. Examples include reviewing and briefing the motions for protection and to stay proceedings. (*See* Am. App. at Ex. F, ¶6; Ex. H, ¶10 (7+ hours for opposing a motion to stay); Ex. I, ¶9 (“editing opposition to motion to stay”); Ex. K, ¶6 (20+ hours for opposing “stay motion”). That Plaintiffs have submitted affidavits from eight attorneys outlining the same work performed underscores the high degree of duplication, which is simply not recoverable. (*See* Am. App. at Exs. F-M.)

expertise.” (See Am. App. at Ex. H, ¶12.) Plaintiffs presumably chose the most qualified lawyer in their contingent to prepare briefing and argue on their behalf. The most qualified lawyer’s rate (\$450 per hour) should set the ceiling for any fee award. Requests exceeding this rate should be rejected or reduced across the board.

9. At the appellate level, the litany of lawyers involved (other than Everytown) took on an even more reduced role. Even so, problems with the amount sought by Plaintiffs at this later stage also exist.

10. In the Fourteenth Court of Appeals, the Plaintiffs did *not* file an opposition to the petition for writ of mandamus, yet they seek nearly \$6,000 for briefing a motion to stay proceedings in the appellate court. (See Am. App. at ¶¶ 11, 22.) That work was not “reasonable and necessary” to the merits of the Rule 91a motion in the trial court.

11. At the Texas Supreme Court, the Plaintiffs filed a response in opposition to the Tennessee Defendants’ petition for review, but the Texas Supreme Court nevertheless ordered full merits briefing, meaning Plaintiffs were *unsuccessful* at avoiding further review. Plaintiffs should not be compensated for appellate work on which they did not prevail.

12. The Plaintiffs filed one merits brief at the Texas Supreme Court. That brief largely repeated arguments they made before this Court. Plaintiffs nevertheless seek to double their recoverable fees from \$75,000 in the trial court to \$150,000 through appeal based, in part, on a repeat of earlier work and work that was separate from the merits of the Rule 91a motion. This is not “reasonable and necessary” work under any construction of Rule 91a.7.

13. It is important to note that, during the trial and appellate court proceedings, the Plaintiffs made several key concessions that eliminate core allegations of their petitions, including that:

- The PLCAA applies to Plaintiffs’ claims against LuckyGunner. Thus, “only claims that fall within PLCAA’s enumerated exceptions can go forward against” LuckyGunner. (Pls.’ Resp. to Pet. for Writ of Mandamus at 12.)
- 18 U.S.C. § 922(x) does not impose a “duty to inquire” on a seller of handgun ammunition. (Pls.’ Resp. to Pet. for Writ of Mandamus at 48.)
- The buyer’s use of a prepaid gift card imparts no information about his age. (*Yanas* Pls.’ Pet. at ¶79.)

These concessions demonstrate good grounds for the filing of the Rule 91a motion in the first place, and, in turn, a legitimate basis for the Court to exercise discretion and deny or greatly reduce any fee/cost award against the Tennessee Defendants under Rule 91a.7.

14. Finally, it is not “reasonable and necessary” that nearly \$100,000 of the roughly \$150,000 sought comes from Everytown Law. Going into this case, Everytown knew the PLCAA immunity defense would be front and center, as their affidavits filed in support of their fee request acknowledge they surely drew on their past research and PLCAA briefing to craft their arguments to work around the PLCAA at the pleadings stage. For example, Ms. Lefkowitz states:

This is a highly specialized area of law due to the existence of the [PLCAA], a federal law on which defendants in the gun industry regularly rely. Through my work, I have become one of the foremost experts in the country on PLCAA. In addition to having litigated over a dozen cases involving PLCAA, I write on the subject and am regularly asked to speak on panels about PLCAA and firearm litigation.

(*See* Ex. H to Am. App. at ¶5.)

15. The takeaway is that the Plaintiffs’ arguments made by Everytown were not a start-from-scratch effort. Indeed, some of their work on the Rule 91a motion tracks arguments made while these same cases (*Yanas*, *Tisdale* and *Yarbrough*) were removed to the Southern District of Texas. That a billionaire-funded entity wants nearly six figures for filing arguments to avoid PLCAA immunity, based at least in part on past research/work, amounts to a requested windfall. The Court has the discretionary power to deny the requested relief. We request the Court do so.

CONCLUSION

For all of the foregoing reasons, the Tennessee Defendants request the Court exercise its discretion and deny Plaintiffs' requested award of fees and costs or, in the alternative, reduce any such award by either 66% (Everytown's approximate share) or 80% (Everytown's approximate share plus a reduction to account for duplicative and unnecessary work and hourly rates in excess of the ceiling for reasonable rates), and thereby permit the Plaintiffs and their lawyers to decide how to split the remaining portion awarded. The Tennessee Defendants request any further, including alternative, relief that the Court deems appropriate.

Dated: May 13, 2022

Respectfully submitted,

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EXHIBIT A

IN THE SUPREME COURT OF TEXAS

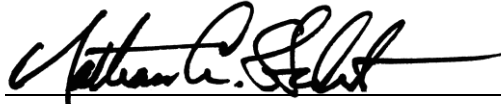
Misc. Docket No. 19-9052

ORDER AMENDING TEXAS RULE OF CIVIL PROCEDURE 91a.7

ORDERED that:

1. The Court approves the following amendments to Rule 91a.7 of the Texas Rules of Civil Procedure.
2. To effectuate the Act of May 21, 2019, 86th Leg., R.S., ch. 885 (HB 3300, codified at TEX. CIV. PRAC. & REM. CODE § 30.021), the amendments are effective September 1, 2019. But the amendments may later be changed in response to public comments. Written comments should be sent to rulescomments@txcourts.gov. The Court requests that comments be sent by November 1, 2019.
3. The amendments apply only to civil actions commenced on or after September 1, 2019. A civil action commenced before September 1, 2019 is governed by the rule as adopted in Misc. Docket No. 13-9022.
4. The Clerk is directed to:
 - a. file a copy of this order with the Secretary of State;
 - b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
 - c. send a copy of this order to each elected member of the Legislature; and
 - d. submit a copy of the order for publication in the *Texas Register*.

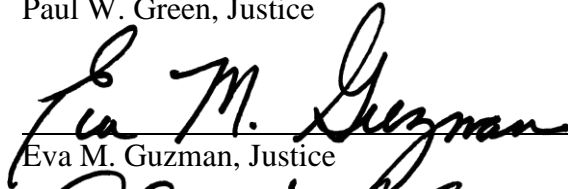
Dated: July 11, 2019



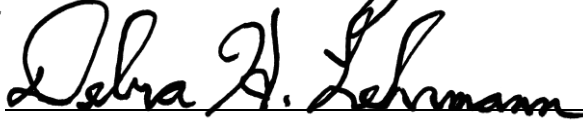
Nathan L. Hecht, Chief Justice



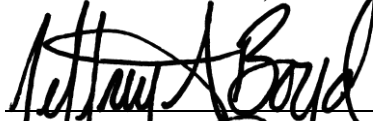
Paul W. Green, Justice



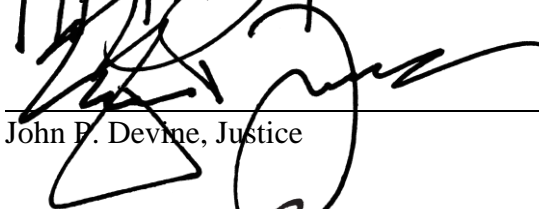
Eva M. Guzman, Justice



Debra H. Lehrmann, Justice



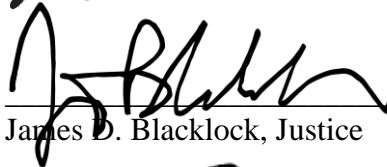
Jeffrey S. Boyd, Justice



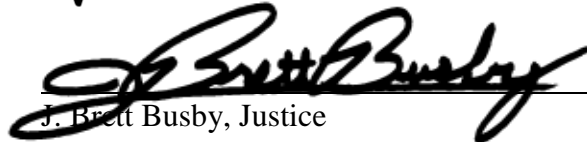
John F. Devine, Justice



Jeffrey V. Brown, Justice



James D. Blacklock, Justice



J. Brett Busby, Justice

RULE 91a. DISMISSAL OF BASELESS CAUSES OF ACTION

91a.7 Award of Costs and Attorney Fees Required. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court ~~must~~ may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. ~~The court must consider evidence regarding costs and fees in determining the award. Any award of costs or fees must be based on evidence.~~

Comment to 2019 change: Rule 91a.7 is amended to implement changes to section 30.021 of the Texas Civil Practice and Remedies Code. The amendments to Rule 91a.7 apply only to civil actions commenced on or after September 1, 2019. A civil action commenced before September 1, 2019 is governed by the rule as adopted in Misc. Docket No. 13-9022.