

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:14-cv-02822 - RPM

SANDY PHILLIPS, individually and as surviving
parent, of Jessica Ghawi, decedent;

LONNIE PHILLIPS, individually and as surviving
parent of Jessica Ghawi, decedent,

Plaintiffs,

v.

LUCKY GUNNER d/b/a/ BULKAMMO.COM,
THE SPORTSMAN'S GUIDE,
BRIAN PLATT d/b/a/ BTP ARMS,
GOLD STRIKE E COMMERCE LLC d/b/a/
BULLETPROOFBODYARMORHQ.COM, and
JOHN DOES 1 through 10, unknown individuals,

Defendants.

DEFENDANT THE SPORTSMAN'S GUIDE'S MOTION FOR FEES AND COSTS

Defendant, The Sportsman's Guide ("Sportsman's Guide"), pursuant to Fed. R. Civ. P. 54(d), D.C. Colo. L.Civ.R. 54.3, C.R.S. § 13-21-504.5, C.R.S. § 13-17-201, 28 U.S.C. §§ 1920 *et seq.*, and the Court's Order of March 27, 2015 (ECF 45), moves this Court for recovery of its reasonable attorneys' fees and costs.

1. On March 27, 2015, the Court entered judgement against Plaintiffs (ECF 46) and granted Sportsman's Guide's motion to dismiss under Rule 12(b)(6), finding that "[p]ursuant to C.R.S. §13-21-504.5, defendants Lucky Gunner and the Sportsman's Guide are entitled to an award of reasonable attorney fees and costs to be determined after filing motions pursuant to D.C.Colo.L.Civ.R.54.3" (ECF 45, 19.) Accordingly, Sportsman's Guide seeks an award of its attorneys' fees based on the Court's Order and pursuant to C.R.S. § 13-21-504.5.

2. Additionally, Sportsman's Guide also seeks recovery of its attorneys' fees pursuant to C.R.S. § 13-17-201. Section 13-17-201 provides fees are available "[i]n all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12 (b) of the Colorado rules of civil procedure...." C.R.S. § 13-17-201. Here, Sportsman's Guide obtained a Rule 12(b) dismissal of Plaintiffs' claims which were based on James Holmes' tortious conduct which resulted in death and injury to person and property. As a result, because the entire action against Sportsman's Guide was dismissed under Rule 12(b), Sportsman's Guide is entitled to full recovery of its attorneys' fees under C.R.S. § 13-17-201.¹

3. Pursuant to D.C. Colo. L.Civ.R. 54.3, the Affidavit of Donald Chance Mark, Jr., one of the attorneys representing Sportsman's Guide in this matter, is filed in support of this Motion. Mr. Mark's affidavit summarizes and encloses information concerning the relevant qualifications and experience of the attorneys for whom fees are claimed.

4. Itemized time entries ("Billing Invoices") documenting the attorney fees and costs incurred in defending this lawsuit by Sportsman's Guide's counsel, Fafinski Mark & Johnson, P.A. ("FMJ") and Peters Mair Wilcox ("PMW") are also attached to Mr. Mark's Affidavit. The Billing Invoices provide detailed description of the services rendered, the amount of time spent, the hourly rate charged, and the total amount claimed, as required by D.C. Colo. L.Civ.R. 54.3(b)(2).

5. FMJ incurred attorneys' fees in the amount of \$69,887.00 to defend Sportsman's Guide in this action. PMW incurred attorneys' fees in the amount of \$1,140.00 to defend

¹ Under the 10th Circuit, attorneys' fees statutes, including C.R.S. § 13-17-201, are deemed substantive law which apply in federal court. *Jones v. Denver Post Corp.*, 203 F.3d 748, 757 (10th Cir. 2000); *Infant Swimming Research, Inc. v. Faegre & Benson, LLP*, 335 F. App'x 707, 715-16 (10th Cir. 2009).

Sportsman's Guide in this action. Collectively, the attorneys' fees incurred amount to \$71,027.00.

6. Sportsman's Guide's costs are in the amount of \$2,010.87. An itemization of the costs incurred and supporting documentation are enclosed with Mr. Mark's Affidavit.

7. Finally, Sportsman's Guide requests its attorneys' fees incurred in preparing this motion for fees and costs and supporting affidavits. "It is obviously fair to grant a fee for time spent litigating the fee issue, at least if the fee petitioner is successful and his claim as to a reasonable fee is vindicated, since it is the adversary who made the additional work necessary." *Glass v. Pfeffer*, 849 F.2d 1261, 1266 n.3 (10th Cir. 1988). Accordingly, FMJ and PMW's attorney fees incurred on and after the Court's entry of judgment on March 27, 2015 (ECF 46) through resolution of the pending motion should be awarded to Sportsman's Guide. Sportsman's Guide will supplement its invoices through resolution of this motion.

LOCAL RULE 7.1 MEET AND CONFER

On April 8, 2015, Sportsman's Guide's counsel emailed Plaintiffs' counsel concerning the Court's Order (ECF 45) awarding Sportsman's Guide its attorneys' fees and costs. Included in this email was a general summary of the attorneys' fees and costs incurred by Sportsman's Guide, and the hourly rates charged by its counsel. On April 9, 2015, Plaintiffs' counsel and Sportsman's Guide's counsel spoke via telephone regarding Sportsman's Guide's entitlement to an award of fees and costs and undertook a reasonable good faith effort to resolve the disputed matter. Nonetheless, the parties were not able to reach a resolution.

CONCLUSION

Sportsman's Guide requests that this Court award it attorney fees in the amount of \$71,027.00 and costs in the amount of \$2,010.87, as described above, and in an amount to be

determined with respect to fees and costs incurred to litigate the fee award.

Respectfully submitted,

FAFINSKI MARK & JOHNSON, P.A.

Dated: April 10, 2015

s/ Patrick J. Rooney

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I hereby further certify that I have mailed the foregoing via U.S. mail, postage prepaid, to the following non-CM/ECF participants:

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