

141-307474-19

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA

Plaintiff,

v.

**FUNIMATION PRODUCTIONS, LLC,
MONICA RIAL, RONALD TOYE, and
JAMIE MARCHI**

Defendants.

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IN THE DISTRICT COURT

141st JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

**DEFENDANTS' MOTION FOR PARTIAL NEW TRIAL OR, IN THE ALTERNATIVE,
MOTION TO MODIFY THE FINAL JUDGMENT**

Defendants Monica Rial ("Rial") and Ronald Toye ("Toye" and, collectively with Rial, "Defendants") file this Motion for Partial New Trial or, in the alternative, Motion to Modify the November 25, 2019 Final Judgment ("Motion") as follows:

I. INTRODUCTION

On October 4, 2019, this Court entered an Order Granting Defendants Funimation Productions, LLC's Motion to Dismiss Under the TCPA, Monica Rial and Ronald Toye's Motion to Dismiss Under the TCPA, and Jamie Marchi's Motion to Dismiss Under the TCPA, dismissing this action against all Defendants with prejudice ("Dismissal Order"). In the Dismissal Order, the Court retained jurisdiction to rule on an award of attorneys' fees, costs, and other expenses incurred in defending this action, and an appropriate sanction pursuant to Texas Civil Practices and Remedies Code § 27.009.

Thereafter, Defendants filed their Brief in Support of Sanctions and Attorneys' Fees pursuant to the Texas Citizens Participation Act (the "Rial/Toye Motion"). Plaintiff objected to the award of fees, but did not offer an alternative as to what would constitute an amount of reasonable and necessary attorneys' fees, nor did Plaintiff present competent evidence on the

Arthur Anderson factors to determine reasonable and necessary fees. Plaintiff's response to the Motion to Dismiss filed by Defendants also did not offer competent evidence to combat Defendants' calculations. Because there was no contradictory evidence presented to the Court, the full amount of fees (\$270,963.04) presented in Defendants' Motion should have been granted.

On November 25, 2019, this Court correctly concluded that Defendants should be awarded attorneys' fees and sanctions, but entered a Final Judgment (the "Final Judgment") wherein it awarded \$100,000.00 to Defendants against Plaintiff for Defendants' reasonable and necessary attorneys' fees, plus the amount of \$15,526.96 in litigation expenses in defense of this matter through November 21, 2019. The Court also awarded Defendants their appellate attorneys' fees if Plaintiff appeals the Final Judgment, and there is no modification or change to the Final Judgment.

The Final Judgment includes two specific errors or issues that require the Court to grant a partial new trial (or to at least modify the Final Judgment). Specifically, the Final Judgment: (i) awards Defendants an amount of attorneys' fees (\$100,000.00) lower than the amount requested and supported by competent evidence in Defendants' Motion (\$270,963.04); and (ii) awards conditional appellate attorneys' fees "in the event there is no modification or change to the [Final] Judgment or the [Final] Judgment is affirmed by the Court of Appeals." This should be modified to grant conditional appellate attorneys' fees in event there is no modification or change to the ***Dismissal Order***.

Defendants move for a new trial or, in the alternative, to modify the Final Judgment as described below.

II. ARGUMENTS & AUTHORITIES

A. **Standard for granting new trial or post-judgment modification.**

A court may grant a new trial or set aside a judgment upon a showing of good cause. *See* Tex. R. Civ. P. 320. Texas courts are afforded broad discretion in granting new trials. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex.1985). A trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment within thirty days after the judgment is signed. Tex. R. Civ. P. 329b(a)&(d). The Final Judgment was signed November 25, 2019.

It is also within the Court's discretion to modify or clarify its judgment. *DeGroot v. DeGroot*, 260 S.W.3d 658, 662 (Tex. App.—Dallas 2008, no pet.) (“During the period of a trial court’s plenary power, its power to modify its judgment is virtually absolute.”); *see also id.* (“The trial court’s plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment is limited to a maximum of one hundred and five days after the judgment is signed.”). In this case, the qualifying language to the awarded appellate fees should be modified to make clear that if Defendants appeal and are successful in “modifying” the \$100,000.00 fee award, then the conditional appellate fees are unaffected.

B. **The Court should grant a partial new trial (or at least modify the Final Judgment) on the issue of Defendants’ award of attorneys’ fees. Defendants presented uncontroverted evidence that their attorneys’ fees totaled \$270,963.04.**

Good cause exists here to grant a partial new trial (or at a minimum modify the Final Judgment) because the Final Judgment awards attorneys’ fees, but improperly awards the same amount of fees to Rial and Toye (\$50,000.00 each) that it awarded to Defendants Funimation Productions (\$50,000.00) and Jamie Marchi (\$48,137.50), despite a lack of evidence justifying this award. As was clear in Defendants’ Motion, Plaintiff’s lawsuit was primarily directed at

Defendants. Plaintiff deposed only Defendants, attached hundreds of allegedly defamatory communications that required costly response, and deliberately launched a strategy of creating nuisance filings against Defendants to increase litigation expenses. Defendants were required to expend more time and money to respond to Plaintiff's bad-faith strategy. Moreover, Plaintiff's legion of followers, directed by Plaintiff's friend and financier, also directed the vast majority of their hate speech at Defendants and their counsel. As explained in Defendants' Motion, Defendants' counsel had to spend considerably more time and money preparing to defend against the lawsuit than the other parties. Regardless, and most importantly, Plaintiff failed to rebut the evidence presented by Defendants, and thus the entire amount requested by Defendants should have been awarded.

Defendants request only a partial new trial on the limited issue of the \$100,000.00 award of attorneys' fees so that this Court may enter an award more in line with the uncontroverted evidence entitling Defendants to \$270,963.04.

The Final Judgment awarded Defendants less in attorneys' fees than is justified and supported by the evidence presented in Defendants' Motion. The Final Judgment awarded Plaintiff \$100,000.00 in attorneys' fees, when all evidence submitted to the Court supported an award of \$270,963.04. Defendants filed their Motion in support of their claim for attorneys' fees, and presented expert testimony. Plaintiff offered unpersuasive objections, failed to present an expert witness, and simply stated that Plaintiff "opposes and objects to several billing entries for costs and attorney's fees offered by Defendants." Simply opposing line-item entries, however, is insufficient to reduce the fee award. Defendants applied a \$24,018.95 reduction to arrive at their requested fee award; therefore, Defendants already accounted for specific line-item inefficiencies or inaccuracies. Therefore, the Court should have awarded Defendants their full fee amount of

\$270,963.04.

C. The Final Judgment's language awarding Defendants their conditional appellate attorneys' fees should be modified to apply only to Plaintiff's appeal of the Dismissal Order.

Defendants further request that this Court modify the language in the Final Judgment to clarify that Defendants are entitled to their appellate fees if they successfully defend against *Plaintiff's appeal* on the *Dismissal Order*, regardless of Defendants' own cross appeal. Specifically, the Final Judgment provides:

Rial's and Toye' shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorney's fees, in the event Plaintiff files a Notice of Appeal:

1. \$55,000.00 in the event there is no modification of or change to the Judgment or the Judgment is affirmed by the Court of Appeals;
2. \$12,500.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the Judgment;
3. \$22,500.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the Judgment; and
4. \$15,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the Judgment.

On October 25, 2019, Plaintiff filed a Notice of Appeal of the Dismissal Order to the Second District Court of Appeals located in Fort Worth, Texas. Specifically, Plaintiff asks the Court of Appeals to reverse this Court's dismissal of the lawsuit, and all subsequent orders. Per the Final Judgment, if Defendants successfully defend against Plaintiff's appeal (*i.e.*, the dismissal stands and there is "no modification" to the Judgment dismissing the lawsuit), Defendants Rial and Toye are entitled to appellate fees of at least \$55,000.00.

The Final Judgment awards Defendants \$100,000.00 in reasonable and necessary attorneys' fees. The language in the Final Judgment, however, does not account for Defendants

successfully appealing that award. Defendants filed a cross-notice of appeal on December 13, 2019, asking the appellate court to render judgment that Defendants be awarded the full amount of their attorneys' fees, totaling \$270,963.04. If Defendants' appeal of the attorneys' fee award is successful (*e.g.*, the appellate court renders judgment on the amount requested by Defendants), there would necessarily be a "modification of or change to" the Final Judgment—affecting the Court's award of conditional *appellate* fees.

The Final Judgment, therefore, should have specified that the conditional appellate fees shall be awarded in the event that there is no modification or change to the ***Dismissal Order*** (*i.e.*, Defendants successfully defend against Plaintiff's appeal). Defendants, therefore, respectfully request that the Final Judgment be modified to read as follows:

Rial and Toye shall also have and recover from Plaintiff Victor Mignogna the following reasonable and necessary appellate attorneys' fees, in the event that Plaintiff files a Notice of Appeal:

1. \$55,000.00 in the event there is no modification of or change to the **October 4, 2019 Dismissal Order** or the **Dismissal Order** is affirmed by the Court of Appeals;
2. \$12,500.00 in the event a Petition for Review is filed by any party and the result is that there is no modification of or change to the **October 4, 2019 Dismissal Order**;
3. \$22,500.00 in the event the Texas Supreme Court requests briefs on the merits and the result is that there is no modification of or change to the **October 4, 2019 Dismissal Order**; and
4. \$15,000.00 in the event the Texas Supreme Court sets the case for oral argument and through the conclusion of the case, and the result is that there is no modification of or change to the **October 4, 2019 Dismissal Order**.

III. PRAYER FOR RELIEF

Based on the foregoing, Defendants Monica Rial and Ronald Toye respectfully pray that:

- (1) the Court grant a partial new trial solely to determine that Defendants be awarded \$270,963.04 in attorneys' fees;
- (2) the Court modify the Final Judgment as requested herein to award appellate attorneys' fees in the event there is no modification or change to the October 4, 2019 Dismissal Order; and
- (3) the Court grant Defendants all other appropriate relief.

Respectfully submitted,

/s/ Rusty J. O'Kane

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon all counsel of record in accordance with the Texas Rules of Civil Procedure, this 26th day of December, 2019.

/s/ Rusty J. O'Kane

Rusty J. O'Kane