

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PATRICIA ILLE, as Trustee for the
Next- of-Kin of Rebecca Wallace; CIVIL NO. 03-2092 (JRT/JSM)
LEO OSBECK, as Trustee for the
Next-of-Kin of Kathleen Wallace; and
LAUREEN HOHANSEE, as Trustee
for the Next-of-Kin of Robert Wallace,

Plaintiffs,

v. ORDER

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendant.

JANIE S. MAYERON, United States Magistrate Judge

On December 1, 2004, the Court issued an Order [Docket No. 154] awarding attorneys' fees and expenses to plaintiffs related to American Family's wavier of attorney-client privilege as to Mary Leahy. Pursuant to that Order, counsel for plaintiffs have submitted affidavits to this Court setting forth the attorneys' fees and associated expenses incurred by their respective clients in connection with the waiver of the attorney-client privilege by Leahy. [Docket Nos. 175, 182, 185]. Defendant disputes the amount of attorneys' fees and expenses that plaintiffs seek.

The Court, being duly advised in the premises, and based upon all of the files, records and proceedings herein, now makes and enters the following Order:

IT IS HEREBY ORDERED that

1. Defendant shall pay \$79,235.05 in attorneys' fees and costs to plaintiffs as set forth in Paragraph 2 below.

Ille Order

2. On or before October 10, 2005, American Family shall deliver to plaintiff Ille's law firm a check in the amount of \$38,022.00; to plaintiff Hohensee's law firm a check in the amount of \$27,351.30; and to plaintiff Osbeck's law firm a check in the amount of \$13,868.75.

Dated: September 30, 2005

s/ Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

In this Court's Order dated December 1, 2004, this Court granted in part and denied in part Plaintiff Hohensee's Motion for a Protective Order and Alternative Motion for Extension of Pretrial Discovery Schedule and Award on Related Expenses, and then ordered defendant American Family to pay plaintiffs attorneys' fees and costs associated with Mary Leahy's belated waiver of the attorney-client privilege, including discovery of additional information, preparation of supplemental expert reports, and time spent in bringing the motion. At the Court's request, plaintiffs submitted affidavits setting forth the time and expenses incurred in pursuing these matters. In this regard, plaintiff Ille sought attorneys fees in the amount of \$38,175 and costs in the amount of \$19,550 (which included expert fees in the amount \$17,002); plaintiff Osbeck sought attorneys fees in the amount of \$13,870 and costs in the amount of \$4,181.25 (which included expert fees in the amount \$3,275.00); and plaintiff Hohensee sought attorneys fees in the amount of \$27,933.75 and costs in the amount of \$4002.00 (which included expert fees in the amount \$3,094.75). As such, the plaintiffs requested a total of \$107,712.00 for all attorneys fees (\$79,978.75) and costs (\$27,733.25) associated with Leahy's waiver of the attorney-client privilege. The Court permitted American Family to file a letter objection to plaintiffs' requests, and then allowed each plaintiff to file a short letter responding to American Family's objections.

In its response to plaintiffs' affidavits, American Family challenges the amount of time expended by plaintiffs' attorneys and costs in connection with the waiver of the attorney-client privilege by Leahy, but does not challenge the hourly rates charged by the various attorneys. American Family asserts that the fees plaintiffs have sought are

unreasonable due to unspecified legal research, telephone conferences, and attorney appearances at motions. American Family also claims that no actual prejudice occurred to plaintiffs by the waiver of the attorney-client privilege, the depositions of Purvis, Ekelund, and Leahy were unrelated to the waiver issues or did not elicit any new information over that which was obtained in their 2004 depositions, and the supplemental reports by plaintiffs' four experts are excessive and unrelated to the waiver issue. In the event this Court decided to award any attorneys fees and costs to plaintiffs, applying "common sense and reasonable expectations at the time the motions were heard", American Family urged the Court to limit its award to \$5000 to \$10,000.

Having determined that plaintiffs were entitled to sanctions in the form of attorneys fees and costs for American Family's waiver of the attorney-client privilege late in the discovery period,¹ the Court must resolve what amount of fees and costs is reasonable. As an initial matter, when examining the bills submitted by each law firm, the Court had to determine whether each plaintiff provided sufficient explanation or support for their respective contention that the service rendered or the cost incurred was indeed related to or caused by Leahy's waiver of the attorney-client privilege. Where the Court could not ascertain from an item's description whether it was related to the waiver of the privilege, or no separate explanation or support was provided for the item, the amounts associated with that item were subtracted from the total fees awarded. Consequently, the following items were subtracted from the award: travel time to and from the motions hearing; attendance at the hearing by more than

¹ In this regard, this Court rejects American Family's attempt to revisit this Court's decision by suggesting that plaintiffs are not entitled to any attorneys' fees and costs on grounds that their waiver motion was denied, they were not prejudiced by the waiver, or no new information was elicited from the discovery obtained by plaintiffs subsequent to Leahy's waiver.

one attorney for a party; time spent at the motions hearing unrelated to the motion for a protective order; the cost of the motions hearing transcript; the costs of videotaping the depositions of Leahy, Purvis and Ecklund; fees incurred in connection with meetings with Trooper Silkey and preparation of his affidavit; and fees charged for legal research regarding the “duty to know facts, duty to investigate, duty to reevaluate.”²

Then the Court weighed and balanced the competing interests raised by plaintiffs and American Family. On the one hand, each plaintiff has a right to competent and zealous representation by their own attorney. Thus, American Family’s reversal of its position on the invocation of the attorney-client privilege, impacted not one, but all three plaintiffs, and it is American Family which must bear the responsibility for this decision. On the other hand, given that there are three different law firms involved in the representation of the plaintiffs’ case, it was incumbent upon counsel for the plaintiffs to take advantage of their joint representation by allocating various tasks among the various firms. Accordingly, any award against American Family should take into account unnecessary duplication of efforts.³

² In the statement submitted by attorney Dahlberg, several hours of legal research (9.5) were spent on the “duty to know facts, duty to investigate, duty to reevaluate” after this Court’s Order was issued on December 1, 2004, and prior to the depositions of Leahy, Purvis, and Ecklund. This not an appropriate cost for American Family to bear because it is a topic that permeates the entire case and is presumably one counsel would need to understand whether or not Leahy had waived the attorney-client privilege.

³ For example, plaintiff Hohensee brought the motion for the protective order and her firm expended approximately 20 hours on research prior to the filing of the motion, and 8 hours on research for the reply. Yet, Ille’s counsel also spent approximately 21.5 hours on research for the initial submission and 4 hours for the research on the reply, and Osbeck’s attorney spent approximately 9 hours on research prior to the initial filing of the motion. While each firm clearly had to satisfy itself on the pertinent law bearing on the motion, nevertheless it appears that there was not sufficient coordination or sharing of the research among the firms. Similarly, Hohensee’s and Osbeck’s firms appeared to each spend approximately 30 hours on preparation for the three depositions, while Ille’s firm appeared to spend approximately 85 hours in preparation for these depositions. Presumably, the Ille Order

Based on these various factors and considerations, the Court concludes that American Family should pay a total award of attorneys' fees and expenses in the amount of \$79,235.05, allocated among the three plaintiffs as follows:

Ille	\$38,022.00 (\$21,020 for attorneys fees; \$17,002 for expert costs)
Hohansee	\$27,351.30 (\$23,349.30 for attorneys fees; \$4002.00 for costs including experts)
Osbeck	\$13,868.75 (\$9,680.50 for attorneys fees; \$4181.25 for costs, including experts)

J.S.M.

three firms would have divided their efforts among these three depositions to avoid duplication of effort, yet the descriptions supplied by each firm suggests that they did not. In any event, the Court concludes that it is not appropriate to assess American Family for approximately 145 hours of deposition preparation.

Ille Order