

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PAUL BARROWS,

Plaintiff,

v.

DAUBERT LAW FIRM LLC, *et al.*,

Defendants.

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ORDER

06-C-409-C

On February 8, 2007, this court granted plaintiff's motion to compel discovery of a specified set of documents withheld by defendants. *See* dkt. 53. Plaintiff then requested \$630 in cost-shifting (3.15 hrs. @ \$200/hr.) pursuant to Rule 37 (a)(4)(A). Defendants oppose cost-shifting, pointing out that this was a close decision on disclosure and that therefore defendant was substantially justified in resisting disclosure.

In this particular situation, defendants are correct. Rule 37(a)(4) is a fee-shifting rule, not a sanction for being wrong. But although "the great operative principle" of Rule 37(a)(4) is that "the loser pays," still "a loser may avoid payment by establishing that his position was substantially justified." *Rickels v. City of South Bend, Ind.*, 33 F.3d 785, 786, 787 (7<sup>th</sup> Cir. 1994); *see also In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 330 (N.D. Ill. 2005). So it is here. Even though defendants ultimately lost their defense of the withheld attorney-generated notes, they were substantially justified in resisting disclosure under the doctrine of attorney work product.

Therefore, plaintiff's motion for cost shifting is denied.

Entered this 5<sup>th</sup> day of March, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge