

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

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KOLBE & KOLBE HEALTH AND  
WELFARE PLAN and KOLBE &  
KOLBE MILLWORK CO., INC,

Plaintiffs,

v.

THE MEDICAL COLLEGE OF  
WISCONSIN, INC. and CHILDREN'S  
HOSPITAL OF WISCONSIN, INC.,

Defendants.

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ORDER

09-cv-205-bbc

Defendants Medical College of Wisconsin, Inc. and Children's Hospital of Wisconsin, Inc. have moved for cost-shifting in accordance with the magistrate judge's order of July 18, 2012, arguing that they are entitled to the fees they incurred in opposing plaintiffs' requests for discovery that they believed to be duplicative and irrelevant to the issues raised by the parties in their pending motions for summary judgment. Plaintiffs oppose any cost-shifting on the ground that they never took any of the discovery defendants opposed.

The dispute arose over notices for Rule 30(b)(6) depositions filed by plaintiffs. Defendants moved for a protective order, dkt. #115, asserting that the discovery was duplicative of other discovery that had been taken and irrelevant to the issues raised by defendants in their motion for summary judgment. Those issues were limited to whether

plaintiffs' claims were preempted by the Employee Retirement Income Security Act (ERISA) and contract interpretation. Earlier in the case, plaintiffs had requested discovery related to payments to defendants for the medical care of an employee's child (K.G.) and defendants' refund processes in general and refunds provided to other payers and patients. In response, defendants had provided more than 5000 pages of documents and defended five depositions of their employees.

After defendants filed their motion for summary judgment, plaintiffs served a discovery request, asking for "all aspects of and the process of the refund request related to K.G. and Medical College's failure to refund payments made for services provided to K.G." Dkt. #117-5 and 6. Plaintiffs wanted to know such things as who was involved in the decision not to refund the money, whether any investigations had been done and if so, whether they had been completed and the result and whether the manner in which the determination of the refund request related to K.G. differed from the standard process, policy or protocol for such determinations and the extent to which the coordination and communication between the two defendants differed from their typical practice. Id.

In response to defendants' motion for a protective order, the magistrate judge held a hearing and concluded that he could not determine which side's position was correct. He left it to plaintiffs to decide what discovery they deemed genuinely necessary to respond to defendants' pending motion for summary judgment. If, after the summary judgment was decided, it became clear that the discovery was not necessary, defendants could file a motion for fee shifting. Text only order, dkt. #125.

In the end, plaintiffs chose not to seek any additional discovery, including depositions, but instead met with defendants and discussed entering into stipulations designed to cover only the minimum information plaintiffs needed to oppose defendants' motion for summary judgment. Defendants agreed to the stipulations. They did not take any 30(b)(6) depositions or ask for any other discovery. Now, however, defendants are asserting that they are entitled to fees and costs for bringing the motion for protective order and the time they spent reviewing plaintiffs' proposed stipulation.

Defendants' request for fees and costs will be denied in part and granted in part. The magistrate judge's fee shifting order was directed to "any discovery taken as a result of the instant order," dkt. #125, not to the cost of bringing the motion for a protective order. As for the costs associated with the stipulations, the stipulations were intended to take the place of discovery, so it is fair to assess some of the fees and costs incurred by defendants in reviewing them. After reviewing the fee request, I conclude that the fees incurred on July 26, July 31, August 6, 13 and 14, totaling \$445.00, are appropriately shifted to plaintiffs.

#### ORDER

IT IS ORDERED that the motion for fee shifting filed by defendants The Medical College of Wisconsin, Inc. and Children's Hospital of Wisconsin, Inc. is GRANTED in part and DENIED in part. Defendants' request for an award of fees associated with the stipulations is GRANTED in the amount of \$445.00; its request for fees incurred to bring the motion for

a protective order is DENIED.

Entered this 1st day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge