

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JEREMY T. McLAUGHLIN,)
) C.A. No. 04C-03-013 JTV
Plaintiff,)
)
v.)
)
DOVER DOWNS, INC., a Delaware corpor-)
ation, KEATING BUILDING CORP-)
ORATION, a foreign corporation, OVER-)
HEAD DOOR CORPORATION, a foreign)
corporation, AUTOMATIC DOOR ENTER-)
PRISES, INC., a foreign corporation, DEL-)
MAR SERVICES, INC., a Delaware corp-)
oration and MIAMI TESTING LABORA-)
TORIES, a foreign business entity,)
)
Defendants.)

Submitted: December 04, 2007

Decided: March 26, 2008

I. Barry Guerke, Esq., Parkowski, Guerke & Swayze, Dover, Delaware. Attorney for Plaintiff.

Michael Tighe, Esq., and Melissa L. Rhoads, Esq., Tighe, Cottrell & Logan, Wilmington, Delaware. Attorneys for Defendants Dover Downs and Keating Building Corporation.

Timothy A. Dillon, Esq., Salmon, Ricchezza, Singer & Turchi, Wilmington, Delaware. Attorney for Defendant Overhead Door Enterprises.

Stephen P. Casarino, Esq., Casarino, Christman & Shalk, Wilmington, Delaware. Attorney for Automatic Door Enterprises.

James T. Perry, Esq., Perry & Sensor, Wilmington, Delaware. Attorney for Del-Mar Services.

*Upon Consideration of Plaintiffs' s
Motion for Reconsideration of Commissioner's Order*
AFFIRMED

VAUGHN, President Judge

ORDER

Before the Court is a dispute over how much the defendants, Dover Downs, Inc., Keating Building Corporation, and Overhead Door Corporation, should be required to pay to take the discovery deposition of the plaintiff's expert witness, Warren Davis, Ph.D. Dr. Davis is an engineer. The plaintiff requested a fee of \$350 per hour for deposition testimony and \$180 per hour for travel time from Massachusetts to Delaware. The defendants offered to pay \$175 per hour for deposition testimony and \$100 per hour for travel time, or such amount as the Court deems appropriate. A Commissioner of the Court, after a hearing, determined that the defendants should pay \$225 per hour for Dr. Davis' deposition testimony and \$125 per hour for travel time.

Superior Court Rule 132(a)(3)(iv) provides that a judge may reconsider a matter such as this one only where it has been shown on the record that the Commissioner's order is based upon findings of fact that are clearly erroneous, contrary to law, or is an abuse of discretion.

PARTIES' CONTENTIONS

The plaintiff contends that the Commissioner's order is clearly erroneous,

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

contrary to law, and/or constitutes an abuse of discretion for the following reasons:

(1) It fails to apply the “manifest injustice” rule to protect the plaintiff from financial hardship which would result from having to defray any of the fees and expenses associated with the defendants’ request to take the discovery deposition of Dr. Davis solely for their own purposes;

(2) It did not take into account the economic disparity of the parties and the relative abilities of the defendants to fully defray the fees and costs of the discovery deposition of the expert they seek for their own purposes;

(3) It fails to take into account that there are five separate defendants among whom the total fees and costs can be fairly and equitably divided whereas there is only one plaintiff;

(4) It fails to take into account that Dr. Davis’ fees are reasonable in the context that he is a highly credentialed, nationally known expert who specialized in areas including the automatic revolving door in this case (i.e., his fees and rates are commensurate with his education, experience, and reputation);

(5) It fails to take into account that the plaintiff submitted a detailed five page Expert Disclosure containing expert information allowed under Rule 26(b)(4)(A)(I), which is far more extensive than is normally provided in response to such interrogatories, which is in and of itself sufficient discovery without the need for a discovery deposition; and

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

(6) It fails to address at all the issue of travel, meals, and lodging expenses associated with taking Dr. Davis' discovery deposition in Delaware.

The defendants contend that there is no Delaware law requiring the Commissioner to consider the economic disparity amongst the parties or the number of defendants by which to divide the cost. They contend that the Commissioner determined a reasonable fee in accordance with established Delaware law.

DISCUSSION

The general policy of the Court's rules is to prevent or minimize surprise at trial by freely permitting discovery depositions of experts who are expected to testify at trial.¹ The taking of a discovery deposition permits the opposing party to prepare adequately for cross-examination of the expert at trial.² A written expert disclosure, even an extensive one, is not a substitute for a deposition and does not render a deposition unnecessary or inappropriate.

Pursuant to Superior Court Civil Rule 26(b)(4)(C), "[u]nless manifest injustice would result, (I) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery," including travel costs.³ It is within the Court's discretion to set a fee that it deems reasonable.⁴ There

¹ *Stearrett v. Newcomb*, 1986 Del. Super. LEXIS 1292, at *4.

² *Id.*

³ *See TV58 Ltd. P'ship v. Weigel Broad. Co.*, 1993 WL 125523, at *5 (Del. Ch.). The intent of Rule 26 is to permit a party to take the deposition of the opposing party's expert witness, but to require that the party who requests the deposition bear the expenses incurred

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

is no fixed formula for determining what a reasonable expert fee should be.⁵ It is not unusual for a party to pay at least a portion of the fees charged by its expert for a discovery deposition taken by the adversary.⁶ “Where the expert charges more than what a court determines a reasonable fee, the party retaining that expert must pay the amount over and above the reasonable rate.”⁷ In 2004, the Court held an hourly rate of \$150 for deposition testimony to be appropriate for an expert engineer.⁸ Reasonable and ordinary travel expenses should not be assessed at the expert’s hourly rate.⁹ Rather, an award for travel time at one-half or less than one-half of an expert’s hourly rate is common.¹⁰

The amount to be paid under the rule is a reasonable fee, not necessarily the amount requested by the expert or the party who has retained the expert. Taking into

therewith. *Sampson v. Orkin Exterminating Co., Inc.*, 124 F.R.D. 631, 634 (N.D. Ind. 1989).

⁴ *Fisher-Price, Inc. v. Safety 1st Inc.*, 217 F.R.D. 329, 333 (D. Del. 2003); *see also Wright v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1241866, at *2 (Del. Super.) (stating that the award of expert witness fees pursuant to 10 *Del. C.* § 8906 is committed to the sound discretion of the Court).

⁵ *Lurch v. Roberts*, 2001 Del. Super. LEXIS 70, at *2.

⁶ *Reed v. Binder*, 165 F.R.D. 424, 428 n.3 (D.N.J. 1996).

⁷ *Id.* (internal quotation marks omitted).

⁸ *McKinney v. Brandywine Court Condo. Council, Inc.*, 2004 Del. Super. LEXIS 311, at *10.

⁹ *Gress v. Viola*, 2007 Del. Super. LEXIS 162, at *2.

¹⁰ *Id.*

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

consideration the applicable law and standard of review, I am not persuaded that the Commissioner's decision as to the amount of a reasonable fee is clearly erroneous, contrary to law, or an abuse of discretion.

The remaining question is whether requiring a reasonable fee, as determined by the Commissioner, rather than the full amount as requested by the plaintiff, creates manifest injustice. There is scant case law interpreting the meaning of manifest injustice in the context of Rule 26.¹¹ However, courts have considered the phrase as it arises in the context of Rule 16(e), which governs amendments to final pretrial orders.¹² In this analogous context, determining whether manifest injustice would occur requires the court to balance the respective hardships of doing justice to the parties against the need to maintain orderly and efficient procedural arrangements.¹³ An indigent party may be relieved of the requirement to pay expenses when necessary and appropriate under the manifest injustice exception.¹⁴ However, manifest injustice is a stringent standard that applies only in special circumstances, and the court is required to exercise restraint in applying the balancing standard.¹⁵ Other courts have

¹¹ *Fisher-Price, Inc.*, 217 F.R.D. at 332 (internal quotation marks omitted) (the federal counterpart is nearly identical to Delaware Superior Court Civil Rule 26(b)(4)(C)).

¹² *Id.*

¹³ *Id.* at 330, 332 (internal quotation marks omitted) (alterations in original); *see also Royal Maccabees Life Ins. Co. v. Malachinski*, 2001 WL 290308, at *16 (N.D. Ill.).

¹⁴ *Royal Maccabees Life Ins. Co.*, 2001 WL 290308, at *16.

¹⁵ *Fisher-Price, Inc.*, 217 F.R.D. at 330, 332; *see also Royal Maccabees Life Ins. Co.*, 2001 WL 290308, at *16.

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

considered whether a disparity in financial resources amounts to manifest injustice under Rule 26.¹⁶ Although there is an obvious and enormous difference in the abilities of the plaintiff and the defendants to pay costs of experts, I am not persuaded that the Commissioner's implicit finding that the stringent standard of manifest is not satisfied is clearly erroneous, contrary to law, or an abuse of discretion.

The cases of *Reed v. Binder* and *Fisher-Price, Inc. V. Safety 1st Inc.*, relied upon by the plaintiff, do not require a different result. In *Reed*, the court shifted the costs of deposing six defense experts to the defendants to punish them for failing to meet the disclosure requirements of Rule 26.¹⁷ Such is not the case here. In *Fisher Price*, the court's holding comported with the purpose of the rule, which requires that the party who requests the discovery deposition bear the expenses incurred therewith.¹⁸ Neither case requires the Court to shift the portion of the fees above that deemed reasonable from plaintiff to defendants merely because defendants have more financial resources and/or more individuals between which to divide the costs.

¹⁶ See, e.g., *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 547 (D. Ariz. 1999) (denying the dentist-plaintiff's argument that requiring him to pay an expert's deposition fee would be manifestly unjust where he was not indigent and no undue hardship would result); *Pudela v. Swanson*, 1993 WL 532546, at *3 (N.D. Ill.) (finding that although the plaintiffs may have less financial resources than the defendants, they are not "indigent" in the sense that the word is commonly used). Black's Law Dictionary defines indigent as follows: "1. A poor person. 2. A person who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*." BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁷ *Reed v. Binder*, 165 F.R.D. 424, 428, 431 (D.N.J. 1996).

¹⁸ The court held that it is not manifestly unjust for the corporation-plaintiff to pay defense expert fees where the plaintiff requested the discovery deposition of the defense expert. *Fisher-Price, Inc.*, 217 F.R.D. at 330, 332.

McLaughlin v. Dover Downs, Inc., et al.

C.A. No. 04C-03-013 (JTV)

March 26, 2008

The Court does not find that the expert fees set forth in the Commissioner's order are clearly erroneous, contrary to law, or constitute an abuse of discretion.¹⁹ Therefore, based on the foregoing, the Commissioner's order shall be *affirmed*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

¹⁹ Super. Ct. Civ. R. 132(a)(3)(iv).