

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA HARRIS FISHER : CIVIL ACTION
and CHARLES FISHER, :
Plaintiffs, :
 :
v. :
 :
ACCOR HOTELS, INC., :
Defendant. : No. 02-CV-8576

MEMORANDUM AND ORDER

J. M. KELLY, J. **JANUARY** , **2004**

Presently before the Court is a Motion for Fees and Expenses filed by Plaintiffs Lisa Harris Fisher and Charles Fisher ("Plaintiffs") and the Response thereto filed by Defendant Accor North America, Inc. ("Defendant"). Plaintiffs' counsel, John C. Capek, Esquire ("Capek") filed the instant motion seeking to recover his expenses relating to defense counsel Edward Bigham, Esquire's ("Bigham") deposition of Plaintiffs' expert witness, Julius Pereira, III, A.I.A. ("Pereira"), on July 29, 2003 from 3:10 p.m. until 5:55 p.m. Capek avers that, during the deposition, Pereira was questioned about his own expert report and Defendant's experts' reports, as well as his qualifications, experience, education and knowledge in the field of safety engineering. Defendant concedes that Pereira is entitled to payment of a reasonable fee for the time spent at his deposition, and there is no dispute that Defendant has already paid Pereira that fee of \$825.00.

Capek now seeks reimbursement of other expenses related to

Pereira's deposition, contending that Federal Rule of Civil Procedure 26(b)(4)(B)¹ and (C)² authorizes the relief requested. Specifically, Capek seeks reimbursement of the following expenditures: (1) \$1,000.00 for the cost of retaining local counsel, David Morrison, Esquire, to appear at Pereira's deposition as a result of Capek's scheduling conflict; (2) \$221.08 for a copy of a deposition transcript and the exhibits attached thereto; and (3) \$275.00 that Pereira billed Plaintiffs for one hour of time that he spent preparing for his July 29 deposition.

As an expert whose opinion would be presented at trial, Pereira was properly deposed by Defendant in accordance with Rule

¹ Rule 26(b)(4)(B) provides:

A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

² Rule 26(b)(4)(C) provides:

Unless 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 under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

26, which provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." Fed. R. Civ. P. 26(b)(4)(A). That Pereira was paid for his appearance at the deposition is also proper under Rule 26, which provides that "the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." Fed. R. Civ. P. 26(b)(4)(C). Less clear under Rule 26's "reasonable fee" mandate, however, is whether the cost of time spent by an expert preparing for a deposition should also be borne by the party seeking such discovery. Compare M.T. McBrian v. Liebert Corp., 173 F.R.D. 491, 493 (N.D. Ill. 1997)(refusing to include preparation time in "reasonable fee" calculation since case was not complex and there was not considerable lapse of time between expert's work and deposition), and Benjamin v. Gloz, 130 F.R.D. 455, 457 (D.C. Colo. 1990)(determining that party not required to pay expert for preparation time), and Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989)(excluding preparation time), with Fleming v. United States, 205 F.R.D. 188, 190 (W.D. Va. 2000)(reimbursing expert for five hours of time spent preparing for deposition as reasonable in light of issues on which expert was expected to provide testimony, amount of materials to be reviewed and length of report furnished by expert), and S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 154 F.R.D. 212, 214 (E.D. Wis. 1994)(reimbursing for preparation time where damage issues were

complex and deposition was to occur five months after expert prepared lengthy report), and Hose v. Chicago and North Western Transp. Co., 154 F.R.D. 222, 228 (S.D. Iowa 1994) (requiring payment for neurologist's time spent reviewing medical reports in preparation for deposition since more costly if expert attempted to refresh memory by review of records at deposition). But see, Collins v. Village of Woodridge, 197 F.R.D. 354, 357 (N.D. Ill. 1999) (finding preparation time compensable regardless of complexity, that "[t]ime spent preparing for a deposition is, literally speaking, time spent in responding to discovery").

There has been no showing that the issues in this case are complex, that the expert report is lengthy, or that there was a considerable lapse of time between the expert's work and the deposition. Without intending to minimize the injuries alleged by Plaintiffs, we find that the issues Pereira addressed were not complex, and that there was no considerable lapse of time between his work and the deposition. In fact, Pereira's expert report dated May 15, 2003 is four pages long and was supplemented by a one-page letter dated May 23, 2003, following his physical inspection of the slip-and-fall site, a hotel bathtub, on May 16, 2003. Little more than two months later, Pereira was deposed by Defendant's counsel. In light of these facts, we find that Defendant need not reimburse Capek for Pereira's deposition preparation time.

Plaintiffs' remaining requests are also denied since the

portion of Rule 26(b)(4)(C) that Capek relies upon as authorizing such relief, specifically, the portion providing that "the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred," applies only to discovery under subdivision (b)(4)(B) relating to an expert who is not expected to be called as a witness at trial. As previously explained, Plaintiffs intended to call Pereira as an expert at trial and, thus, the provision relied upon is inapplicable here. Furthermore, Plaintiffs never requested to reschedule Pereira's deposition on account of Capek's scheduling conflict, or otherwise indicated that there they would suffer any hardship, such that Defendant should be required to pay local counsel's fee. Finally, Plaintiffs cannot demonstrate that the cost of Pereira's deposition transcript relates, in any way, to time spent in responding to discovery.

For these foregoing reasons, having considered Plaintiffs' Motion for Fees and Expenses (Doc. No. 20) and the Defendant's Response thereto (Doc. No. 21), **IT IS ORDERED** that Plaintiffs' Motion is **DENIED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.