



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 11, 2023

JUDGES

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**Re: *Keolattana Tootoo Saphilom v. USAA General Indemnity Company,*
Case No. CL-2021-992**

Dear Counsel:

When a litigant chooses to depose an opponent's expert witness that litigant must "pay the expert a reasonable fee for time spent and expenses incurred." VA. SUP. CT. R. 4:1(b)(4)(C). The issue before the Court is what exactly the litigant must pay; whether the litigant pays only for the time the expert is being deposed, or if the litigant must also pay for the expert's travel and deposition preparation time. Defendant USAA General Indemnity Company ("USAA") argues that, as a matter of practice in Virginia, litigants only pay for the opposing expert's time during the deposition. Plaintiff Keolattana Saphilom ("Saphilom") argues that litigants must pay for the expert's time spent being deposed, plus travel time, plus deposition preparation.

OPINION LETTER

No Virginia authority explains the boundary of Rule 4:1(b)(4)(C) despite the frequency of expert witness depositions. The Court holds a litigant who chooses to depose an opposing expert witness must pay a reasonable fee for the expert's time spent and expenses incurred, absent a resulting manifest injustice. This fee may include the time spent in the deposition, reasonable time spent traveling to the deposition, and reasonable time preparing for the deposition.

I. OVERVIEW.

USAA insured Saphilom to cover damage to Saphilom's real property, personal property, and her loss of use of the real property.

The underlying facts in the case are undisputed. One of Saphilom's toilets leaked. The water intrusion fostered mold contamination, rendering the property uninhabitable and destroying personal property. She filed an insurance claim to USAA who did not pay. So, Saphilom sued for breach of contract. USAA defends its refusal to pay citing a mold exclusion section of the insurance policy that bars coverage.

The parties argued various pretrial motions January 4, 2023: (1) USAA's Motion for Summary Judgment; (2) USAA's First Motion to Exclude and Supplement Motion for Summary Judgment; (3) USAA's Second Motion to Exclude and Supplement Motion for Summary Judgment; (4) USAA's Motion in Limine to Exclude Certain Testimony of Carlos Elizondo; (5) Saphilom's Motion for Counsel to Withdraw; and (6) Saphilom's Motion for Fees for Expert Witness Deposition. USAA also moves for attorney fees in connection with a deposition taken of one of Saphilom's witnesses.¹

Relevant to Saphilom's Motion for Fees for Expert Witness Deposition, Saphilom designated several expert witnesses, including Carlos Elizondo and Linda McKoy. USAA noticed depositions for Elizondo on December 6, 2022, and for McKoy on December 16, 2022.

Elizondo spent two hours preparing for the deposition, and five hours at the deposition, including travel time to and from the deposition, at a billable rate of \$300 per hour, for a total cost of \$2,100. McKoy spent eight hours preparing for the deposition, at a rate of \$195 per hour, and spent four hours at the deposition at a rate of \$295 per hour, for a total cost of \$2,740. Following USAA's deposition of McKoy, Saphilom withdrew McKoy as an expert.

Saphilom moves the Court in their motion to shift these fees to USAA under Virginia Supreme Court Rule 4:1(b)(4)(C).

USAA argues that there is no Virginia case law requiring a defendant to pay for a plaintiff's expert witnesses' deposition preparation or travel time. Even if there was such authority, it argues that deposition preparation time is a benefit to the party offering the expert, not the

¹ This Opinion Letter addresses only the issue of expert witness fees. The Court resolves the balance of the motions in the accompanying Memorandum Order.

opposing side. Therefore, USAA believes Saphilom should pay the fees to prepare her own witness. USAA also argues that a fee shift to it would be unfair because Saphilom waited until after the experts prepared for the depositions to request that USAA pay those costs. Finally, USAA objects to paying any fees for McKoy's deposition considering Saphilom withdrew her as an expert after the deposition.

II. ANALYSIS.

A. A Party Deposing an Opponent's Expert Witness Must Pay All Reasonable Fees and Costs Incurred by the Opposing Expert Witness for the Deposition.

"A party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b)(4)(C) of this Rule concerning fees and expenses." VA. SUP. CT. R. 4:1(b)(4)(A)(ii).

"Unless manifest injustice would result, (i) the court must require that the party seeking discovery pay the expert a reasonable fee for time spent and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii), (b)(4)(A)(iii), and (b)(4)(B) of this Rule." VA. SUP. CT. R. 4:1(b)(4)(C).

Plainly, this Rule means a party who deposes an expert witness must pay the expert "a reasonable fee" and "expenses incurred" for such a deposition absent a resulting "manifest injustice." Both parties are correct that no Virginia court further explained this Rule, and the Court accepts USAA's representation that as a matter of custom litigants only pay for the time the expert spends in the deposition. However, the Court cannot ignore the plain language of the Rule that is not as limiting as USAA wishes.

This holding is consistent with familiar federal civil litigation practice. Va. Sup. Ct. R. 4:1(b)(4)(C) is almost identical to Federal Rule of Civil Procedure 26(b)(4)(E), which reads: "[u]nless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (d)." While no Virginia court has yet interpreted Va. Sup. Ct. R. 4:1(b)(4)(C), federal courts have explained FRCP 26(b)(4)(E). "The goal of Rule 26(b)(4)(C) is to calibrate expert fees, so that plaintiffs will not be unduly burdened in their efforts to hire quality experts, while defendants will not be hampered by unreasonably high fees which prevent feasible discovery. Ultimately, it is in the court's discretion to set an amount that it deems reasonable." *Fleming v. U.S.*, 205 F.R.D. 188, 189 (W.D. Va. 2000).

In *Fleming*, the court found that "it is well established that time spent by an expert preparing for his or her deposition by opposing counsel is part of a reasonable fee. This is often due to the complexity of issues presented by a case, the lapse in time between the expert's examination of the facts and the deposition, the level of detail in an expert's report and supporting schedules, or the volume of pleadings submitted by the parties." *Id.* at 190 (internal citations omitted).

While the court in *Fleming* found that the preparation fees were appropriate to be paid by the party taking the deposition, the travel fees were not, since the deposition was taken at the plaintiff's offices. However, the court did note that "it would seem logical that if Johnson had been brought to defense counsel's office, then defense counsel should be made to pay his travel expenses." *Id.* at 189.

Various federal courts have recognized a variety of helpful factors to determine what would be a reasonable fee for an expert under the federal rule. These include "(1) the witness's area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interest implicated by Rule 26." *Fisher-Price, Inc. v. Safety 1st, Inc.*, 217 F.R.D. 329, 333 (D. Del. 2003); *see also Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 546 (D.Ariz.1999)

In determining whether "manifest injustice" exists, under which circumstance the deposing party would not be responsible for the reasonable fees incurred by the expert, federal courts have looked at the use of "manifest injustice" under FRCP 16(e), and found that "determining whether manifest injustice would occur requires 'weigh[ing] the possible hardships imposed on the respective parties ... [and] balanc[ing] the need for doing justice on the merits between the parties ... against the need for maintaining orderly and efficient procedural arrangements.'" *Fisher-Price, Inc.*, 217 F.R.D. at 332 (quoting *Reed v. Binder*, 165 F.R.D. 424, 427-28 (D.N.J.1996)).

As with FRCP 26(b)(4)(E), Va. Sup. Ct. R. 4:1(b)(4)(C) encourages experts to prepare for their depositions. This results in experts who can confidently answer those questions at a deposition that will help the party taking the deposition prepare for trial. The Court rejects USAA's position that deposition preparation only benefits Saphilom. Without adequate deposition preparation the witness will likely provide less complete answers to counsel's questions, diminishing the value of the deposition. Allowing the expert to charge fees for their preparation time increases the likelihood that the answers at the deposition will be correct and complete, reducing the need of the expert to correct themselves later, supplement their answers, or interrupt the deposition itself to look up information to fully answer an inquiry by the deposing party.

This provision also rightfully, when appropriate, places the burden of payment on the party requesting the deposition. From a logical standpoint, this makes sense – the party taking the deposition is the party who wants the expert's time, and therefore causes the expert to spend time preparing, traveling, and attending the deposition. The party who designated the expert gains little from the deposition of their own witness by the opposing party – they should not be responsible for those fees that result from the expert being deposed.

USAA's argument that Saphilom did not ask for it to pay all the expert witness fees prior to the deposition fails. Telephones work two ways. USAA could have asked about the fees prior

to the deposition but did not. In any event, the applicable rule requires payment, and it is up to the Court to determine whether the fees are reasonable.

B. USAA Must Reimburse Saphilom for All Reasonable Costs Incurred by Elizondo in Preparing for, Traveling to, and Attending the Deposition. However, it Would Be a Manifest Injustice to Order USAA to Pay Fees Incurred by Withdrawn Witness McKoy.

This Court has held that the party seeking the deposition of an expert must pay the reasonable fees of the expert, including the time spent preparing for, traveling to, and spending time at the deposition, if reasonable and unless manifest injustice would result to the party taking the deposition. Therefore, it must determine the reasonable reimbursement to Saphilom because of USAA's depositions of her experts.

As to Saphilom's expert Carlos Elizondo, this expert spent two hours preparing for the deposition at a rate of \$300 per hour, with an additional five hours traveling to and attending the deposition. The total fees are \$2,100. The Court considered his expertise as a mold expert, the short preparation time, and the ratio of his preparation to the actual deposition time. The Court inspected his invoices and finds these fees reasonable under the *Fisher-Price* factors, based on the information it has. Due to the nature of the case, to fully prepare for the deposition and to fully answer the questions asked, this is a reasonable amount of preparation. The travel time was negligible.

As to Saphilom's expert Linda McKoy, her total fees preparing for and attending the deposition was \$2,740. However, following the deposition of this expert by USAA, Saphilom withdrew McKoy as an expert in the case. The Court finds that it would result in manifest injustice to require USAA to pay the fees the expert incurred preparing for a deposition of a witness recalled by Saphilom. It will not require USAA to pay her fees.

C. CONCLUSION.

This Court holds that under Virginia Supreme Court Rule 4:1(b)(4)(C) the party requesting the deposition of an expert must pay all reasonable fees and expenses incurred by the expert for that deposition, including time preparing for, traveling to, and attending the deposition, unless the Court finds that it would be a manifest injustice to require the deposing party to pay such fees.

Here, the Court finds expert witness Elizondo's time preparing for, traveling to, and attending his deposition are reasonable, and that USAA is responsible, as the party requesting the deposition, for paying his fees. USAA will be ordered to reimburse Saphilom \$2,100 for those fees.

The Court finds it would be a manifest injustice to order USAA to pay for the fees associated with the deposition of McKoy, given that Saphilom withdrew McKoy as a witness following the deposition.

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An appropriate Memorandum Order is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KEOLATTANA TOOTOO SAPHILOM,)	
Plaintiff,)	
v.)	CL-2021-992
)	
USAA GENERAL INDEMNITY CO.,)	
Defendant.)	

MEMORANDUM ORDER

THIS MATTER came before the Court January 4, 2023, on Defendant USAA General Indemnity Company’s (“USAA’s”) Motion for Summary Judgment, Plaintiff Keolattana Saphilom’s (“Saphilom’s”) attorney’s Motion to Withdraw as Counsel, and Saphilom’s Motion for Fees for Expert Witness Deposition, along with USAA’s cross Motion for Attorney Fees. .¹

It is

ORDERED Saphilom’s Motion for Fees is GRANTED IN PART AND DENIED IN PART.

For the reasons set forth in the accompanying Opinion Letter of January 11, 2023, incorporated herein by reference, Saphilom is generally entitled to reimbursement from USAA for the expert witness fees she incurred due to USAA’s deposition of her expert witnesses. The fees include the reasonable fees incurred during the deposition itself, as well as the reasonable fees incurred for travel and reasonable fees for the expert’s preparation for the deposition.

Therefore, the Motion is GRANTED to the extent USAA must pay Saphilom \$2,100.00 for the fees she incurred for her expert, Carlos Elizondo, to prepare for, travel to, and attend his deposition at the demand of USAA. The Court finds these fees to be reasonable.

¹ The parties filed additional motions. Since this dispositive Order renders them moot, the Court has not ruled on them.

The Motion is DENIED to the extent USAA need not pay Saphilom for expert witness fees she incurred for her expert, Linda McKoy, because Saphilom later withdrew Ms. McKoy as an expert after designating her. The Court found requiring USAA to pay expert witness fees to this withdrawn witness would result in a manifest injustice to USAA under VA. SUP. CT. R. 4:1(b)(4)(C);

ORDERED USAA'S Motion for Attorney Fees connected to attorney preparation work USAA incurred for its deposition of Ms. McKoy, who Saphilom withdrew as an expert, is DENIED. Assuming without deciding that an award of fees is justified, USAA in open court disavowed its motion if the Court were to impose attorney fees on Saphilom and not solely on her attorney, Bret Giaimo. The Court finds insufficient cause to assess attorney fees against Mr. Giaimo alone and, consistent with USAA's request, treats USAA's motion as withdrawn;

ORDERED, for reasons stated in open court, USAA's Motion for Summary Judgment is GRANTED and Saphilom's Complaint is DISMISSED. The Court found the insurance contract unambiguous in its mold coverage exclusion. It relied on the controlling authority of *Travco Insurance Company v. Ward*, 284 Va. 547, 557-559 (2012) and persuasive authority of *Poore v. Main St. Am. Assurance Co.*, 355 F. Supp. 3d 506 (W.D. Va. 2018), which both squarely contradict Saphilom's argument that USAA's insurance contract exclusion for damage caused by mold is inapplicable where the mold is the damage caused by a covered loss; and

ORDERED Bret Giaimo is WITHDRAWN as counsel for Saphilom and shall have no further responsibility with this case after giving a copy of this Memorandum Order to Saphilom.

THIS CAUSE IS ENDED.


Judge David A. Oblon

JAN 11 2023

Entered

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD OF THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA. ANY DESIRED ENDORSEMENT OBJECTIONS ARE DUE WITHIN 10 DAYS.