IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RUBY PRICE, Plaintiff, v. KENT GENERAL HOSPITAL a/k/a Bayhealth, JOANNE T. BIRCH, as Kent General Nursing Vice President and Individually, DR. ROBERT FRIEDMAN, as Kent General Doctor and Individually, JOHN DOE, Officially and Individually, and JANE DOE, Officially and Individually, Defendants.	:	Civil Action No. 97-716-GMS

REPORT AND RECOMMENDATION

At Wilmington this **2nd** day of **November, 1999**,

On September 29, 1999, the court conducted a hearing to discuss various discovery issues related to the case of Price v. Kent General Hospital, C.A. No. 97-716-GMS. This discussion included a request for costs related to the originally noticed deposition of Mrs. Mary Casson for September 15, 1999.

According to Mr. Michael Broadhurst, counsel for defendant, Kent General Hospital, the deposition did not occur as scheduled due to the tardiness of Ms. Lorraine Harris, counsel for the plaintiff, Ms. Ruby Price. (D.I. 69 at 32-33.) As a result, defense counsel seeks reimbursement from Ms. Harris for costs incurred during the scheduled deposition, including: (1) Mr. Broadhurst's time; (2) Mr. Broadhurst's travel and parking expenses; (3) the time of Mr. Donald Tinnel, Kent General Hospital Security Supervisor, and; (4) the

mileage associated with Mrs. Casson's transportation from Dover to Wilmington and back. (D.I. 88, Ex. A, B.)

The court notes that Ms. Harris has chosen not to respond to the October 22, 1999 submission from Mr. Broadhurst regarding fees and expenses.

a. Sanctions Related to Missed Deposition

A court order for sanctions in the form of attorney's fees and costs is an appropriate remedy for a noticed deposition which is not attended by a party or party's counsel. Fed. R. Civ. P. 37(d). See Blue Grass Steel, Inc. v. Miller Bldg. Corp., 162 F.R.D. 493 (E.D. Pa. 1995) (awarding opposing counsel attorney's fees and costs associated with filing of sanctions motion, where plaintiff failed to appear for scheduled deposition); Davis v. Williams, 1992 WL 50877 (D. Kan. Feb. 27, 1992) (denying sanction of dismissal, but awarding reporter's costs and one hour of attorney's fees to each defense counsel present, where plaintiff and plaintiff's counsel failed to attend scheduled deposition and defense counsel spent one hour trying to locate them before determining that the deposition would not occur as scheduled). Although a party may eventually arrive at the scheduled deposition, this does not preclude an award of sanctions. "'Belated compliance with discovery orders does not preclude the imposition of sanctions.'" Lee v. Walters, 172 F.R.D. 421, 428 (D. Ore. 1997) (quoting North Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1451 (9th Cir. 1986). Sanctions are an equally appropriate response from the court when the party missing the deposition is the party who scheduled it.

However, under Rule 37(d), the court may opt not to award reasonable costs and fees if it determines that "the failure [to appear] was substantially justified or that other circumstances make an award or expenses unjust." Fed. R. Civ. Pro. 37(d).

b. "Appropriate Costs & Reasonable Fees"

As a result of lengthy argument by both counsel, the court found that "Ms. Harris [would] be responsible for ***reasonable costs*** incurred for the benefit of Ms. Casson coming [for the deposition] and traveling expenses for September 15th." (D.I. 69 at 46 (emphasis added).) The court also ordered "***reasonable attorney's fees*** . . . incurred by the defense." (D.I. 69 at 47 (emphasis added).) There is guidance from the Third Circuit as to what constitutes "reasonable" fees, and that is, the attorney's normal billing rate. "'Our premise was then, and still is, that the reasonable value of an attorney's time is the price that time normally commands in the marketplace for legal services . . . .'" American Health Systems, Inc. v. Liberty Health System, 1991 WL 22133, at *1 (E.D. Pa. Feb. 15, 1991) (quoting Cunningham v. City of McKeesport, 753 F.2d 262 (3d Cir. 1985), vacated on other grounds, 478 U.S. 1015 (1986)).[1]

Presumably, D.I. 88, Ex. A, provides an adequate basis from which to determine Mr. Broadhurst's reasonable fees for the day in question. Mr. Broadhurst assesses his rate to be $135.00 per hour, and at 2.6 hours amounted to a figure of $351.00. This figure, in and of itself, does not appear to be unreasonable. However, upon review of Mr. Broadhurst's submission, he indicates that a portion of his calculation is attributable to "at least 1.0 hour during which I was unable to be productive . . . [and] because I could not anticipate that Ms. Harris would not appear for the deposition, I did not plan to fill this time with other work." (D.I. 88, Ex. A.)

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[1] The Third Circuit's decision in Cunningham is certainly consistent with the earlier pronouncement of the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, at 433.

In Henley v. Eckerhart, the Supreme Court, in assessing fees reasonably attributed to the litigation, noted that "the district court should also exclude from [its] . . . calculation, hours that were not 'reasonably expended.'" 461 U.S. 424, 434 (1983). The Court further noted that "hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."[2] Id. The Court's suggested method of evaluating reasonable value may assist this court in determining whether the time spent "waiting for Ms. Harris to appear" and the one hour "being unproductive" constitutes a sufficient basis from which to assess reasonable attorney fees. (D.I. 88, Ex. A.)

Additionally, there are the issues of Mr. Broadhurst's travel and parking expenses in the amount of $24.55, and the wages and mileage of Mr. Tinnel in the amount $77.18, which is attributable to Mrs. Casson's transportation. Unremarkably, there is not a great deal of case law within the Circuit on this specific issue. However, one case from the District may be instructive. In Coalition to Save Our Children v. State Bd. of Educ., the court determined that no compensation for travel costs would be awarded to out-of-state counsel for plaintiff, but the court gave value for travel time, as equally adequate in-state counsel would have incurred a similar expense because of travel distance. 901 F.Supp. 824, 834 (D. Del. 1995).[3]

Coalition to Save Our Children certainly could be interpreted to partially vitiate Mr. Broadhurst's claims, as he seeks reimbursement for travel costs, not time. However, it

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[2] Certainly, the relationship between the holding in Hensley, and the issue at bar is attenuated, as Hensley addresses the calculation of fees associated with successful litigation, not sanctions for discovery abuses. However, the themes addressed in this holding are, this court believes, instructive for evaluating the instant matter.

[3] Admittedly, this case also deals with assessments of attorney's fees attributable to successful litigation, not discovery sanctions. However, it too is cited for its value in determining reasonableness.

does not appear that Mr. Broadhurst's asserted costs are unreasonable in light of the circumstances, and upon consideration "that adequate in-state counsel" could have easily incurred the same expenses. A similar argument could be made regarding the mileage calculations for Mrs. Casson's journey, and as such, it too may reasonably be assessed against Ms. Harris.

However, it seems less than reasonable to assess Mr. Tinnel's time against Ms. Harris. "Time, to be compensable must be reasonable and necessarily spent." American Health Systems, Inc. v. Liberty Health System, 1991 WL 22133, at *1 (E.D. Pa. Feb. 15, 1991).[4]

There has been no representation that "chauffeur service" was an expense reasonably necessary or attributable to Ms. Harris' tardiness. There was no demonstration that Mrs. Casson was incapable of transporting herself to Wilmington, only a representation that she doesn't "feel comfortable" driving to Wilmington. (D.I. 69 at 33.) Certainly, Mrs. Casson's time would be a better measure of reasonable costs, than would Mr. Tinnel's.

However, in light of the fact that the hourly rate of Mrs. Casson's time as a nurse with Kent General Hospital is likely greater than or at least equal to that of Mr. Tinnel, the court will award defendant the value of Mr. Tinnel's time, in lieu of Mrs. Casson's. Further, the mileage expenses for Mrs. Casson would have been incurred whether Mrs. Casson drove herself or had been transported, as in this case.

Therefore, IT IS RECOMMENDED that:

1. An award in the amount of $351.00 for Mr. Broadhurst's reasonable attorney's

[4] Although the court in American Health Systems was referring, generally speaking, to counsel's time, the same could said for the other costs associated with an aborted deposition.

fees be made.

2. An award in the amount of $24.55 for Mr. Broadhurst's travel and parking expenses be made.

3. An award in the amount of $52.88 for the expenses associated with Mr. Tinnel be made.

4. An award in the amount of $24.30 for the mileage for Mrs. Casson's transportation be made.

5. A finding that the fees, costs and expenses as contained in paragraphs 1 through 4 of this order totaling $452.73 are reasonable.

6. The award for said fees, costs and expenses as contained herein are made solely against Ms. Harris, and not the plaintiff, nor her local counsel, for conduct in relation to the scheduled deposition of Mrs. Mary Casson on September 15, 1999.

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UNITED STATES MAGISTRATE JUDGE