

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

IN RE:

**SKECHERS TONING SHOE
PRODUCT LIABILITY LITIGATION**

: CASE: 3:11-md-02308-TBR

:

: MDL No.: 2308

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This Document Applies to All Actions

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: Judge Thomas B. Russell

PRACTICE AND PROCEDURE ORDER NO. 4 (Depositions)

This Practice and Procedure Order No. 4 shall apply to all personal injury claims pending before the Court in MDL No. 2308. Depositions taken pursuant to the terms of this order shall be governed by the following terms:

1. Deposition Notice.

A. All depositions in MDL No. 2308, except pursuant to Court order, will be noticed and conducted pursuant to Fed. R. Civ. P. 30. This Practice and Procedure Order No. 3 (Depositions) may be adopted by reference in any Skechers Toning Shoe action pending in a state court.

B. This Order shall be attached to any party or non-party subpoena or deposition notice.

C. Each deposition notice shall include the name and, if known, the general occupational description of each deponent, the expected length of the deposition, and the date, time, and place for the deposition (including address and phone number of a contact).

D. Deposition notices shall state whether the deposition is to be videotaped. All videotaped depositions shall proceed pursuant to the provisions of paragraph 10, *infra*.

2. Cooperation.

Counsel is expected to cooperate with, and be courteous to, all counsel and deponents. Behavior brought before this Court alleged and found to be contrary to this Order is subject to sanctions.

3. Scheduling.

A. Absent extraordinary circumstances, counsel shall consult with opposing counsel and proposed deponents in advance in an effort to schedule depositions at mutually convenient times and places.

B. More than one deposition may take place in MDL No. 2308 at the same time.

C. Depositions must be noticed under Fed. R. Civ. P. 30 at least thirty (30) calendar days in advance, unless agreed otherwise by the parties, with notice served upon Liaison Counsel by email and mail. Service upon Liaison Counsel shall be deemed service upon all parties. A continued deposition may be resumed upon ten (10) days' notice.

4. Locations for Taking Depositions.

A. Unless otherwise agreed by Liaison Counsel, depositions of plaintiffs will take place in each plaintiff's home district at the office of plaintiff's counsel or at its designated office site.

B. Unless otherwise agreed by Liaison Counsel, depositions of Skechers' employees (past and current) will take place in one of the following locations, as designated by Skechers at the office of Skechers' counsel:

- * Manhattan Beach, CA
- * Louisville, KY
- * The deponent's home district at Skechers' counsels' designated office site.

C. Unless otherwise agreed by Liaison Counsel, the deposition of an expert witness shall take place in the expert witness' home district at a location selected by the sponsoring party.

5. Deposition Day.

Unless agreement of the parties or court order dictates otherwise, the deposition day shall commence at 8:30 a.m. and terminate no later than 5:30 p.m. On Fridays, depositions shall end no later than 3:00pm.

6. Attendance.

A. **Who May be Present.** Unless otherwise agreed to by Liaison Counsel, depositions may be attended only by the parties, the deponent, the deponent's attorney, attorneys of record in MDL No. 2308 or state Skechers Toning Shoe cases (including any employee or retained consultant of such attorney who is assisting in the litigation and whose presence is reasonably required by the attorney), in-house counsel for Skechers, the court reporter, and the videographer. Upon motion twenty (20) days prior to the scheduled deposition, and for good cause shown, the Court may permit attendance by a person who does not fall within any of these categories.

Any person, including attorneys in state Skechers Toning Shoe cases, who are not otherwise bound by the Protective Order entered in this MDL proceeding shall execute the Acknowledgment and Agreement to Be Bound attached as Exhibit A to the Protective Order, prior to attending any deposition conducted pursuant to the Order.

7. Conduct of the Deposition.

Except by order of the Court, the following provision shall apply at all depositions of fact witnesses:

A. Selection of Attorneys to Conduct Examination.

(1) One attorney will conduct the principal examination of the deponent on behalf of (i) the Plaintiffs' Steering Committee and plaintiffs in state court actions; and (ii) one attorney will conduct the principal examination on behalf of Skechers. The attorney so designated by the Plaintiffs' Steering Committee will coordinate with other plaintiffs' counsel reasonably in advance of the date scheduled for the deposition regarding the areas of examination.

B. Objections.

(1) All objections as to relevance and admissibility shall be preserved for later ruling by the Court. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to endorse a limitation on evidence directed by the court, or to present a motion.

(2) Objections to the responsiveness of the answer shall be stated by the examining attorney, or by counsel for parties other than the witness, with the single word "objection" following the answer. Only if the attorney representing the witness requests it shall additional explanation be given.

(3) As soon as any one attorney representing a party to this litigation states the word "objection," all parties shall be deemed to have preserved all possible objections to the form of the question or the responsiveness of the answer. Counsel for other parties shall not repeat the objection. Only if an explanation for the basis of the objection is requested may counsel other than the first to object reiterate the objection and explain.

C. Directions Not to Answer; Suspension of a Deposition

(1) Directions to the deponent not to answer are improper except on the ground of privilege or to enable a party or deponent to present a motion for protective order on the grounds that it is being conducted in bad faith, or in such manner as to unreasonably annoy, embarrass, or oppress the party or the deponent. Such directions shall be kept to the bare minimum. All grounds for an instruction not to answer a question must be stated at the time the instruction is given or may be waived. When a privilege is claimed, the witness must nevertheless answer the questions relevant to the

basis, or waiver, of the privilege, such as the date of a communication, who made it, to whom and in whose presence, and the identity of other persons to whom the communication may have been disclosed. (*See* para. 8.B(1))

(2) If a party believes that a deposition should be suspended on the grounds set forth in (c)(1), the party who desires the suspension, prior to the suspension of the deposition, will contact the Courtroom Deputy for the scheduling of a telephone conference with Judge Russell. If the telephone conference does not resolve the discovery dispute, the party shall file and serve a motion for protective order under Fed. R. Civ. P.26(c) within ten (10) days of suspension of the deposition. If the motion is not timely filed, a motion to compel and for sanctions may be filed by the examining party under Fed. R. Civ. P.37.

D. **Objections to Documents.** Objections to the admissibility of documents are not waived and are reserved for later ruling by the Court or trial judge.

E. **Sequence of Examination – Depositions Taken by Plaintiffs.** Questioning at the depositions to be taken by plaintiffs will be conducted in the following sequence:

- (1) the primary examiner selected by the Plaintiff's Steering Committee;
- (2) other MDL No. 2308 plaintiffs' attorneys on non-redundant matters;
- (3) the primary examiner selected by Skechers;
- (4) individual counsel for the deponent, if any;
- (5) any re-cross or redirect by 1-4, *supra*;
- (6) examination by plaintiffs' and defense attorneys in cross-noticed state cases in the following order: counsel for state plaintiffs on non-redundant matters; counsel for state defendants on non-redundant matters; counsel for the deponent; any re-cross and redirect.

F. **Sequence of Examination – Depositions Taken by Skechers** Questioning at the depositions to be taken by defendants shall be conducted in the following sequence:

- (1) the primary examiner selected by Skechers;
- (2) the primary examiner selected by Plaintiffs' Steering Committee;
- (3) any other MDL No. 2308 plaintiffs' attorney on non-redundant matters;
- (4) individual counsel for the deponent, if any;
- (5) any re-cross and redirect by 1-4, *supra*;
- (6) examination by plaintiffs' and defense attorneys in cross-noticed state cases in the following order: counsel for state defendants on non-redundant matters; counsel for state plaintiffs on non-redundant matters; counsel for the deponent; any re-cross and redirect.

G. **Smoking and Use of Other Tobacco Products.** There shall be no smoking or use of other tobacco products in any room in which a deposition is being conducted, including before, during, or after a deposition, or in the deposition room during deposition recesses.

9. Documents.

A. **Production of Documents.** Witnesses subpoenaed or noticed to testify and to produce documents shall be noticed and served with the subpoena or deposition notice and document request at least thirty (30) days before the scheduled deposition. This provision shall not supersede any preexisting agreement or order governing which documents should be produced and/or when.

B. **Copies.** Extra hard copies of documents about which counsel expect to examine the deponent should be provided to the reporter, primary counsel for the parties, the deponent, and deponent's counsel during the course of the deposition.

C. **Marking of Deposition Exhibits.** Whenever possible, recognizing that more than one deposition may be taken at the same time, the parties' deposition exhibits shall each be numbered sequentially running from deposition to deposition. The first time a document is marked as a deposition exhibit, it shall be referred to by the Bates number appearing on the document. Thereafter, the exhibit shall be referred to by its deposition exhibit number. If exhibits bear the same number as a result of simultaneous depositions, these exhibits shall be differentiated by adding a letter to the number (i.e., Ex. 1-A, Ex. 1-B).

10. Video Depositions.

The provisions of this order regarding the examination of deponents apply to video depositions. Any deposition may be videoed at the request and cost of a party pursuant to the following terms and conditions:

A. **Stenographic Recording.** A certified court reporter shall simultaneously record stenographically all deposition proceedings and testimony. The court reporter shall administer the oath or affirmation to the deponent on camera. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to the witness) and 30(f) (filing: exhibits).

B. **Cost of Deposition.** The noticing party shall bear the expense of video and stenographic recording. Requests for taxation of these costs and expenses may be made at the conclusion of the litigation in accordance with applicable law.

C. **Video Operator.** The video camera shall be operated by an experienced video camera operator. The operator shall be subject to the provisions of Fed. R. Civ. P. 28(c).

D. **Identification of Persons in Attendance.** Before the deposition commences, each person in attendance shall give the court reporter his or her name, firm or business affiliation, business address, and the name of the client he or she represents. The list of these people shall be included at the beginning of the deposition transcript.

E. **Interruptions.** The video camera operation will be suspended during the deposition only by agreement of counsel examining and defending the deposition, and "off the record" discussions shall not be recorded. The video camera operator shall

record on camera the time of suspension and any subsequent reconvening of the deposition.

F. **Index.** The video operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel beings and ends, and at which exhibits are identified.

G. **Filing.** After the deposition is completed, the video operator shall certify on camera the correctness, completeness, and accuracy of the video recording in the same manner as a stenographic court reporter.

H. **Objections.** Objections and instructions not to answer at video depositions are subject to the provisions of paragraph 8(b)-(d) of this Order. If the objection involves matters peculiar to the video, a copy of the video recording and equipment for viewing it shall be submitted to the Court together with a brief supporting the positions submitted by each party limited to three (3) pages.

I. **Video Camera System.** Up to two video cameras may be used. The cameras shall video the deponent or exhibit. The camera(s) on deponent shall be only a “head and shoulders/waist up” shot.

11. Real-Time Transcription.

Any party may arrange for “real-time” transcription of a deposition at its cost. Notice to other parties is not required.

12. Supplemental Depositions.

Witnesses may be subjected to more than one deposition upon the showing of a good faith basis that further inquiry of the deponent is necessary.

13. Correction and Signing Deposition.

The transcript of a deposition shall be submitted to the deponent for correction and signature within thirty (30) days after the completion of the deposition. If no corrections are made within sixty (60) days after completion of the deposition, the transcript will be deemed accurate.

14. Rulings Concerning Disputes at Depositions.

A. Disputes arising during depositions that cannot be resolved by agreement and that if not immediately resolved will significantly disrupt the depositions scheduled, would require a rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, may be presented to the undersigned or Magistrate Judge Lanny King by telephone. In the first instance, the parties are directed to negotiate such disputes in good faith. In the event that an agreement cannot be reached after such negotiation, any party seeking a ruling from the Court shall arrange a telephone conference call within the undersigned's or the Magistrate Judge's law clerk at the Court's earliest convenience. Facilities shall be provided so that counsel attending the deposition and the deposition reporter can hear the proceedings. The deposition reporter shall make a transcript of the conference call proceedings, which shall be transcribed immediately and bound separately. During such proceedings, counsel shall have the opportunity to argue to the Court, and the Court will, whenever possible, resolve the dispute during the conference call proceedings.

B. If the telephone conference does not resolve the discovery dispute, the parties will be requested to present the dispute to the Court in a motion with supporting authority. The motion and brief should be limited to ten (10) pages with the summary of its position in short, simple sentences together with the salient authority relevant to the dispute. The Court will issue a prompt ruling, as its schedule permits.

C. In the event that the Court is unavailable by telephone, fax, or email to resolve disputes arising during the course of a deposition, the deposition shall nevertheless continue to be taken as to matters not in dispute.

D. The Court will exercise the authority granted under 28 U.S.C. § 1407(b) to act as District Judge in any district in which a deposition is being taken.

15. This Order will be adjusted as necessary to allow for orderly discovery.

IT IS SO ORDERED.