

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

**IN RE: SKECHERS TONING SHOE
PRODUCTS LIABILITY LITIGATION**

**Master File No. 3:11-MD-2308-TBR
MDL No. 2308**

**THIS DOCUMENT RELATES TO:
PERSON INJURY PRODUCT LIABILITY CASES**

**THOMAS B. RUSSELL
U.S. DISTRICT JUDGE**

ORDER

This matter is before the Court on Plaintiffs’ motion for a protective order. (Docket #2471). The Defendants have responded. (Docket #2598). This matter is now ripe. For the following reasons, Plaintiffs’ motion for a protective order (Docket #2471) is GRANTED in part and DENIED in part.

BACKGROUND

In this case, Plaintiffs allege that Defendants breached warranties and violated product liability laws in designing, marketing, and distributing Shape-ups footwear. A group of plaintiffs have asserted similar claims against Defendants in litigation currently pending in Los Angeles County Superior Court (the “California Action”).

In this case, Plaintiffs have designated five expert witnesses who may testify at trial. Four of these expert witnesses – Wilson Hayes, Joseph Hamill, John Porcari, and Richard Gill – were also designated by plaintiffs in the California Action. Defendants have deposed these four expert witnesses in the California Action. Defendants now seek to depose these four expert witnesses in this case. Plaintiffs have moved for a protective order to prohibit an “unnecessary” second deposition. (Docket #2471). Defendants argue these depositions are proper because this case presents new issues not found in the California Action and because there are additions to Plaintiffs’ experts’ reports in this case not found in the California Action. (Docket #2598).

Plaintiffs request that if these depositions are allowed they be limited to topics not previously covered and be conducted telephonically. (Docket #2471). The Court will deny Plaintiffs' motion for a protective order but grant Plaintiffs' request that discovery be limited to topics not previously covered and be conducted telephonically.

STANDARD

“[I]t is well established that the scope of discovery is within the sound discretion of the trial court.” *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981)); Fed. R. Civ. P. 26(b). A district court may, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c).

“To justify restricting discovery, the harassment or oppression should be unreasonable, but discovery has limits and these limits grow more formidable as the showing of need decreases.” (punctuation omitted) *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (*quoting* 8A Charles Alan Wright & Arthur R. Miller *et al.*, Federal Practice and Procedure § 2036 (3d ed. 2012)).

A court may limit discovery to avoid undue burden in a number of ways, including “specifying terms, including time and place, for the disclosure or discovery” and “limiting the scope of disclosure or discovery to certain matters.” Fed. R. Civ. P. 26(c)(1).

DISCUSSION

Plaintiffs have moved for a protective order prohibiting Defendants from deposing Wilson Hayes, Joseph Hamill, John Porcari, and Richard Gill as these are expert witnesses who were previously deposed by Defendants in the California Action.

Defendants have presented several arguments why these depositions are necessary. First, this case involves different injuries than the California Action. While both cases involve

plaintiffs who suffered injuries from a fall, this case also contains plaintiffs whose claim chronic injuries which resulted from wearing the Shape-ups footwear. Defendants seek to question Plaintiffs' experts on how their theories of injury causation support these claims of chronic injury.

Second, several experts have supplemented their expert reports since they were deposed in the California Action. For instance, Wilson Hayes has supplemented his theory on causation and John Porcari has added an opinion regarding Defendants' health claims purportedly made while promoting the Shape-ups footwear. Defendants seek to question these experts on their new or supplemented opinions.



Finally, Defendants argue Plaintiffs have not complied with their requirement to cross-notice depositions. This Court's order coordinating this case with the California Action prohibited a second deposition "of any deponent noticed in the California Actions and cross-noticed in the MDL" unless good cause is shown. (Docket #1470). Defendants argue that Plaintiffs did not cross-notice the expert depositions in the California Action in this case.

While Defendants have shown the need for deposing these expert witnesses, Plaintiffs raise a valid concern that unnecessary expense may be incurred. The parties have previously agreed that "any deposition that is taken in the California Actions will be admissible in the MDL." (Docket #1470). Accordingly, these depositions shall be limited to issues not previously covered in each respective expert's first deposition. In the interest of limiting undue expense, the parties shall conduct these depositions telephonically or by video teleconference.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a protective order (Docket #2471) is GRANTED in part and DENIED in part. To the extent Plaintiffs request that Defendants be

prohibited from deposing expert witnesses previously deposed in the California Actions, Plaintiffs' motion is DENIED. Plaintiffs' motion is GRANTED to the extent that it seeks to limit the depositions of expert witnesses previously deposed in the California Actions to issues not addressed in those expert's first deposition and to limit these depositions to be conducted telephonically or by video teleconference. Any document that may be used in the deposition shall be provided to the deponent and opposing counsel at least 48 hours prior to the deposition.



**Thomas B. Russell, Senior Judge
United States District Court**

April 14, 2015