

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

GLORIA COOK
Plaintiff,

v.

CIVIL ACTION NUMBER:
CV 07-111

EDWARD D. TUCKER;
MIKE RICE CONTRACTING, INC.
Defendants.

PROTECTIVE ORDER

This matter comes before the Court on Plaintiff's motion for a protective order with regard to the taking of medical testimony from Plaintiff's treating physician in which the said physician has required a fee of \$1,500 for the first hour and \$250.00 for each 15 minute interval over the initial one hour. Plaintiff seeks relief from the Court under the provisions of Rule 26(c), which provides as follows:

“(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition. . . the court in the circuit where the deposition . . . is to be taken may *make any order which justice requires* to protect a party or person from . . . undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had *only on specified terms and conditions*, including a designation of the time or place; . . . A motion for a protective order shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel or, if the opposing party is not represented by counsel, with the opposing party.(emphasis added)”

Plaintiff has properly documented his motion with evidence of attempts to resolve this matter independently of the Court's intervention in this matter. Counsel for the treating physician having been present before the Court for the oral argument of the motion, conducted on August 21, 2009, the Court hereby finds the following:

1. The Circuit Court is charged by the Rules of Civil Procedure with regulating all pre-trial discovery and with the enforcement of the Alabama Rules of Civil Procedure to insure that the process is fair so as to provide the best opportunity for a fair result of litigation on the merits.

2. The Constitution of 1901, §11, provides: "That the right of trial by jury shall remain inviolate." To the extent that a party seeking resolution of a civil dispute must present testimony from a member of the medical profession and to the extent that the cost to access such testimony is prohibitively high, this constitutional right of the party before this Court has been compromised.

3. Accordingly, the Birmingham Bar Association and the Jefferson County Medical Association have prepared guide to both professions with regard to the securing of medical evidence and testimony for purposes of civil litigation. In pertinent part, Article II(c)(1)(a) provides as follows:

"Generally, fact witnesses at depositions or trial, including medical providers, are not entitled to compensation for their time, except for a witness fee of \$1.50/day and \$0.05/mile pursuant to Ala. Code §12-19-131 and Ala. R. Civ. P. 45. A medical provider who is a fact witness may ask for a *reasonable fee* for his time as a witness at trial or deposition. A fee is typically set by the physician, but may be negotiated between the medical provider and the attorney requesting the medical provider's time. *This fee should be consistent with the actual time spent and the time away from patient care.* If arrangements cannot be arranged or agreed upon, the physician will be subject to being subpoenaed."

4. Plaintiff has made the necessary showing that medical testimony is necessary and required in order for Plaintiff to present evidence in support of his claim in a court of law.

5. The Court finds that the fee quoted to counsel for Plaintiff by the treating physician to be inconsistent with the provision cited hereinabove and agreed upon by the legal and medical professionals who practice in this forum.

6. The Court finds that the fee quoted to counsel for Plaintiff is constitutes an undue and unreasonable infringement upon Plaintiff's constitutional right to have her complaint heard in a court of law and that a protective order is necessary for the Court to guarantee the constitutional right cited herein, and in order protect and defend the integrity of these

proceedings as the Supreme Court of the State of Alabama has provided under the provisions of Rule 25(c), ARCivP.

WHEREFORE, THE FOREGOING IS HEREBY ORDERED:

1. The Court, hereby sets the specific terms and conditions to the taking of medical testimony by deposition in this matter, whether by Plaintiff, by Defendant and with regard to all health care providers who deposition testimony may be necessary or required to either prosecute or to defend this action:

a. The said deposition shall be conducted at a time and place convenient to the medical provider and all attorneys of record who wish to participate or observe the taking of the said medical deposition, all of whom shall take all reasonable measures to accommodate each other's schedules;

b. The health care provider whose deposition is to be taken shall charge no more than \$500.00/hour. \$125.00 for each 15 minute interval that the deposition exceeds one hour, and in no event more than \$1,000 for his or her deposition;

c. The health care provider may, at his or her option, require that his or her fee for the first hour be payable immediately prior to the rendering of the oral deposition testimony.

d. The health care provider shall have the right to be compensated for his or her time for the giving of deposition testimony, in the event that the deposition requires more than one (1) hour, within not more than twenty-four (24) hours from completion of the said testimony and may request that the said deposition be quarantined until such time as his or her deposition fee has been paid in full.

2. Should the health care provider whose deposition is sought not agree to the terms and conditions that the Court has hereby ordered, then said health care provider shall be subject to being subpoenaed to provide his or her testimony in person and to be compensated therefore at the rates specified by Rule and Statute as set forth herein.

DONE AND ORDERED THIS THE 14 DAY OF AUGUST 2009.


CIRCUIT JUDGE