

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

KAREN BARTON,	)	CASE NO.: ST-10-CV-725
	)	
Plaintiff,	)	ACTION FOR: DAMAGES
	)	
v.	)	JURY TRIAL DEMANDED
	)	
VIRGIN ISLANDS PORT AUTHORITY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff Karen Barton's ("Barton") Motion for a Protective Order, filed on August 20, 2013.¹ On January 22, 2014, Defendant Virgin Islands Port Authority ("VIPA") filed an opposition to Barton's motion. Barton moves the Court for a protective order prohibiting VIPA from taking the deposition of her treating physician, Dr. Adam Shapiro, unless and until VIPA pays Dr. Shapiro a reasonable expert witness fee under Federal Rule of Civil Procedure 26(b)(4)(E).² In opposition to Barton's motion, VIPA argues that Dr. Shapiro is a fact witness and is, therefore, only entitled to receive a \$45 witness attendance fee pursuant to 28 U.S.C. § 1821.³

In this case, Barton did not identify Dr. Shapiro as an expert witness, and did not comply with any procedural requirements governing the disclosure of expert witnesses in respect to Dr. Shapiro. Instead, Barton identified Dr. Shapiro as a treating physician, who, in the Virgin Islands, may be deposed as a fact witness so long as his testimony is limited to his personal observations and rationally based on his perceptions. Further, because V.I. CODE ANN. tit. 5, § 660 establishes the witness attendance fee that is to be applied in the Virgin Islands, Dr. Shapiro is entitled to receive an attendance fee that is in compliance with this local law—not a federal statute. Thus, contrary to Barton's position, Dr. Shapiro is not entitled to receive a reasonable expert witness fee prior to having his deposition taken by VIPA. Therefore, because Barton has not shown good cause warranting the issuance of a protective order, Barton's Motion for a Protective Order will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 2010, Plaintiff Karen Barton ("Barton") filed a Complaint against Defendant Virgin Islands Port Authority ("VIPA") for allegedly failing to properly maintain, inspect and repair its premises at the Cyril E. King Airport in St. Thomas, Virgin Islands. As a result of VIPA's actions, Barton contends that she experienced extreme exposure to mold and other

¹ Plaintiff is represented by Lee J. Rohn, Esquire, of Lee Rohn and Associates, LLC. Defendant is represented by Robert L. King, Esquire, of the Law Offices of Robert L. King.

² The Federal Rules of Civil Procedure are applicable to the Superior Court by virtue of Superior Court Rule 7.

³ The Court notes that 28 U.S.C. § 1821(b) provides that the witness attendance fee is \$40, not \$45.

airborne contaminants which negatively affected her health.

On July 5, 2013, VIPA provided Barton with a Notice of Deposition and Subpoena Duces Tecum of Dr. Adam Shapiro, Barton's treating physician.⁴ The notice provided that the deposition would occur on July 16, 2013.⁵ However, prior to that date, VIPA postponed the deposition. On August 20, 2013, Barton filed a Motion for a Protective Order asserting that prior to taking his deposition, VIPA must pay Dr. Shapiro a reasonable expert witness fee pursuant to Fed. R. Civ. P. 26(b)(4)(E).⁶ On January 22, 2014, VIPA filed an opposition to Barton's motion arguing that Dr. Shapiro is a fact witness who is only entitled to a \$45 witness fee under 28 U.S.C. § 1821.⁷

ANALYSIS

I. Barton has properly raised her Motion for Protective Order before this Court concerning the oral deposition of Dr. Adam Shapiro.

The first issue before the Court is whether Barton has properly raised her motion to obtain a protective order. Pursuant to Federal Rule of Civil Procedure 26(c)(1), "[a] party or person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken."⁸ When a motion for protective order is related to an oral deposition, the parties are not required to confer or file a written certification prior to seeking court intervention.⁹ The court has discretion to issue a protective order, for good cause shown, to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense."¹⁰ If the motion is wholly or partly denied, the court may order either party to provide or permit discovery.¹¹

Here, Barton has properly filed her Motion for a Protective Order. On July 5, 2013, VIPA provided Barton with a notice of taking the deposition of Dr. Adam Shapiro on July 16, 2013 in St. Thomas, Virgin Islands.¹² After VIPA postponed the deposition, Barton filed the instant Motion for a Protective Order with this Court, which is where her action is pending. Because the Motion for a Protective Order is in relation to an oral deposition, Barton was not required to confer with VIPA, or file a written certification of compliance prior to seeking court intervention. Therefore, Barton properly filed her Motion for a Protective Order, and this Court will now consider whether there is good cause shown for this Court to issue a protective order to protect Dr. Shapiro from annoyance, embarrassment, oppression, or undue burden or expense.

⁴ (See Mot. for a Protective Order, Ex. 1, Aug. 20, 2013).

⁵ (See Mot. for a Protective Order, Ex. 1, Aug. 20, 2013).

⁶ (Mot. for a Protective Order, 2, Aug. 20, 2013).

⁷ (Opp'n to Pl.'s Mot. for a Protective Order, 1, Jan. 22, 2014).

⁸ Fed. R. Civ. P. 26(c)(1).

⁹ LRCi 37.1; See LRCi 37.2.

¹⁰ *Id.*

¹¹ Fed. R. Civ. P. 26(c)(2).

¹² (See Mot. for a Protective Order, Ex. 1, Aug. 20, 2013).

II. This Court finds that Barton has not shown good cause to justify the issuance of a protective order prohibiting VIPA from taking the deposition of Dr. Adam Shapiro prior to paying Dr. Shapiro a reasonable expert witness fee.

The second issue before this Court is whether a treating physician, who has not been identified as an expert witness, is entitled to receive a reasonable expert witness fee pursuant to Fed. R. Civ. P. 26(b)(4)(E). Under the Federal Rules of Procedure, after an action has commenced, each party must provide initial disclosures of all discoverable information pertaining to the matter. In addition to initial disclosures, “[a] party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705” pertaining to expert witnesses.¹³ “[I]f the witness is one retained or specifically employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony,” the disclosure must include a written report prepared and signed by the witness.¹⁴ For all other expert witnesses, the disclosure must state “the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.”¹⁵ If the opposing party seeks to obtain discovery from an expert witness, that party must “pay the expert a reasonable fee for time spent in responding to discovery.”¹⁶

Here, Barton identified Dr. Shapiro as a treating physician rather than an expert witness under Rule 26(a)(2)(A).¹⁷ Upon identifying Dr. Shapiro as a non-expert witness, Barton did not—and was not required to—comply with any of the provisions relating to the disclosure of expert witnesses. Namely, she did not provide a written expert report,¹⁸ a statement of the subject matter of Dr. Shapiro’s testimony,¹⁹ or a summary of facts and opinions. Thus, there was no indication from Barton that Dr. Shapiro would serve as an expert witness in this matter. Accordingly, VIPA provided notice to depose Dr. Shapiro as a fact witness. It was not until after VIPA disclosed its intent to depose Dr. Shapiro as a fact witness did Barton assert that Dr. Shapiro was an expert witness. She argues that although Dr. Shapiro was identified as a treating physician, he is also an expert witness because he must call upon his specialized knowledge to testify about Barton’s medical condition and diagnosis.

However, the Supreme Court of the Virgin Islands has taken a different position than Barton. In *Charles v. People of the Virgin Islands*,²⁰ the Supreme Court addressed the issue of

¹³ Fed. R. Civ. P. 26(a)(2)(A).

¹⁴ Fed. R. Civ. P. 26(a)(2)(B).

¹⁵ Fed. R. Civ. P. 26(a)(2)(C).

¹⁶ Fed. R. Civ. P. 26(b)(4)(E).

¹⁷ (Opp’n to Pl.’s Mot. for a Protective Order, 3, Jan. 22, 2014).

¹⁸ Fed. R. Civ. P. 26(a)(2)(B) reads, in pertinent part,—

Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.”

¹⁹ Fed. R. Civ. P. 26(a)(2)(C) reads,—

²⁰ 60 V.I. 823 (V.I. 2014). Although the Supreme Court’s rationale is set forth in a criminal case, Federal Rule of Evidence 701 is applicable to criminal and civil cases pursuant to Fed. R. Evid. 1101(b).

whether this Court properly allowed two treating physicians to testify about their observations made during medical examinations without first qualifying the doctors as expert witnesses.²¹ Upon finding that the doctors were not testifying as expert witnesses, the Supreme Court explained that “a witness with specialized testimony is nevertheless a lay witness so long as the witness’s testimony is limited to actual perceptions.”²² The Supreme Court further provided that—

although the physicians’ specialized training may have contributed to their ability to evaluate [the victims’] injuries, the Superior Court correctly permitted their testimony without qualifying them as experts, given that they limited their testimony to their personal observations of [the victims] and limited their opinion testimony only to that which was “rationally based on the[ir] perception[s].”²³

Thus, a treating physician’s status as an expert or lay witness is dependent upon the content and scope of the witness’ testimony. When a treating physician’s testimony is based on “knowledge, skill, experience, training, or education,” the treating physician is an expert witness, and must be identified as such during discovery.²⁴ On the other hand, when a treating physician’s testimony is limited to personal observations, is “rationally based on the witness’s perception,” is helpful to the jury in understanding the testimony or a fact in issue, and is “not based on any scientific, technical, or specialized knowledge within the scope of Rule 702,” the treating physician may testify as a lay witness.²⁵

In the instant matter, VIPA asserts that it only intends to depose Dr. Shapiro as a fact witness.²⁶ Because a treating physician is not automatically deemed an expert witness, VIPA may depose Dr. Shapiro as a fact witness as long as the scope of the deposition is limited to questions that elicit testimony that is based on Dr. Shapiro’s personal observations, and is rationally based on

²¹ *Id.* at 840. In *Charles*, the Supreme Court of the Virgin Islands analyzed the issue of expert witnesses under Uniform Rule of Evidence 911. However, in doing so, the Supreme Court recognized that “section 911 [of the URE] and Federal Rule of Evidence 701 codif[ie]d the same standard as to whether a witness must be qualified as an expert before rendering opinion testimony.” Therefore, the Supreme Court’s analysis of the expert witnesses and treating physicians in *Charles* is analogous to the issue in this matter.

²² *Id.* at 841 (comparing *Allen v. Parkland School District*, 230 Fed. Appx. 189, 194-95 (3d Cir. 2007) (stating that a physician is a fact witness to the extent he or she testifies concerning the facts learned during the treatment of the patient), *Turner v. Delta Air Lines, Inc.*, No. 06 CV 1010, 2008 U.S. Dist. LEXIS 5528, *4, 2008 WL 222559, at *1 (E.D.N.Y. Jan. 25, 2008) (unpublished) (“[I]f the witness testifies only to the opinions formed in providing plaintiff medical care, such opinions are considered an explanation of treatment notes and the physician may properly be characterized as a fact witness.”), *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349-50 (D. Colo. 1995) (two doctors that examined accident victim were ordinary fact witnesses), and *Sipes v. United States*, 111 F.R.D. 59, 61 (S.D. Cal. 1986) (“**The mere fact that a treating physician may possess opinions regarding the care and treatment provided to the plaintiff herein does not ipso facto render such a physician as an expert witness.**”), with *Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993) (holding physician who treated plaintiff became expert witness when testimony shifted from their treatment of plaintiff to discussion of the applicable standard of care)) (emphasis added).

²³ *Id.*

²⁴ See Fed. R. Evid. 702; see also Fed. R. Civ. P. 26(a)(2)(A).

²⁵ Fed. R. Evid. 701; see *Charles*, 60 V.I. at 841; see also *Castillo v. Kmart Corp.*, Civ. No. 2012-017, ___ V.I. ___, 2014 U.S. Dist. LEXIS 18720, at *2 (D.V.I. Feb. 14, 2014) (“Treating physicians or other health care professionals generally may testify as fact witnesses without providing an expert report when ‘testifying ‘based on their examination, diagnosis and treatment of a patient.’”) (citations omitted).

²⁶ (Opp’n to Pl.’s Mot. for a Protective Order, 3, Jan. 22, 2014).

his perceptions.²⁷ Therefore, in this matter, because Dr. Shapiro will be deposed as a fact witness, he is not entitled to receive a reasonable expert witness fee pursuant to Fed. R. Civ. P. 26(b)(4)(E).

III. Dr. Shapiro is entitled to receive an attendance witness fee pursuant to 5 V.I.C. § 660, which establishes the fee applicable to witnesses testifying in the Virgin Islands.

The remaining issue that is before this Court is whether a treating physician who testifies as a fact witness is entitled to receive a witness attendance fee under 28 U.S.C. § 1821, or 5 V.I.C. § 660. In its opposition to Barton's motion, VIPA argues that Dr. Shapiro is entitled to a witness attendance fee pursuant to 28 U.S.C. § 1821. Section 1821 provides that, "a witness shall be paid an attendance fee of \$40 per day for each day's attendance." In the Virgin Islands, the Legislature has created a similar witness fee setting statute that is modeled after the federal law. Specifically, 5 V.I.C. § 660, states that,—

[a] witness attending . . . before any person authorized to take his deposition . . . *shall receive \$4 for each day's attendance* and for the time necessarily occupied in going to and returning from the same, and shall be reimbursed for his necessary and reasonable expenses of travel in going from and returning to his place of residence.

A witness who is not a salaried employee of the Virgin Islands or Federal government and who is not in custody and who is required to attend, as herein described, in a judicial division in which he does not reside, *shall be entitled to an additional allowance of \$8 per day for subsistence* including the time necessarily occupied in going to and returning from the place of attendance.²⁸

Although the Supreme Court of the Virgin Islands has recognized that "members of the Virgin Islands Bar have made it a practice to provide witnesses with a \$40 fee when serving subpoenas,"²⁹ the Supreme Court has also found that there is "no authority for applying the fee set forth in section 1821 instead of the fee established under local law."³⁰ The Legislature has delegated power to this Court to fix certain fees, however "this power does not extend to fees that have already been set by statute."³¹ Because 5 V.I.C. § 660 expressly sets the witness attendance fee that is applicable in this Territory, this Court does not have discretion to enforce a customary practice that does not align with the governing statutory provision. Therefore, Dr. Shapiro is entitled to receive a witness attendance fee in accordance with 5 V.I.C. § 660, rather than 28 U.S.C. § 1821.

²⁷ See *Sutherland v. Hyannis Air Servs. Inc.*, Civ. No. 2006-0001, 2008 U.S. Dist. LEXIS 103440 (D.V.I. Dec. 23, 2008) (unpublished); see also *Hadley v. Pfizer, Inc.*, Civ. No. 08-1440, 2009 U.S. Dist. LEXIS 47363 (E.D. Pa. June 5, 2009) (unpublished).

²⁸ 5 V.I.C. § 660 (emphasis added).

²⁹ *Terrell v. Coral World*, 55 V.I. 580, 591 n. 15 (V.I. 2011).

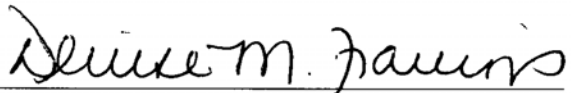
³⁰ *Id.* at 589-90. The Court notes that in *Terrell*, the Supreme Court of the Virgin Islands' decision was narrowly addressed the issue of costs and fees awarded to a prevailing party under 5 V.I.C. § 541. However, upon addressing that issue, the Supreme Court provided a thorough analysis of the interplay between 28 U.S.C. § 1821 and 5 V.I.C. § 660, which is directly related to the issues present in the instant matter.

³¹ *Id.* at 591 n. 13 (citing 4 V.I.C. § 514).

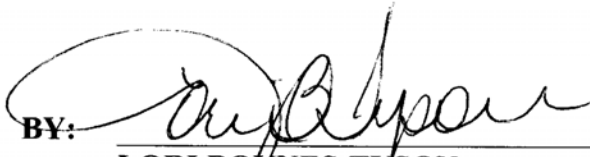
CONCLUSION

Having considered the premises of Barton's Motion for Protective Order, this Court finds that Barton has not shown good cause warranting the issuance of a protective order. Here, Barton did not identify Dr. Shapiro as an expert witness, nor did she comply with the procedural requirements governing the disclosure of expert witnesses as it pertains to Dr. Shapiro. Being that Barton only identified Dr. Shapiro as a treating physician, VIPA may depose Dr. Shapiro as a fact witness so long as the scope of questioning is limited to elicit testimony that is based on Dr. Shapiro's personal observations and is rationally based on his own perceptions. Thus, in this matter, Dr. Shapiro is not entitled to receive a reasonable expert witness fee, but is entitled to receive an witness fee pursuant to 5 V.I.C. § 660. Therefore, Barton's Motion for Protective Order will be denied.

Dated: June 3, 2015


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES-TYSON
Court Clerk Supervisor 6/3/15