

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JUDITH FOSTER)	
)	
)	CIVIL ACTION FILE NO.:
PLAINTIFF,)	04-VS-073178-H
)	
VS.)	
)	
GARDEN FRESH RESTAURANT)	
CORP., D/B/A SWEET TOMATOES)	
RESTAURANT,)	
)	
DEFENDANT.)	
)	

**BRIEF IN RESPONSE AND OPPOSITION TO PLAINTIFF’S MOTION TO
COMPEL RESULTS OF SURVEILLANCE CONDUCTED BY DEFENDANT**

Comes now Garden Fresh Restaurant Corp. d/b/a Sweet Tomatoes Restaurant, named as Defendant in the above-styled action (hereinafter referred to as “Defendant”), by and through undersigned counsel and pursuant to Uniform Rule of State Court 6.2, files this *Brief In Response and Opposition to Plaintiff’s Motion to Compel Results of Surveillance Conducted by Defendant* (hereinafter referred to as “*Motion to Compel*”). In response and opposition to this motion, Defendant shows as follows:

I. OVERVIEW

Plaintiff sued Defendant alleging she received personal injuries in a trip-and-fall at Defendant’s restaurant for which she claims Defendant is responsible. During discovery, Defendant properly acknowledged to Plaintiff that as part of its preparation for trial, it had performed surveillance of Plaintiff. However, when production of the video footage and all reports related thereto was demanded by Plaintiff, Defendant properly

objected to such production on grounds that the information sought was outside the scope of discovery and that it was work-product that was created in anticipation of trial. Plaintiff brings the instant *Motion to Compel* seeking this information. For the reasons presented below, this Honorable Court should determine that Defendant's objections are proper and that Plaintiff's motion should be denied. To the extent it is required, Defendant respectfully requests this Honorable Court to treat this *Brief* as a *Motion for Protective Order* pursuant to O.C.G.A. § 9-11-26(c).

II. LEGAL ANALYSIS

A. Standard for Granting a Motion to Compel

The standard of review of a trial court's ruling on discovery disputes is abuse of discretion. Fisher v. Bd. of Commrs. of Douglas County, 200 Ga. App. 353, 354, 408 S.E. 2d 120 (1991). The trial courts have broad discretion to determine what is and what is not discoverable, and the appellate courts will not interfere with those decisions absent a clear abuse. Smith v. U-Haul Co. Georgia, 225 Ga. App. 356, 357, 484 S.E. 2d 49 (1997)(citing Apple Investment Properties v. Watts, 220 Ga. App. 226, 227, 469 S.E. 2d 356 (1996)).

B. Surveillance Performed by Defendant is Excluded from Discovery As Work-Product and Is Outside the Scope of Rule 26.

The vast majority of the case law cited by Plaintiff is support of her position that the surveillance video is "discoverable" is federal law interpreting the requirements of the Federal Rules of Civil Procedure utilized in federal court proceedings. However, the

Federal Rules of Civil Procedure and cases interpreting them are inapplicable to this State Court case controlled by the Georgia Civil Practice Act and Uniform Rules of Court. While the Georgia Civil Practice Act is modeled on the Federal Rules, they are by no means identical; and in fact, the Federal Rules are far more liberal with discovery of impeachment evidence than the Civil Practice Act. See, e.g. Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572 (2002)(where the Supreme Court of Georgia held that Uniform Superior Court Rule 7.2 and O.C.G.A. § 9-11-16 do not impose a duty to list all documents to be used at trial; rather, it provides a listing of “all documentary and physical evidence that will be tendered at trial by the plaintiff or defendant.”).

O.C.G.A. § 9-11-26(b)(1) defines the scope of discovery in Georgia State Courts. That statute provides that “[p]arties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action....” (emphasis added). What should immediately be noted is that it is not contested by Plaintiff that undersigned counsel’s work product is not discoverable. In fact, Plaintiff implicitly acknowledges that the video footage and any reports generated as a result thereof are undersigned counsel’s work-product and as such the disclosure of same is controlled by O.C.G.A. § 9-11-26(b)(3).

Specifically, Plaintiff argues only that “[P]laintiff has a ***substantial need*** to discover the surveillance tapes because of the potential impact on the trial.” *Brief* at 2 (emphasis added). Although it is not explicitly mentioned, this is clearly a reference to O.C.G.A. § 9-11-26(b)(3) regarding “TRIAL PREPARATION; MATERIALS,” wherein it is provided that:

a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in

anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) ***only upon a showing that the party seeking discovery has substantial need of the materials*** in the preparation of his case ***and that he is unable without undue hardship*** to obtain the substantial equivalent of the materials by other means.

(emphasis added). See also, Lowe's of Ga. v. Webb, 180 Ga. App. 755, 757, 350 S.E. 2d 292 (1986).

Thus, in order to compel production of the work-product video footage, Plaintiff must demonstrate both prongs of the requirement. First, she must demonstrate substantial need; and second she must demonstrate that she would be subject to an undue hardship without the materials. Plaintiff has demonstrated neither prerequisite for disclosure.

1. Plaintiff has failed to demonstrate a substantial need as required by O.C.G.A. § 9-11-26(b)(3).

Documents, statements and other tangible items of evidence developed by one party in preparation for litigation are discoverable by the other party only in carefully limited circumstances. McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 502, 562 S.E. 2d 809 (2002)(*citing Ga. Intl. Life Ins. Co. v. Boney*, 139 Ga. App. 575, 580-581, 228 S.E. 2d 731 (1976)). The party seeking the trial preparation material must affirmatively show “a substantial need for the evidence and that undue hardship will result should the seeking party be required to develop the evidence by other means.” McKinnon v. Smock, 264 Ga. 375, 376, 445 S.E. 2d 526 (1994).

Plaintiff cannot and has not demonstrated a substantial need of this material. The only argument presented by Plaintiff that she has “substantial need” of the evidence is her claim that it is “highly relevant to the issues of whether a plaintiff suffered the injuries of

which she complains and the extent of the damages the jury should award.” *Brief* at 2-3 (citing Darwin v. Metropolitan Atlanta Rapid Transit Authority, 158 Ga. App. 635, 281 S.E. 2d 361 (1981)). Whether trial preparation materials are “relevant” or “highly relevant” does not demonstrate “substantial need” as required for disclosure as provided by Rule 26(b)(3). Such are issues regarding admissibility at trial, not whether the work-product privilege is overcome.

Similarly, Plaintiff’s reliance on Darwin is misplaced. The issue in Darwin had nothing to do with whether a party had shown “substantial need” as required by Rule 26(b)(3), but rather whether a trial court erred in allowing the defense to call the person that had performed surveillance on Plaintiff as a witness to impeach Plaintiff at trial when that witness had not been listed on the Pre-Trial Order entered prior to trial. *Id.* at 636-37. Ultimately, the Darwin Court concluded that even if it was error to allow such testimony, it was harmless. *Id.* at 637. Darwin had nothing to do with the plaintiff’s requirement to demonstrate “substantial need” prior to obtaining opposition’s work-product.

If the video of the surveillance and any reports generated as a result thereof were to be used at some point in the future, it would only be introduced into evidence for impeachment purposes. The Supreme Court of Georgia held in Ballard v. Meyers, 275 Ga. 819, 572 S.E. 2d 572 (2002), that, “[w]hile an attorney in a civil action should disclose the names of those who will or may be relied upon affirmatively to prove the client’s case [in the Pre-Trial Order], there is no comparable rationale for requiring the disclosure of documents which may be used to attack the credibility of the other side’s witnesses.” *Id.* at 820. To allow Plaintiff to obtain these materials would undermine the

entire purpose of impeachment. If Plaintiff were alerted to the actual contents of potential impeachment, that would provide Plaintiff with opportunity to amend or shade her testimony to conform with the evidence contained in the surveillance materials. Further, “[t]he mere fact that [work product] may contain impeachment materials is not sufficient to show either undue hardship or substantial need as required by O.C.G.A. § 9-11-26(b)(3).” Sturgill v. Garrison, 219 Ga. App. 306, 464 S.E. 2d 902 (1995). See also, Howell v. U.S. Fire Ins. Co., 185 Ga. App. 154, 363 S.E. 2d 560 (1987)(party failed to show substantial need in seeking insurer’s file prepared in anticipation of litigation).

Because Plaintiff has failed to meet Rule 26(b)(3)’s first requirement of substantial need, her motion should be denied.

2. *Plaintiff has failed to demonstrate the undue hardship requirement of O.C.G.A. § 9-11-26(b)(3).*

Plaintiff devotes only a single paragraph in her *Brief* to the second requirement for disclosure pursuant to Rule 26(b)(3), undue hardship. In making her argument, Plaintiff cites to no Georgia case, but only to federal cases from Pennsylvania and Iowa. Yet, even then, Plaintiff provides no tenable argument that she would suffer an undue hardship if the video footage were not produced.

The best argument that Plaintiff musters is that “the material sought is not reproducible, does not exist elsewhere and is in the sole-possession of the Defendant.” *Brief* at 3. Plaintiff attempts to further this by noting that the surveillance tapes are unique in that they capture a moment in the past that is incapable of exact duplication.” *Brief* at 3. However, Plaintiff overlooks a critical fact in making this argument, namely that she herself could have and still can create video footage of her.

Nobody has better knowledge of Plaintiff's whereabouts, actions, and activities than Plaintiff herself. Had Plaintiff desired or needed surveillance or documentation of her activities, she could have and can still obtain this material far more easily than Defendants. Such measures were available and continue to be available to Plaintiff; she simply has apparently chosen not to take advantage of them.¹ As was true in Warmack v. Mini-Skools Ltd., 164 Ga. App. 737, 739, 297 S.E. 2d 365 (1982), "if [Plaintiff] did not inquire into the same matters as the claims representative, certainly she had the opportunity to do so."

Because Plaintiff cannot and has not demonstrated that she would suffer an undue hardship, Plaintiff is not entitled to the materials sought. Plaintiff's *Motion to Compel* should be denied.

C. Plaintiff Is Not Entitled to the Identity of the Person(s) Performing the Surveillance on Plaintiff.

Finally, it appears from her *Brief* that Plaintiff is also seeking to compel the identity of the person(s) performing the surveillance in question on Plaintiff. Because this information is also outside the scope of discovery, Plaintiff is not entitled to this information.

The only Georgia case upon which Plaintiff relies in support of her motion is Jones v. Scarborough, 194 Ga. App. 468, 390 S.E. 2d 674 (1990), but even then, her reliance on Jones is misplaced. In Jones, the Georgia Court of Appeals determined the trial court erred in disallowing a party to depose the opposition party's *previously*

¹ Further, the fact that Plaintiff may claim that her memory has faded about the time, place and/or location at which she was surveilled does not constitute undue hardship. Clarkson Industries, Inc. v. Price, 135 Ga. App. 787, 218 S.E. 2d 921 (1975) (*overruled on other grounds by Tobacco Road, Inc. v. Callaghan*, 174 Ga. App. 539, 330 S.E. 2d 768 (1985)).

identified witness who had performed surveillance. In Jones, there was no question that the witness in question had been previously identified, and in fact identified as an expert witness (although the Court determined that he was not an expert but merely a fact witness). Even the Jones Court recognized, however, that “[a]ny person *not privileged* having knowledge of issues being tried should be made available to the parties as [a witness].” Id. at 470 (emphasis added) (*citing Logan v. Chatham County*, 113 Ga. App. 491, 492, 148 S.E. 2d 471 (1966)).

At this time, the person(s) performing the surveillance in question on Plaintiff are not relevant to the question of Plaintiff’s claimed injuries and damages and will not become so unless and until Plaintiff testifies to information at trial that will subject her to impeachment. As such, the person(s) has/have not yet been identified. Although, Plaintiff attempts to minimize this argument by referring to it as “inane,” Plaintiff’s reliance on Darwin v. MARTA, *supra*, in doing so is again misplaced. What was labeled as “inane” by the Darwin Court was the justification presented by the party utilizing the witness in question at trial that it had not notified the opposition of the witness’s existence prior to the entry of the *Pre-Trial Order*, not that it was not anticipated that the impeachment witness even existed in the first place or that he might be used at trial to impeach the Plaintiff if such became needed. Id. at 636.

Because, at this time, the identity of the person(s) performing surveillance on Plaintiff is not subject to discovery, Plaintiff’s *Motion to Compel* same should be denied.

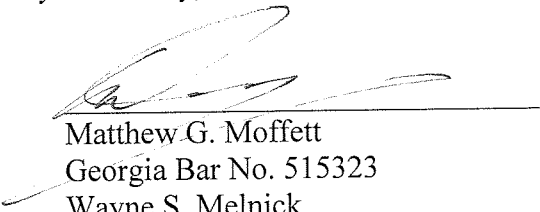
D. Should This Honorable Court Compel Discovery, an In-Camera Inspection of the Material in Question is Required.

As demonstrated above, Plaintiff is not entitled to any material related to the surveillance of her performed by Defendant in anticipation of trial as provided by Rule 26. However, in the event this Honorable Court determines that production is required, which Defendant denies, this Honorable Court should hold an in-camera examination (or utilize some other acceptable method) to protect otherwise undiscoverable mental impressions or legal theories pursuant to Georgia International Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E. 2d 731 (1976). It should be noted that the in-camera inspection is only required after Plaintiff has demonstrated both substantial need and undue hardship as required by O.C.G.A. § 9-11-26(b)(3), something which Plaintiff has failed to do here. The inspection cannot be used to find the prerequisites in question. Warmack v. Mini-Skools Ltd., 164 Ga. App. 737, 739, 297 S.E. 2d 365 (1982). However, as demonstrated above, because Plaintiff cannot meet the requirements of either substantial need or undue hardship, let alone both, no such in-camera inspection is required and Plaintiff's *Motion to Compel* should be denied.

III. CONCLUSION

For the above-stated reasons, Defendant respectfully requests this Honorable Court to deny Plaintiff's *Motion to Compel*. To the extent it is required, Defendant respectfully requests this Honorable Court to treat this *Brief* as a *Motion for Protective Order* pursuant to O.C.G.A. § 9-11-26(c) and grant same and to issue an *Order* protecting the information requested from discovery.

Respectfully submitted, this 17th day of January, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the **BRIEF**
IN RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
RESULTS OF SURVEILLANCE CONDUCTED BY DEFENDANT by depositing a
copy of the same in the United States mail with adequate postage thereon to ensure
delivery to the following counsel of record:

Grant G. Morain, Esq.
1429 Cortez Lane
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This 17th day of January, 2008.

Respectfully submitted,



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