

**IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA**

CANDI L. MINCEY,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.:
)	14 A 2416-7
v.)	
)	
BI-LO, LLC d/b/a BI LO GROCERY STORE)	
)	
Defendant.)	

**DEFENDANT’S MOTION FOR PROTECTIVE ORDER REGARDING PRODUCTION
OF STORE SURVEILLANCE VIDEO**

COMES NOW, BI-LO, LLC (hereinafter “Bi-Lo”), Defendant in the above-styled action, and pursuant to O.C.G.A. 9-11-26(c), and for good cause shown, respectfully requests entry of a protective order delaying the production of store surveillance video capturing Plaintiff’s alleged incident until after Plaintiff’s deposition, and in support thereof, states as follows:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

1.

Plaintiff alleges she was injured while shopping at Bi-Lo’s grocery due to multiple boxes of food falling from a pallet and striking her. (Plaintiff’s Complaint ¶ 5).

2.

On August 28, 2014, Bi-Lo was served with Plaintiff’s Complaint, as well as Plaintiff’s First Interrogatories and First Requests for Production of Documents (hereinafter, “Plaintiff’s Discovery Requests”).

3.

Plaintiff's Request for Production of Document No. 9 sought, "A copy of any surveillance movies or photographs which have been made of Plaintiff."

4.

On November 12, 2014, Bi-Lo responded to Plaintiff's Discovery Requests. In response to Request for Production of Document No. 9, Bi-Lo stated the following: "BI-LO objects to this Request on the grounds that it is overly broad, vague, ambiguous, and unduly burdensome and to the extent it seeks information that is considered to be privileged, work product and/or seeks information obtained in anticipation of litigation. Subject to and without waiving these objections, *Defendant agrees to produce a copy of the CCTV footage capturing Plaintiff's alleged incident following the completion of Plaintiff's deposition.*" (emphasis added).

5.

On November 18, 2014, Plaintiff's counsel sent the undersigned counsel a Rule 6.4 letter contesting Bi-Lo's withholding of the CCTV footage until after Plaintiff's deposition, indicating Plaintiff counsel's intention to seek a protective order should Bi-Lo notice Plaintiff's deposition prior to production of the CCTV footage, requesting legal authority supporting Bi-Lo's position to withhold the CCTV footage and requesting the production of the CCTV footage within 10 days of the letter. (A true and correct copy of the November 18, 2014 letter is attached as Exhibit "1" to the affidavit of Brandon G. Day. The Affidavit of Brandon G. Day is attached hereto as Exhibit "A" and is incorporated by reference.).

6.

On November 25, 2014, the undersigned counsel responded to Plaintiffs' Rule 6.4 letter reiterating Bi-Lo's position on the delayed production of the CCTV footage and providing copies

of two recent opinions supporting Bi-Lo's position and legal reasoning for the delayed production of CCTV footage until after a plaintiff is deposed. (A true and correct copy of the November 25, 2014 correspondence and enclosures is attached as Exhibits "2" to the affidavit of Brandon G. Day and incorporated herein by reference).

7.

On December 3, 2014, the undersigned counsel contacted Plaintiff's counsel by telephone to determine Plaintiff's position on Bi-Lo delaying the production of the CCTV footage. Despite the undersigned counsel providing legal opinions in support of Bi-Lo's position and attempting in good faith to resolve the dispute on the CCTV footage, Plaintiff's counsel indicated his position remained unchanged and he further indicated his intention to seek this Court's intervention to compel Bi-Lo to produce the CCTV footage. (Paragraph 7 of Affidavit of Brandon G. Day).

ARGUMENT AND CITATION OF AUTHORITY

Pursuant to O.C.G.A. § 9-11-26(c) and to preserve the significant value of the CCTV footage as impeachment evidence, Bi-Lo seeks a protective order signed by this court precluding the production of the CCTV footage until after Plaintiff's deposition is completed. Plaintiff will suffer no prejudice by entry of such a protective order because Plaintiff will have access to the CCTV footage after completing her deposition. Delaying the production of the CCTV footage will also ensure that Plaintiff provides untainted deposition testimony based upon her own recollection of the alleged incident.

There are no Georgia appellate opinions that have addressed the delayed production of surveillance video until after a plaintiff's deposition. Numerous other courts, however, have recognized delaying production of surveillance video created in anticipation of litigation until

after a plaintiff's deposition has been conducted preserves the impeachment value of the video and prevents the tailoring of plaintiff's testimony. See Tripp v. Severe, 2000 U.S. Dist. LEXIS 16488, *2 (D. Md. 2000) (holding defendant should not be compelled to produce video footage of the plaintiff until after the plaintiff has provided deposition testimony, because "this approach prevents unfair surprise while serving the truth-seeking interests of the litigation process."); Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tx. 1996) (holding surveillance evidence must be disclosed only after the plaintiff's deposition has been taken as this procedure preserves the impeachment value of the surveillance by requiring the plaintiff to commit by deposition to a description of the scope of his injuries); Martino v. Baker, 179 F.R.D. 588, 590 (D. Co. 1998) (holding that defendant did not have to produce surveillance tapes of plaintiff until ten days after plaintiff's deposition had been completed in order to preserve the impeachment value of the tapes); Gibson v. Nat'l Railroad Passenger Corp., 170 F.R.D. 408, 410 (E.D. Pa. 1997) (holding to preserve impeachment value of surveillance, courts generally allow plaintiff's deposition to be taken before any films or photos are produced by the defendant); Snead v. Am. Export-Isbrandstem Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973) (holding defendant did not have to produce surveillance tapes of plaintiff until after plaintiff's deposition, in order to prevent the tailoring of plaintiff's testimony); Machi v. Metropolitan Life Ins. Co., 2008 U.S. Dist. LEXIS 45365 (W.D. Pa. 2008) (holding that the defendant did not have to produce surveillance video of plaintiff until after the plaintiff's deposition was taken, because this "will preserve the impeachment value of the surveillance material after [the Defendant] has had the opportunity to obtain [the Plaintiff's] testimony under oath.").

In a factual analogous case, the United States District Court for the Southern District of Georgia, Brunswick Division, recently followed this rationale and agreed that the potential

impeachment value of CCTV footage capturing plaintiff's alleged incident outweighed the substantive evidentiary value and granted the defendant's motion for protective order in Pate v. Winn-Dixie Stores, Inc. 2014 U.S. Dist. LEXIS 25494 (Feb. 20, 2014). In Pate, defendant grocery store objected to providing the store surveillance video prior to plaintiff's deposition; a motion to compel by plaintiff and motion for protective order by defendant ensued. Id. at *1-2. Plaintiff argued that the video may allow her to refresh her recollection. Defendant argued it had a right to hear Plaintiff's unrefreshed recollection of the incident. Id. at *2. The court held the defendant should have the opportunity to depose Plaintiff based on her own independent recollection of the incident giving rise to his action. Id. at *3. As such, the court granted defendant's motion for protective order permitting the production of the video after the deposition of plaintiff and her husband. Id.

Several courts have also examined cases involving production of store video surveillance and held it is likewise within the Court's discretion to allow the discovery deposition of a plaintiff before disclosure of video surveillance of an incident. See Parks v. NCL (Bahamas) Ltd., 285 F.R.D. 674 (S.D. Fla. Oct. 5, 2012); Bolitho v. Home Depot, 2010 U.S. Dist. LEXIS 76487 (S.D. Fla. June 3, 2010). See also Rankin v. Waldbaum, 670 N.Y.S. 2d 1023, 1024 (N.Y. 1998) (granting defendant's motion for protective order and holding production of store surveillance video should be delayed until after plaintiff's deposition, reasoning that "danger is present that the Plaintiff would tailor her testimony based upon what is depicted in the videotape. The best way to ensure honest testimony is to conduct the Plaintiff's deposition before the videotape is exchanged.").

In Parks, plaintiff brought a claim for personal injury as a result of a slip and a fall on a cruise ship. Id. 285 F.R.D. at 674. Plaintiff requested production of videotapes and pictures of

the scene of the accident as well as a videotape of plaintiff taken by closed circuit television cameras at the time of the incident. Id. Defendant argued it preserved the videotape solely because it anticipated litigation and it was thus protected by attorney-work product. Id. In determining whether the videotape should be produced before or after the plaintiff's deposition, the Court determined it was not necessary to decide whether the videotape was protected work product, as Florida Rule of Civil Procedure 26(d) grants the Court broad discretion to decide the timing and sequence of discovery. Id. at 675. Defendant expressed its arguments as follows:

Regardless of whether there is, at this point, any reason to believe the Plaintiff will testify untruthfully, the only way to ensure that Plaintiff provides her recollection of the events, as opposed to testimony regarding what she perceives is depicted (or not depicted) in the video, is to permit Defendant to withhold the video until after completion of the Plaintiff's deposition...if Plaintiff provides truthful testimony at her deposition, then the video will corroborate her testimony, and if she does not provide truthful testimony, the impeachment value of the video will be preserved. Moreover, if Plaintiff does not recall what happened then she can simply testify as such, and the video may be used later to refresh her recollection.

Id.

The Court agreed with defendant that plaintiff should be required to give her deposition testimony based on her own independent recollection of the incident without being refreshed in any way by the videotape. Id. The Court further found the plaintiff would not suffer any prejudice by delaying the production of the videotape, and granted defendant's motion for protective order. Id.

Similarly in Bolitho, the court ruled that production of a surveillance video of the incident could be delayed until after a plaintiff's deposition "to ensure that all relevant evidence reaches the trier of fact in a fair and accurate fashion." Bolitho, 2010 U.S. Dist. LEXIS 76487 at *3. In Bolitho, the plaintiff was allegedly injured at the service counter of one of the defendant's retail locations and the incident in question was recorded on video. Id. at *1. Home Depot stated

that it had only copied and preserved the subject video at that point because it had anticipated litigation and thus the video was protected from disclosure by the work product privilege. *Id.* During discovery, the plaintiff requested the production of the surveillance footage, and defendant objected to the request as privileged work-product but stated that “subject to and without waiving [the objection]... that [Defendant] is in possession of store surveillance video that captured the alleged incident...[and that it] will be provided to the Plaintiff immediately after her deposition.” *Id.* at *3. The Magistrate Judge denied plaintiff’s motion to compel, agreed with the defendant that the video was protected work product, and held it was within the Court’s discretion to allow the plaintiff’s deposition to occur before disclosure of the video. *Id.* at *3. On appeal, the District Court upheld the Magistrate’s ruling. *Bolitho v. Home Depot*, 2010 U.S. Dist. LEXIS 76032 (S.D. Fla. June 29, 2010).

Finally, in *Young v. BC Services, Inc.*, 2011 U.S. Dist. LEXIS 64796 (S.D. Ala. June 17, 2011), another case factually analogous to the case at bar, the important impeachment value of audiotapes, similar to videotapes, was recognized and the production of the audiotapes prior to plaintiff’s deposition was delayed. In *Young*, plaintiff brought an action pursuant to the Fair Debt Collection Practices Act (FDCPA), and defendant sought an Order permitting it to delay production of telephone recordings between plaintiff and defendant’s employees until after plaintiff was deposed. *Id.* at 1-2. Defendant argued if plaintiff was provided the recordings prior to her deposition, she would tailor her testimony around the recordings, and the impeachment value of the recordings would be lost. *Id.* The Court found the impeachment value of the recordings greatly outweighed their substantive value, as the great value of the recordings is that they may impeach allegations that plaintiff may make during her deposition. *Id.* at 6-7. If plaintiff was provided the recordings before the deposition, the impeachment value would be

lost. Id. Additionally, the Court found there was nothing inherently unfair about requiring a party who had filed a lawsuit to give sworn deposition testimony about the alleged harassing telephone calls before being provided with copies of the telephone recordings. Id. The Court found this particularly true where plaintiff and her counsel were placed on notice that recordings exist and where plaintiff was free to explain any discrepancies which might exist between her deposition testimony and the recording. Id. As such, defendant's motion for protective order was granted, and defendant was directed to make the recordings available to plaintiff after her deposition was concluded. Id.

Consistent with the extensive persuasive authority in the above holdings, the only way to ensure that Plaintiff in the case at bar provides her own untainted recollection of the events, as opposed to testimony regarding what she perceived is depicted in the video, is to permit Bi-Lo to delay the production of the CCTV footage until after the completion of the Plaintiff's deposition. To be clear, Bi-Lo merely seeks to delay the production of the CCTV footage so that Bi-Lo may obtain a fair and unbiased recollection of Plaintiff's own memory of the alleged events before she has access to the CCTV footage. Plaintiff's deposition testimony has great potential to be influenced and altered by the production of the CCTV footage, which may lead Plaintiff to tailor her testimony or alter her memory of the incident, and lead her to spontaneously remember certain events leading up to the alleged incident that she does not, herself, recall. If Plaintiff is able to view the CCTV footage of her incident prior to giving her testimony on the record, her memory of the subject event will unquestionably be tainted by the footage, which will indelibly prejudice Bi-Lo.

No prejudice will result to Plaintiff by the delay production of the CCTV footage as truthful testimony will corroborate her testimony, and if she does not recall the incident, she can

testify accordingly. If the Plaintiff has the opportunity to view the video prior to her testimony, a potentially serious detriment is suffered by Bi-Lo as all impeachment value of the evidence is lost.

CONCLUSION

This is a serious concern to be addressed by this Court particularly in this case where Plaintiff's counsel has indicated his intention to move to compel Bi-Lo to produce the CCTV footage and/or to seek a protective order should Bi-Lo notice Plaintiff's deposition prior to producing the CCTV footage. Accordingly, Bi-Lo respectfully requests this Honorable Court to enter an Order granting Bi-Lo's Motion for Protective Order, and allowing Bi-Lo to withhold production of the CCTV footage until after Plaintiff has given her deposition testimony.

This 8th day of December, 2014.

Respectfully submitted,

HANKS BROOKES, LLC



JERALD R. HANKS

Georgia State Bar No. 323470

BRANDON G. DAY

Georgia State Bar No. 101496

Attorneys for Defendant Bi-Lo, LLC

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**IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA**

CANDI L. MINCEY,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.:
)	14 A 2416-7
v.)	
)	
BI-LO, LLC d/b/a BI LO GROCERY STORE)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

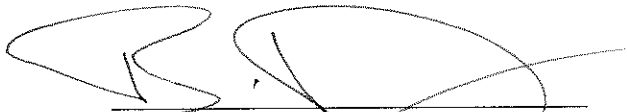
I **HEREBY CERTIFY** that I have this day served a copy of the DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING PRODUCTION OF STORE SURVEILLANCE VIDEO upon all parties in this matter by depositing a true and correct copy of same in the U.S. Mail, proper postage prepaid, addressed as follows:

Douglas R. Powell
HINTON & POWELL
2800 Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

This 8th day of December, 2014.

Respectfully submitted,

HANKS BROOKES, LLC



BRANDON G. DAY
Georgia State Bar No. 101496
Attorney for Defendant Bi-Lo, LLC

Two Securities Centre
3500 Piedmont Road, N.E., Suite 320
Atlanta, Georgia 30305
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**IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA**

CANDI L. MINCEY,)	
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Plaintiff,)	CIVIL ACTION FILE NO.:
)	14 A 2416-7
v.)	
)	
BI-LO, LLC d/b/a BI LO GROCERY STORE)	
)	
Defendant.)	

AFFIDAVIT OF BRANDON G. DAY

BEFORE ME, the undersigned authority, on this day personally appeared Brandon G. Day, who after being first duly sworn upon his oath deposed and said:

1.

I, BRANDON G. DAY, am over the age of eighteen (18) years, suffer no disabilities and am competent to give this Affidavit.

2.

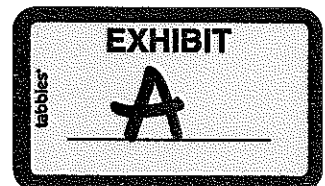
I am presently a practicing attorney, in good standing, in the state of Georgia.

3.

I am counsel of record for Defendant Bi-Lo, LLC. ("Bi-Lo") in the above-styled matter.

4.

I hereby certify that I attempted to conference with Plaintiff's counsel Douglas R. Powell as required by Uniform State Court Rule 6.4(B). My efforts at this conference are outlined below. My efforts at resolving Bi-Lo's discovery dispute as it relates to the production of Bi-Lo's CCTV footage capturing Plaintiff's alleged incident have not been successful.



5.

On November 18, 2014, Plaintiff's counsel sent the undersigned counsel a Rule 6.4 letter contesting Bi-Lo's withholding of the CCTV footage until after Plaintiff's deposition, indicating Plaintiff counsel's intention to seek a protective order should Bi-Lo notice Plaintiff's deposition prior to production of the CCTV footage, requesting legal authority supporting Bi-Lo's position to withhold the CCTV footage and requesting the production of the CCTV footage within 10 days of the letter. (A true and correct copy of the November 18, 2014 letter is attached hereto as Exhibit "1").

6.


On November 25, 2014, I sent correspondence to Plaintiff's counsel in response to his Rule 6.4 letter reiterating Bi-Lo's position on the delayed production of the CCTV footage and providing copies of two recent opinions supporting Bi-Lo's position and legal reasoning for the delayed production of CCTV footage until after a plaintiff is deposed. (A true and correct copy of the November 25, 2014 correspondence and enclosures is attached hereto as Exhibits "2").

7.

On December 3, 2014, I contacted Plaintiff's counsel by telephone to determine his position on Bi-Lo delaying the production of the CCTV footage. Despite providing the requested legal opinions in support of Bi-Lo's position and attempting in good faith to resolve the dispute on the production of the CCTV footage, Plaintiff's counsel indicated his position remained unchanged and he further indicated his intention to seek this Court's intervention to compel Bi-Lo to produce the CCTV footage.

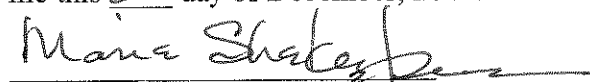
FURTHER AFFIANT SAYETH NOT.

This 8th day of December, 2014.



BRANDON G. DAY
Georgia State Bar No. 101496

Sworn to and subscribed before
me this 8th day of December, 2014.



Notary Public

My Commission Expires:

Notary Public, DeKalb County, Georgia
My Commission Expires May 20, 2016

LAW OFFICES

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November 18, 2014

Brandon G. Day, Esq.
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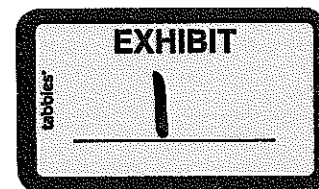
Re: Candi L. Mincey v. BI-LO, LLC d/b/a/ BI-LO Grocery Store
State Court of Cobb County
Civil Action File No.: 14 A 2416-7

Dear Mr. Day:

As you know we represent Ms. Candi Mincey in connection with the above-referenced claim. On August 28, 2014 we served upon you Plaintiff's First Request for Production of Documents to Defendant. Thereafter, on November 12, 2014, Defendant served their responses and objections to the Plaintiff's First Request for Production of Documents to Defendant. Plaintiff disputes Defendant's response to Plaintiff's First Request for Production of Documents number nine (9).

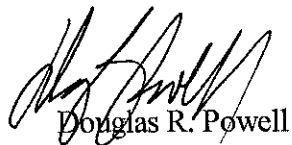
Plaintiff's First Request for Production of Documents number nine (9) requests "A copy of any surveillance movies or photographs which have been made of the Plaintiff." In response to this request Defendant stated "Defendant agrees to produce a copy of the CCTV footage capturing the Plaintiff's alleged incident following the completion of Plaintiff's Deposition."

We contest your withholding of the surveillance footage and refusal to produce the video until after the Plaintiff provides her deposition. Therefore, should Plaintiff receive notice of a deposition before the surveillance video is produced, we will file a protective order declining the deposition until the issue concerning the production of the video is resolved.



This letter has been written pursuant to Uniform Superior Court Rule 6.4(b) in a good faith attempt to resolve this discovery dispute. We insist on production of the CCTV footage within ten (10) days of this letter. If you have any legal authority for your position we will review it before seeking intervention of the court.

Sincerely yours,



Douglas R. Powell

DRP/arl
Enclosure(s)



Two Securities Centre ■ 3500 Piedmont Rd. NE ■ Suite 320
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P.404-892-1991 ■ F. 404-892-8180

Brandon G. Day

email: bday@hanksbrookes.com

November 25, 2014

VIA E-MAIL ONLY (dpowell@hintonpowell.com)

Douglas R. Powell
HINTON & POWELL
2901 Piedmont Road, N.E., Suite A
Monteith Commons
Atlanta, Georgia 30305

RE: Candi L. Mincey v. Bi-Lo, LLC d/b/a Bi-Lo Grocery Store;
State Court of Cobb County; State of Georgia; Case No.: 14 A 2416-7

Dear Mr. Powell:

I am in receipt of your November 18, 2014 Rule 6.4 letter regarding the production of the CCTV footage capturing Plaintiff's alleged incident. Pursuant to your request, I have attached recent legal authority in support of Bi-Lo's position as to the delayed production of the CCTV footage until your client's deposition is conducted. Specifically, as explained in the attached opinions addressing this precise discovery dispute, Bi-Lo should have the opportunity to depose your client based on her own independent recollection of the incident giving rise to this action. Your client will not suffer any prejudice by delaying the production of the CCTV footage. This is especially true in this pending litigation considering two attorneys from the co-counsel's firm at Montlick & Associates viewed the CCTV footage at issue in my office on May 28, 2014. As further noted in the attached opinions, should your client have limited recollection and is uncertain as to details of the incident, she may testify to that.

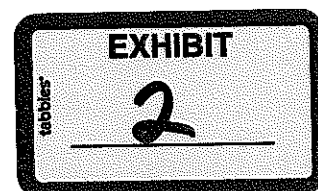
If you are inclined to contact me to discuss this issue further, I welcome your call. Due to the upcoming Thanksgiving holiday, I do not plan to be back in my office until Monday, December 1.

Sincerely,

/s/ Brandon Day

Brandon G. Day
HANKS BROOKES, LLC

Enclosures



Pinkney v. Winn-Dixie Stores, Inc.

United States District Court for the Southern District of Georgia, Brunswick Division

September 15, 2014, Decided; September 15, 2014, Filed

CIVIL ACTION NO.: CV214-075

Reporter

2014 U.S. Dist. LEXIS 129604

LADONNA PINKNEY, Plaintiff, v. WINN-DIXIE STORES, INC., Defendant.

Core Terms

incident report, surveillance video, video, work product, photographs, materials

Counsel: [*1] For Ladonna Pinkney, Plaintiff: Roy J. Boyd, Jr., LEAD ATTORNEY, Killian & Boyd, PC, Brunswick, GA.

For Winn-Dixie Stores, Inc., Defendant: Jenifer S. Worley, LEAD ATTORNEY, Saalfield Shad Law Firm, Jacksonville, FL.

Judges: JAMES E. GRAHAM, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JAMES E. GRAHAM

Opinion

ORDER

Plaintiff has filed a Motion for Order Compelling Disclosure of Photographs, Surveillance Video, and Incident Report. (Doc. 11). Defendant has filed a Response (doc. 12), and Plaintiff has filed a Reply (doc. 16). The Court rules as follows:

1. Photographs — Plaintiff moves the Court to order Defendant to produce "all photographs depicting the area where [the] subject incident occurred." (Doc. 11, p. 11). Plaintiff cites Defendant's response to interrogatory that "photographs were taken at the time of [the] investigation" of the incident. (*Id.* at Exh. D, p. 38). Defendant asserts that there are no photographs of the incident scene itself and that after Plaintiff filed the instant Motion, Defendant provided to Plaintiff all previously undisclosed photographs in Defendant's possession. (Doc. 12, pp. 7-8).

Based on Defendant's representations, it appears that this portion of Plaintiff's Motion is moot. This portion [*2] of Plaintiff's Motion is **DISMISSED**.

2. Surveillance Video — Plaintiff also seeks production of "all surveillance videotapes in any way depicting [the] subject incident prior to depositions" of Plaintiff and eyewitness Mr. Tim

Overstreet. (Doc. 11, p. 11). Plaintiff emphasizes that production of such video will allow Plaintiff to refresh her recollection and will eliminate an otherwise unfair advantage for Defendant during the depositions. (*Id.* at pp. 7-8). Defendant maintains that the surveillance video is not discoverable, because the video is work product for which Plaintiff has not shown a substantial need. (Doc. 12, pp. 2-3). Alternatively, Defendant seeks to withhold production of the surveillance video until after deposing both Plaintiff and Mr. Overstreet. (*Id.* at 3-5).

Federal Rule of Civil Procedure 26(b)(3)(A) sets forth the parameters of the work product doctrine:

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise [*3] discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Work product thus encompasses not only materials that an attorney has prepared but also materials prepared "by or for a party or any representative acting on his behalf." Fed. R. Civ. P. 26 advisory committee's note. A party invoking work-product protection must show that the material was "prepared for litigation purposes and not merely in the ordinary course of business." Jackson v. Deen, No. CV412-139, 2013 U.S. Dist. LEXIS 65814, 2013 WL 1911445, at *10 n.21 (S.D. Ga. May 8, 2013) ("A party must anticipate litigation at the time the documents were drafted Materials or documents drafted in the ordinary course of business are not protected."). The focus, then, in assessing whether the work product doctrine applies is when and why the material was created. *Id.*

Defendant recorded the video of the incident during the routine recording of its store surveillance system. (Doc. 12, p. 2). Defendant does not allege that it maintains the surveillance system in anticipation of litigation. See Sowell v. Target Corp., No. 5:14-cv-93, 2014 U.S. Dist. LEXIS 72435, 2014 WL 2208058, at *2 (N.D. Fla. May 28, 2014) ("Indeed, common sense dictates that store surveillance [*4] videos are utilized by stores to prevent and detect theft by customers or by store employees."). It therefore appears that the video of the incident was recorded in the ordinary course of Defendant's business and is not protected work product.

Defendant's act of preserving the footage of the incident beyond the time when the system normally deletes videos, though done for the purposes of litigation, is not sufficient to transform the video into work product. At that time, Defendant had a duty to preserve the video to avoid spoliation of evidence. See Schulte v. NCL (Bahamas) Ltd., No. 10-23265-CIV, 2011 U.S. Dist. LEXIS 9520, 2011 WL 256542, at *3 (S.D. Fla. Jan. 25, 2011) ("It would be anomalous, to say the least, if by ordering a client to preserve evidence created in the ordinary of business, in anticipation of litigation, counsel was able to shield that evidence from production based upon work product protection.").

While the surveillance video is subject to discovery, the Court retains the discretion to determine the timing of such discovery. See Fed. R. Civ. P. 26(d). Consistent with this Court's recent decision

in Pate v. Winn-Dixie Stores, Inc., No. CV213-166, 2014 U.S. Dist. LEXIS 25494, at *3 (S.D. Ga. Feb. 20, 2014), the Court finds that Defendant should have an opportunity to depose Plaintiff and Mr. Overstreet based on their own [*5] independent, unrefreshed recollections of the incident, prior to producing the surveillance video. Plaintiff will not suffer any prejudice from delaying production of the surveillance video. If either deponent has limited recollection as to any details of the incident, he or she may testify to that.

This portion of Plaintiff's Motion is **GRANTED** in part. Defendant shall produce the surveillance video but need not do so until after deposing Plaintiff and Mr. Overstreet.

3. Incident Report — Plaintiff also requests the incident report that Defendant's manager prepared, stating that disclosure would refresh Plaintiff's recollection and promote fairness among the parties and that work-product protections do not apply. (Doc. 11, pp. 7-8). Defendant asserts that the investigative report is privileged work product and that Plaintiff does not have a substantial need because Plaintiff can depose the manager as a substantial equivalent. (Doc 12, p. 6). Defendant states that it nevertheless served to Plaintiff, after Plaintiff filed the instant Motion, a redacted copy of the incident report that excludes the mental impressions and conclusions of the manager. (Id. at p. 6 & n.3).

The work-product framework, [*6] discussed supra, applies equally to the investigative report. When an incident occurs in one of Defendant's stores, store employees investigate and create an incident report, which is transmitted to Defendant's claims department and to defense counsel. (Id. at p. 6). Defendant's incident report policy appears to exist solely for the purposes of evaluating claims and preparing for the prospect of litigation. The incident report in this case thus falls within the realm of work product.

Defendant nonetheless produced to Plaintiff a redacted copy of the incident report, and, to the extent that Plaintiff's Motion seeks an unredacted version, Plaintiff has not shown substantial need and undue hardship with regard to the redacted portions. Given that Plaintiff has the factual portions of the incident report, Plaintiff can adequately prepare her case; Plaintiff does not have a substantial need for the manager's mental impressions and conclusions in order to do so. See Southern Railway Co. v. Lanham, 403 F.2d 119, 132-33 (5th Cir. 1968) ("No doubt opposing counsel would like to confront the [appellant] with an evaluation or recommendation from its own agent that tends to undermine the [appellant's] case. But the agent's impressions are by no means necessary for the adequate [*7] preparation of appellee's case.").

To the extent that Plaintiff requests production of an unredacted incident report, this portion of Plaintiff's Motion is **DENIED**.

SO ORDERED, this 15th day of September, 2014.

/s/ James E. Graham

JAMES E. GRAHAM

UNITED STATES MAGISTRATE JUDGE



LINDA PATE, Plaintiff, v. WINN-DIXIE STORES, INC., Defendant.

CIVIL ACTION NO.: CV213-166

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
GEORGIA, BRUNSWICK DIVISION**

2014 U.S. Dist. LEXIS 25494

**February 20, 2014, Decided
February 20, 2014, Filed**

COUNSEL: [*1] For Linda Pate, Plaintiff: Robert P. Killian, LEAD ATTORNEY, Killian & Boyd, PC, Brunswick, GA.

For Winn-Dixie Stores, Inc., Defendant: Jenifer S. Worley, LEAD ATTORNEY, Saalfield Shad Law Firm, Jacksonville, FL.

JUDGES: JAMES E. GRAHAM, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JAMES E. GRAHAM

OPINION

ORDER

This action arises out of a slip and fall incident which occurred in a Winn-Dixie store in Brunswick, Georgia, on December 23, 2011. Plaintiff alleges that water leaking from the store's cooler accumulated in a large area on the floor. Plaintiff claims that she did not see this water, stepped into it, slipped, and fell. Plaintiff alleges that she was seriously injured.

Presently before the Court is Plaintiffs Motion to Compel. (Doc. 19). Defendant filed a Response. Defendant filed a Motion for Protective Order Regarding Production of Store Surveillance Video (doc. 21), to which Plaintiff filed a Response. The undersigned held a hearing on these motions on February 13, 2014.

Plaintiff seeks to compel Defendant to fully comply with Plaintiffs discovery requests, including the production of the surveillance video of this incident, and a protective order that she not be deposed until the video is produced. Defendant [*2] argues that Plaintiff failed to provide legal authority to support her Motion, except that provided for on the issue of punitive damages. Defendant claims it is not required to produce the surveillance video until after conducting Plaintiffs deposition and has the right to hear Plaintiffs unrefreshed recollection of the incident. Defendant also seeks a protective order precluding production of the surveillance video until after Plaintiffs deposition is complete. Plaintiff argues that the video may allow her to refresh her recollection.

Federal Rule of Civil Procedure 26 permits a court to issue a protective order "forbidding [] disclosure or discovery; specifying terms, including time and place, for the disclosure or discovery; [and] prescribing a discovery method other than the one selected by the party seeking discovery." *FED. R. CIV. P. 26(c)(1)(A)-(C)*. [*3] Defendant should have the opportunity to depose Plaintiff based on her own independent recollection of the incident giving rise to this action. Plaintiff will not suffer any prejudice by delaying the production of the video. If Plaintiff has limited recollection and is uncertain as to details of the incident, she may testify to that.

The Court finds a protective order to be the appropriate remedy. Defendant has demonstrated good cause to justify a protective order. The proper balance in the instant case is to require production of the surveillance video after Plaintiff's deposition and the deposition of her husband have been taken.

Defendant's Motion for Protective Order Regarding Production of Store Surveillance Video is **GRANTED**. Defendant shall produce the surveillance video after the depositions of Plaintiff and her husband. During the February 13, 2014, hearing, counsel for Plaintiff and Defendant indicated a willingness to resolve the other issues raised in Plaintiff's Motion to Compel. That Motion to Compel is **DISMISSED**. If counsel are unable to amicably resolve their discovery disagreement either party may file the appropriate motion.

SO ORDERED, this 20th day of February, 2014.

/s/ [*4] James E. Graham

JAMES E. GRAHAM

UNITED STATES MAGISTRATE JUDGE