IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

JAMIL JENKINS,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
RODERICK A. STEVENSON, M.D. et al,	)	FILE NO.: 12A43890-1
Defendants.	)	

ORDER

This case came before the Court for a hearing on May 15, 2014. The parties appeared through counsel. The Court ruled from the bench on the parties' motions in limine and these rulings are a matter of record. The Court also took Plaintiff's motion to compel discovery, filed April 7, 2014, under advisement. This order further addresses Plaintiff's motion in limine 22, Defendants' motion in limine 10, and Plaintiff's motion to compel.

Plaintiff's motion in limine 22, seeking to exclude evidence of Plaintiff's 2001 cocaine conviction is denied. Defendants argue this conviction is relevant to the question of whether Plaintiff's criminal history would have prevented him from working in the field of aviation maintenance. While the Court questions whether Defendants' vocational expert can opine as to whether Plaintiff's criminal history would have kept him from working in this field, the Court cannot rule until it hears the evidence. Plaintiff shall make his evidentiary objection at trial.

At issue in Defendants' motion in limine is testimony by Plaintiff's mother that Dr. Stevenson called her and told her "he had some problems in the – with the surgery. That he had cut the main artery, that he pushed too hard and the instrument got away from him, and that Jamil had lost eight pints of blood and he had put some pressure on his main artery and he was waiting on the vascular team, but he had said that he was coming up, but never did." Defendants seek to exclude

this testimony under OCGA § 24-4-416(b): "In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest." In Airasian v. Shaak, 289 Ga. App. 540, 540-41 (2008) (decided under § 24-3-37.1(c)), the Court of Appeals held this statute required the exclusion of a wife's observations that the doctor appeared "white as his jacket" and "quite upset" and told her "This was my fault." Unlike in Airasian, Plaintiff's mother's testimony does not fall within the statute. Her testimony merely relays facts allegedly conveyed by Dr. Stevenson: that he cut the main artery, pushed too hard and the instrument got away from him, and Jamil had lost eight pints of blood. These are not the type of statements expressing "regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence" contemplated by this statute. Defendant's motion in limine 10 is **denied**.

Plaintiff's motion to compel seeks surveillance photographs and videos as well as the identity of any persons with knowledge of the facts at issue who made written or oral statements of which Defendants have knowledge. Defendants maintain that whether they conducted surveillance and the surveillance videos/photos themselves are work product. Upon questioning by the Court, Defendants admitted they had conducted surveillance.

Under Georgia law, a surveillance report prepared for an attorney in anticipation of litigation by a private investigator is work product. Smith v. Smith, 223 Ga. 551, 555-56 (1967). However, the identity of the private investigator may be subject to disclosure. See Ballard v. Meyers, 275 Ga. 819, 820-21 (2002); Jones v. Scarborough, 194 Ga. App. 468, 470-71 (1990).

Georgia law does not require disclosure of impeachment documents in the pretrial order. Ballard, 275 Ga. at 22. But that is a separate issue from whether impeachment material must be disclosed in discovery.

Surveillance videos and photos are clearly work product when prepared in anticipation of litigation, as in this case. Therefore, they can only be disclosed upon a showing of substantial need and undue hardship. OCGA § 9-11-26(b)(3). When these conditions are met for surveillance videos and photos appears to be an issue of first impression in Georgia's appellate courts.

Persuasive authority from other jurisdictions show two primary approaches. The courts which allow a defendant to reveal the surveillance materials for the first time at trial focus on the need to protect the impeachment value of the materials and the fact that the plaintiff already knows about his or her own condition. See, e.g., Smith v. AMTRAK, 22 Va. Cir. 348 (1991). The courts which require pre-trial disclosure are not unmindful of these concerns, which they often address by requiring production of the surveillance only after the plaintiff is deposed. See, e.g, Pioneer Lumber v. Bartels, 673 N.E.2d 12, 18 (Ind. Ct. App. 1996). However, for these courts, factors unique to a video such as its highly persuasive nature and the inability to duplicate the evidence as well as the concern that the materials may be misleading or incomplete tip the balance in favor of disclosure. See, e.g., Roa v. Tetrick, 2014 U.S. Dist. LEXIS 24619, 9-10 (S.D. Ohio Feb. 24, 2014). Even under this approach, however, the plaintiff will not have a substantial need if the defendant does not intend to use the surveillance at trial. See, e.g., Pioneer Lumber, 673 N.E.2d at 17.

The Court finds this second line of cases more persuasive. If Defendants will not use the surveillance materials, no further response to interrogatory 13 and request for production 13 is required. If they intend to use the surveillance at trial, Defendants must produce all surveillance videos and photographs and provide the names of any investigators that would be responsive to interrogatory 13. By **5:00 p.m. on Friday, May 30, 2014**, Defendants must either respond to interrogatory 13 and request for production 13 by stating they will not use surveillance materials or

they must produce any surveillance videos and photos and identify the investigators. Failure to do so will lead to exclusion of the surveillance evidence at trial.

SO ORDERED, this 19 day of May, 2014.

ALVIN T. WONG, Judge
State Court of DeKalb County

Copy To:
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Richard C. Mitchell, Esq.
Kristin L. Hiscutt, Esq. / Timothy H. Bendin, Esq.

FILED IN THIS OFFICE
THIS 19 DAY OF May 2014
Clerk, State Court, DeKalb County, GA