

documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. . . .”

O.C.G.A. § 9-11-26(b)(3) provides 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

Inasmuch as the exercise of the attorney-client privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 730 S.E.2d 608 (2012). And even if the required showing is made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Id. at 23, 730 S.E.2d at 626.

Plaintiff's Contentions

Plaintiff seeks the immediate identification and production of all surveillance videos, photos and reports and the identity of all persons who have conducted such surveillance concerning Plaintiff which Defendants have admitted exist. Plaintiff filed Interrogatories and document requests seeking discovery pertaining to her belief that Defendants were engaged in surreptitious surveillance efforts. Plaintiff argues that she is entitled to know the identity of all persons who have conducted surveillance in this case and to take their discovery depositions.

Surveillance evidence is not protected work product, and Plaintiff has substantial need of the evidence. Plaintiff has not enlisted an investigator to photograph Plaintiff during her illness, and she cannot obtain the same evidence anywhere else. The events observed, photographed, or captured by video are events that occurred in the past, and Plaintiff may or may not have any recollection of the events. Those events may have been observed by no other witness than the investigator. Therefore, the information cannot be duplicated.

Whether Defendants intend to use the surveillance evidence at trial does not prevent disclosure to Plaintiff. There may be evidence that Plaintiff would want or need to use at trial. Further, if Defendants decide to use the evidence at trial, Plaintiff would be left with no opportunity to take discovery regarding such evidence. Plaintiff's physical limitations are the crux of this case and any evidence bearing on that is important. Plaintiff needs to examine the evidence timely and to test its veracity well prior to trial. A party has an interest in assuring that the surveillance tapes, if used at trial, accurately depict previous events; were not subject to misleading editing or distortion; and are the result of the

appropriate manner and means of conducting surveillance. Only with an adequate opportunity for discovery can Plaintiff and the Court be assured of the veracity of the evidence.

Plaintiff is unable without undue hardship to obtain the substantial equivalent of the evidence. Plaintiff requests that Defendants supplement their responses and respond to the Interrogatories pertaining to surveillance and produce all tangible items of evidence pertaining to such surveillance within two weeks of the Court's Order.²

Defendants' Contentions

The discovery requests at issue are Interrogatories No. 1 and No. 2, and Request to Produce Documents No. 1. Plaintiff requests that Defendants identify each record, tape, film or other recording of surveillance of any party or any written document pertaining to each surveillance; and that Defendants identify all persons who now have or have had custody and/or control of any records, tapes, films or other recording of such surveillance. However, the surveillance reports and video evidence that may be obtained at defense counsel's direction is secured as work product material and under the protection of anticipation of litigation and/or trial.

Plaintiff has failed to substantiate or show undue burden and substantial need for the evidence. Further, evidence about Plaintiff's alleged physical limitations are cumulative as she and her treatment providers have submitted statements and documents in support of her claims. Notwithstanding Plaintiff's

² Additionally, Plaintiff argues that Defendants' discovery responses were untimely, and any objections contained therein must be deemed waived as a matter of law. See Drew v. Hagy, 134 Ga. App. 852, 216 S.E.2d 676 (1975). At the hearing, however, the Court indicated that it would rule on the merits.

argument that it cannot obtain the same evidence anywhere else, Plaintiff claims ongoing treatment and testing for the same conditions and severe pain that she has complained of since the filing of this lawsuit. Plaintiff has offered only a desire to view surveillance evidence or to know the identity of an investigator. She must still demonstrate an undue burden in obtaining the same.

Conclusions of the Court

After considering the arguments from both parties, the Court finds that Plaintiff's Motion to Compel should be granted in part and denied in part.

Defendants must identify all persons who conducted surveillance of Plaintiff, and who now have or have had custody and/or control of any tapes, films or other recordings of such surveillance. See O.C.G.A. § 9-11-26(b)(1). The person or persons who have conducted and made recordings of the surveillance should be treated as any other "fact" witness, excluding from discovery only his or her conclusions or other "work product." See Jones v. Scarborough, 194 Ga. App. 468, 390 S.E.2d 674 (1990). Any person not privileged having knowledge of issues being tried should be made available to the parties as a witness. See id. Discovery of the facts observed by the person who conducted surveillance or who had custody and/or control of the recordings is permissible. See id. The person who conducted the surveillance or had custody and/or control of the recordings may be deposed pre-trial and questioned at trial about his or her observations of Plaintiff. See id.³

³ In Jones v. Scarborough, 194 Ga. App. 468, 390 S.E.2d 674 (1990), the Court of Appeals agreed with appellant that Fincher could have been deposed and questioned at trial about his observations of appellant and the fact that he never saw her engaging in activity which would belie her claim of injury. Appellant's purpose in deposing Fincher was "to find out what it was he had seen, what photographs he might have or what recordings he might have." Appellant stated in her offer of proof that had she been allowed to call Fincher as a witness at trial, he would have detailed the dates and the period of time he observed appellant and that the evidence would

However, the actual surveillance tapes and any written reports pertaining to the surveillance prepared by or for Defendants' counsel is work product and is not discoverable. See Smith v. Smith, 223 Ga. 551; 156 S.E.2d 916 (1967).⁴ Defendants have met their burden of showing that the surveillance videos and reports were prepared in anticipation of litigation and/or trial, and constitute work product. See GMC v. Conkle, 226 Ga. App. 34, 486 S.E.2d 180 (1997). Plaintiff has failed to show that she has substantial need to discover such video evidence or written reports for the preparation of her case, and that she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. See Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 730 S.E.2d 608 (2012). Plaintiff's general claim that she may or may not have any recollection of the events videoed and/or photographed is not sufficient to establish substantial need for work product evidence. See Lowe's of Georgia, Inc. v. Webb, 180 Ga. App. 755, 350 S.E.2d 292 (1986).⁵ Plaintiff has produced no satisfactory explanation as to why she would be unable

show that Fincher never saw her pursuing any of the activities appellant had testified at trial that her injuries had prevented her from doing. Appellant claimed Fincher's testimony would have corroborated her case and would have weighed greatly in her favor, especially since he had been retained by appellee. The Court found that the trial court erred in preventing appellant from questioning Fincher as to these matters. However, the error was harmless because appellant herself, as well as her treating physicians, testified as to her injuries and the resulting restrictions on her activities.

⁴ In Smith v. Smith, 223 Ga. 551; 156 S.E.2d 916 (1967), the wife's discovery effort failed with respect to production of the report of an investigator whom the husband's attorney hired after the suit was filed. The investigator, whom the attorney hired to keep his wife under surveillance, reported directly to that attorney. The Court found that this report was the work product of the husband's attorney; and the trial court's refusal to require production of a copy of the report was not erroneous.

⁵ In Lowe's of Georgia, Inc. v. Webb, 180 Ga. App. 755, 350 S.E.2d 292 (1986), the Court found that "the statements of the parties prepared by the claims representative so soon after the tragic incident may have been of some benefit to appellant, if nothing more than because of the likelihood of fresher memories and possible impeachment materials; nevertheless, we cannot consider that possible benefit sufficient to show either a substantial need or an inability to obtain the substantial equivalent of the materials."


to recall events in which she personally participated. See id. Further, Plaintiff's unsubstantiated concern for the veracity or authenticity of the tapes does not justify disclosure of work product materials.

Accordingly, the Court finds that Plaintiff's Motion to Compel the disclosure of the identity of all persons who have conducted such surveillance or had custody and/or control of the recordings must be granted. However, Plaintiff's Motion to Compel production of all surveillance videos, films and photographs of Plaintiff, and written reports prepared by or for Defendants' attorney with respect to the surveillance videos, films and/or photographs of Plaintiff must be denied. See Smith v. Smith, 223 Ga. 551; 156 S.E.2d 916 (1967).

WHEREFORE, Plaintiff's Motion to Compel the disclosure of the identity of all persons who have conducted such surveillance or had custody and/or control of the recordings is **GRANTED**.

WHEREFORE, Plaintiff's Motion to Compel production of surveillance videos, films and/or photographs of Plaintiff and written reports prepared for Defendants' attorney with respect to the surveillance videos, films and/or photographs of Plaintiff is **DENIED**.

SO ORDERED this 20th day of December, 2012.


JANIS C. GORDON, JUDGE
State Court of DeKalb County

cc: Keenan R.S. Nix, Esq.
Christopher J. Graddock, Esq.
William Daniel Floyd, Esq.
R Clay Porter, Esq.

FILED IN THIS OFFICE
THIS 20th DAY OF DEC 2012