ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

VANESSA CATALANO	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CV 403-167**
	)	
GWD MANAGEMENT CORPORATION d/b/a MCDONALD'S and MCDONALD'S CORPORATION	)	
	)	
Defendants.	)	

SEALED ORDER

Before the Court are Defendant GWD Management Corporation's Motion for Summary Judgment (Doc. 52), Defendant McDonald's Corporation's Motion for Summary Judgment (Doc. 47), Plaintiff Catalano's Motion to Compel (Docs. 60 and 69), and Defendants' Motions to Strike (Docs. 97 and 104). Plaintiff Vanessa Catalano filed this action against GWD Management Corporation ("GWD") and McDonald's Corporation ("McDonald's"). In her complaint, she alleges GWD engaged in sexual harassment in violation of Title VII of the Civil Rights Act of 1964. She also alleges that both Defendants violated various state tort laws. Plaintiff's claims stem from an incident at a McDonald's restaurant, where she was strip-searched by GWD's employees at the instructions of a caller pretending to be a police officer.

117

BACKGROUND[1]

Plaintiff Catalano was employed as a crew member at a McDonald's restaurant ("Restaurant") located at 213 West Oglethorpe Highway in Hinesville, Georgia. The Restaurant is owned and operated by GWD pursuant to a franchise agreement between Gary Dodd, the owner and President of GWD, and McDonald's. The property on which the Restaurant is located is owned by McDonald's and leased to Gary Dodd.

The Strip Search of Catalano

On February 2, 2003, at approximately 8:12 p.m., a man made a collect call to the Restaurant and identified himself as Gary Stanberry, the director of operations for GWD. Tracy Gotham, the shift manager, accepted the phone call. According to Ms. Gotham, the caller told her that a customer had reported money missing from a purse left at the Restaurant earlier that day. The caller asked Ms. Gotham which female employees were working that night, and Ms. Gotham gave a physical description of each female employee, including Vanessa Catalano. The caller informed Ms. Gotham that he was on a third party line with the police and that Catalano was "involved in something really serious." He told Ms. Gotham to go into the lobby to see if the undercover cop had arrived. She told him no one was there, and the caller informed her that the police would be there soon. The caller told Ms.

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[1] Defendants submitted Statements of Undisputed Material Facts. (Docs. 49 and 56). Plaintiff responded to these statements. (Docs. 84 and 87). Except as otherwise noted, the following facts are those which are included in Defendants' statements and admitted by Plaintiff.

Gotham that Catalano was involved with drugs and that Catalano had a choice of being searched by Ms. Gotham or of being arrested. Ms. Gotham, following the instruction of the caller, told Catalano to go into the ladies' restroom.

Once inside the restroom, Ms. Gotham told Catalano that she was on the phone with Mr. Stanberry and the police, and that Catalano was suspected of possessing illegal drugs. Catalano was then given the option of being strip-searched by Ms. Gotham or being strip-searched by the police, who were allegedly on their way to the restaurant. (Doc. 86, Ex. 1, p.74-75). Ms. Gotham never told Catalano that she had the right to refuse the strip search. (Doc. 86, Ex. 2, p. 45). Following Ms. Gotham's instructions, Catalano entered a closed bathroom stall and handed her clothes, one by one, over the stall to Ms. Gotham. (Doc. 86, Ex. 1, pp. 76-77). Ms. Gotham then described each item of clothing to the caller before placing them in a garbage bag. The caller told Ms. Gotham that the clothes would be searched by the police. After Ms. Gotham had placed all of Catalano's clothes in the garbage bag, Ms. Gotham took the clothes out of the bathroom. (Doc. 86, Ex. 2, p. 30-36). Before Ms. Gotham left, Catalano asked Ms. Gotham when she could get her clothes back. (Doc. 86, Ex. 1, p. 78). Ms. Gotham told her she could not get them back until the police were finished searching them. (Doc. 86, Ex. 1, p. 78). Ms. Gotham observed that Catalano was crying and was visibly upset. (Doc. 86, Ex. 2, pp. 32, 59).

Outside the bathroom, the caller told Ms. Gotham to identify the oldest male employee who worked at the restaurant. After Ms. Gotham identified fifty-five year old

maintenance employee Sam Spencer, the caller instructed Ms. Gotham to call Mr. Spencer and request that he come to the restaurant immediately. Mr. Spencer arrived at the Restaurant approximately ten minutes after Ms. Gotham called him. Once there, Ms. Gotham informed Mr. Spencer that Mr. Stanberry wanted to speak to him and she gave him the phone. Ms. Gotham told Mr. Spencer that she had taken Catalano's clothes from her and needed him to assist with the search of Catalano. (Doc. 86, Ex. 5, p. 19-20).

The caller identified himself to Mr. Spencer as Mr. Stanberry, and stated that he needed Mr. Spencer's help with an employee who had been accused of stealing. The caller then told Mr. Spencer he was handing the phone to a police officer, and, according to Mr. Spencer, a second individual got on the line. Believing that he was speaking with the police, Mr. Spencer entered the restroom with Ms. Gotham. At the instruction of the caller, Ms. Gotham exited the restroom. The caller then instructed Mr. Spencer to enter the stall with Catalano. Mr. Spencer attempted to offer Catalano his coat, but the caller "emphatically" told Mr. Spencer not to do this. (Spencer Dep., pp. 21-22). According to the caller's specific instructions, Mr. Spencer performed a physical search of Catalano. Catalano had never seen Mr. Spencer before, and believed him to be a plain-clothes police officer. (Doc. 86, Ex. 1, p. 85). Catalano was told that if she did not comply with Mr. Spencer's requests she would be arrested. (Doc. 86, Ex. 1, p. 88).

Mr. Spencer, at the demands of the caller, proceeded to perform a body cavity search of Catalano. (Spencer Dep., pp. 23-26). Mr. Spencer was also told to make Catalano

exercise while she was in the stall. Id. At some point, the caller made statements causing both Mr. Spencer and Catalano to realize something was wrong.[2] Catalano told Mr. Spencer she would not allow him to touch her anymore. (Doc. 86, Ex. 1, sub-ex.10). Catalano asked for her clothes back, and they were returned to her. (Catalano Dep., pp. 92-94). Mr. Spencer then dialed 9-1-1 for assistance and notified Ms. Gotham that something was wrong. Ms. Gotham called Gary Stanberry, who confirmed he had not called them.

Post-Strip Search Events

Ms. Gotham began crying upon realizing this had been a scam. The police were called. Mr. Stanberry and Area Manager Chong Saile immediately went to the restaurant. Plaintiff was asked if she needed medical attention. She did not require such attention.

On February 3, 2003, Plaintiff met with GWD's Human Resources Manager, Lisa Dodd. At that time, Dodd told Plaintiff that GWD would pay for counseling or any other treatment Plaintiff needed to recover from the incident. Dodd also offered Plaintiff a job at any GWD restaurant of her choice. Plaintiff resigned on February 6, 2003.

On February 5, 2003, Mr. Stanberry terminated both Ms. Gotham and Mr. Spencer, even though he realized they were remorseful for their actions. GWD also sent out memos to all its managers warning them of the telephone scam and instructing them on the

[2] Plaintiff stated in her deposition, "the guy on the phone told me I had to be really nice to the man in the bathroom with me, and I had to laugh and giggle and act like I liked it." (Catalano Dep., p. 92).

proper procedures for dealing with theft and drug possession. GWD managers were instructed not to perform strip searches under any circumstances.

Other Strip Search Incidents

Similar strip search incidents had occurred at McDonald's restaurants prior to this incident. In 1999, during security council meetings, McDonald's security directors became aware of the existence of the strip search scam at McDonald's restaurants. The directors decided to send out written notification to all McDonald's restaurants in the United States. The director in each division was responsible for sending out notice to the restaurants in his area. Matt Gwynne was the Regional Security Manager for GWD's region from 1999 until November 6, 2001. Matt Gwynne testified that he sent a memorandum on January 5, 1999 to all Owner/Operators in his region, including GWD, detailing the strip search scam. (Doc. 86, Ex. 14, pp. 22-23). In that memo, Gwynne stated McDonald's policy on employee searches. Id. Gwynne testified that another memo warning of the strip search scam was sent out on January 15, 2001. (Gwynne dep, pp. 33-34, 36-37 and Ex. 2 & 3). Gwynne also testified that a voice mail message about the strip search scam was sent to all Owner/Operators in his region, including GWD, on January 15, 2001. (Gwynne dep, pp. 65-67). Since November 2001, McDonald's Operating and Training Manual ("O&T Manual") has contained a policy prohibiting strip searches of McDonald's employees or customers. This manual was to be provided to all McDonald's restaurants.

GWD claims that it had no knowledge of the strip search scams and that it did not receive any of the information sent by Matt Gwynne. (Stanberry Dep., pp. 49, 58-59, 63; Stanberry Decl., ¶ 6; Saile Decl., ¶ 6; Gary Dodd Decl., ¶ 5). GWD also contends it did not receive CD-ROMs with updated versions of the O&T Manual that contained the strip search policy. (Stanberry Decl., ¶ 7; Saile Decl., ¶ 8).

SUMMARY JUDGMENT MOTIONS

I. Summary judgment standard

Summary judgment serves to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note, cited in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). It is appropriate only when the pleadings, depositions, and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A court must view the evidence and any inferences that may be drawn from it in the light most favorable to the non-movant. Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997), cert. denied sub nom. Combs v. Meadowcraft Co., 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998) (citing Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989)).

The party seeking summary judgment must first identify grounds demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323,

106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1583 n.16 (11th Cir. 1991), cert. denied, 506 U.S. 903, 113 S. Ct. 295, 121 L. Ed. 2d 219 (1992). Such a showing shifts to the non-moving party the burden "to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed R. Civ. P. 56(e)).; Thompson, 934 F.2d at 1583 n.16. A non-movant does not create a genuine issue of material fact by relying on "conclusory allegations based on mere subjective beliefs." Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 804 (N.D. Ga. 1994), aff'd, 56 F.3d 1391 (11th Cir. 1995) (citing Carter, 870 F.2d at 585). Further, a "mere . . . scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986).

This case presents an unusual scenario for establishing liability, as the root of all the harms alleged is the conduct of a third party prank caller. The Court continually has to decide in this case how much the caller's motivations should be considered in determining the extent of Defendants' liability. The Court attempts to assign liability where it is due without forgetting that all events were triggered by a perverted miscreant. The Court, while realizing that all the parties involved in this case were to some extent victims of this hoax,

also notes that they still had a responsibility to use common sense and to avoid falling prey to such a scam.

II. GWD's motion

Plaintiff has withdrawn her claims for negligent infliction of emotional distress (Count V), slander (Count VI), and negligent hiring and retention (Count VIII) due to lack of evidence. Accordingly, these claims are **DISMISSED**.

A. Title VII - Employment discrimination and punitive damages (Count I and XVI)

1. Substance of claim

Plaintiff alleges her rights have been violated under Title VII of the Civil Rights Act of 1964. Specifically, Plaintiff alleges that Mr. Spencer and Ms. Gotham's actions constituted sexual harassment, thus creating a hostile work environment which led to her constructive discharge. Plaintiff also seeks punitive damages under Title VII.

2. Discussion

Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court held that the phrase "terms, conditions or privileges of employment" extends to a sexually hostile work environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986). A plaintiff wishing to establish a hostile work

environment claim must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment was based on a protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment ; and (5) that the employer is responsible for such environment under either a theory of vicarious liability or of direct liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). "In proving a claim for hostile work environment due to sexual harassment, . . . the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

It is undisputed that Plaintiff is a female and a member of a protected class under 42 U.S.C. § 2000e. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 79, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 25, 114 S. Ct. 367, 372, 126 L. Ed. 2d 295 (1993) (Ginsburg, J., concurring).

The Eleventh Circuit has held that a sexual harassment claim fails where factors other than gender motivated the alleged harassment. In Succar v. Dade County School Board, 229 F.3d 1343 (11th Cir. 2000), the Eleventh Circuit affirmed a district court's

grant of summary judgment for a school board where the harassment of a teacher by a former lover was "not the result of Plaintiff's gender 'but of responses to an individual because of her former intimate place in [that individual's] life.'" Id. at 1345 (quoting Succar v. Dade County Sch. Bd., 60 F.Supp.2d 1309, 1315 (S.D. Fla. 1999)). The Court found "gender was merely coincidental." Id. The same reasoning applies to the present case. Here, there is no evidence that the strip search of Catalano by Mr. Spencer and Ms. Gotham was linked to her status as a woman. Both Mr. Spencer and Ms. Gotham were acting under the impression that they were following the directions of the police. (Catalano Dep., pp. 93, 96-97). The strip search by Ms. Gotham and Mr. Spencer was not motivated by Catalano's gender, but rather was the result of a vicious prank, and thus their actions are not punishable under Title VII.

The Court further determines that GWD is not liable under Title VII for the actions of the third party caller. The test for Title VII employer liability based on third party actions was set out by the Eleventh Circuit in Watson v. Blue Circle, Inc., 324 F.3d 1252 (2003). There, the Eleventh Circuit noted that "when . . . the alleged harassment is committed by co-workers or customers, a Title VII plaintiff must show that the employer either knew (actual notice) or should have known (constructive notice) of the harassment and failed to take immediate and appropriate corrective action." Id. at 1259. Actual notice can be established by proof that management knew of the harassment, and constructive notice is established when the harassment was "so severe and pervasive that management reasonably should have known of it." Id.

Plaintiff argues that GWD should be liable under Title VII for the caller's actions because it had notice of the harassment and failed to take corrective action. The Court concludes that even if GWD had notice of the strip search scam, such notice would have been insufficient to create Title VII liability. At best, Plaintiff has evidence that McDonald's sent GWD various warning memos about the strip search hoax. Even if GWD did receive the warning memos, GWD only would have known such harm was occurring at other businesses. To establish notice in a Title VII context, Plaintiff needs evidence that the alleged harasser had previously engaged in harassment at one of GWD's restaurants. The Court determines that a business's knowledge of a particular harassment at other businesses is not sufficient to establish Title VII liability. Plaintiff has been unable to point to any Title VII case where liability was based solely on the employer's knowledge of harassment in other workplaces.[3] Accordingly, the Court refrains from extending the scope of Title VII to such a situation now.

Further, the evidence also shows GWD took prompt and remedial action once it learned of the harassment of its employee. GWD responded to the strip search incident by terminating both Ms. Gotham and Mr. Spencer within days after the occurrence. GWD also

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[3]Plaintiff points to the case of Ferris v. Delta Air Lines, Inc., 227 F.3d 128 (2d Cir. 2001). That case, however, is distinguishable. In that case, Delta had notice that a particular employee had raped several of Delta's female employees in the workplace. The court found that Delta had a responsibility to protect not just those who had already been harassed, but also potential future victims. In the present case, there had not been any past harassment in GWD's workplace by Mr. Spencer, Ms. Gotham, or the miscreant caller. Further, there had never been a similar incident at any of GWD's restaurants.

specifically instructed its managers that they were not to perform strip searches under any circumstances, and sent out memos warning against the scam and detailing the proper methods for dealing with employees accused of theft and drug possession. GWD management also offered to pay for counseling and offered Plaintiff a job in GWD's other restaurants. (See Catalano Dep.. pp. 118-119).

The Court **GRANTS** GWD's motion for summary judgment as to Plaintiff's claim of liability under Title VII. Accordingly, GWD's motion for summary judgment as to punitive damages under Title VII is also **GRANTED**.

B. Invasion of privacy–false light (Count II)

Plaintiff failed to respond to GWD's summary judgment motion insofar as it was directed to her claim for invasion of privacy- false light (Count II). Therefore, the Court considers the motion as unopposed. See Local Rule 7.5 ("Failure to respond shall indicate that there is no opposition to a motion."). It is hereby ordered that GWD's motion for summary judgment as to Plaintiff's claim for invasion of privacy- false light is **GRANTED**.

C. Invasion of privacy–intrusion upon seclusion (Count III)

Plaintiff claims GWD invaded her privacy by intruding physically and mentally into her private concerns.[4] This privacy claim is based upon the alleged intrusion upon her

[4]"Under Georgia case law, the concept of invasion of privacy encompasses four loosely related but distinct torts, as follows: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation for the defendant's advantage of the plaintiff's name and

seclusion by persons within the authority of GWD. The "unreasonable intrusion" aspect of this invasion of privacy tort "involves a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns." Yarbray v. Southern Bell Tel. & Tel. Co., 261 Ga. 703, 705, 409 S.E.2d 835, 837 (1991). In order to recover for intrusion upon seclusion, a plaintiff must show that she was subjected to a "physical intrusion analogous to a trespass." Association Services, Inc v. Smith, 249 Ga. App. 629, 632, 549 S.E.2d 454, 458 (2001). "[H]ighly personal questions or demands by a person in authority may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy." Yarbray, 261 Ga. at 705, 409 S.E.2d 837 (quoting Keeton, Prosser & Keeton on Torts § 117 at p.121 (5th ed. 1984)). "However, there are some shocks, inconveniences and annoyances which members of society in the nature of things must absorb without the right of redress." Id. (citation and internal punctuation omitted). This tort is analyzed under an objective standard. Everett, 268 Ga. App. at 544, 602 S.E.2d at 292 (2004).

Here, the facts are sufficient to create a jury issue as to whether Plaintiff suffered an intrusion upon her seclusion as a result of GWD's employees' actions. Specifically, Plaintiff was subjected to an invasive strip search at the hands of GWD's employees. For GWD to be liable for this tort, however, there must also be a genuine issue of fact as to whether Mr. Spencer and Ms. Gotham were acting within the scope of their employment.

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likeness." Everett v. Goodloe, 268 Ga. App. 536, 544, 602 S.E.2d 284, 291(2004).

GWD argues that it should not be liable for the intentional torts of its employees. "In determining whether an employer is liable for an employee's tortious conduct, the test is whether the tort was done within the range of employment and for the purpose of accomplishing business authorized by the employer." Roberts v. Duco Dev., Inc., 229 Ga. App. 549, 550, 494 S.E.2d 313, 314(1997). "If a tort is committed by an employee not by reason of the employment, but because of matters disconnected therewith, the employer is not liable." Piedmont Hosp., Inc. v. Palladino, 276 Ga. 612, 613, 580 S.E.2d 215, 217 (2003) (citations and quotations omitted). "The question whether or not the servant at the time of an injury to another was acting in the prosecution of his master's business and in the scope of his employment is for determination by the jury, except in plain and indisputable cases." Bacon v. News-Press & Gazette Co., 188 Ga. App. 703, 704, 373 S.E.2d 797, 799 (1988). "Summary judgment for the master is appropriate where the evidence shows that the 'servant was not engaged in furtherance of his master's business but was on a private enterprise of his own.'" Brownlee v. Winn-Dixie Atlanta, Inc., 240 Ga. App. 368, 370, 523 S.E.2d 596, 598 (1999).

Here, it is arguable that Mr. Spencer and Ms. Gotham were acting within the scope of their employment at the time of the strip search incident. While GWD would certainly never condone such an intrusive and personally offensive body cavity search, both Ms. Gotham and Mr. Spencer perceived they were acting in furtherance of their employer's business when they facilitated and committed the search. There is no evidence that either

Mr. Spencer or Ms. Gotham were pursuing personal agendas when they detained Plaintiff and subjected her to a strip search. (See Catalano Dep., pp. 96-97).

GWD argues that the personal agenda of the degenerate caller should be taken into consideration when analyzing this issue. The Court, however, feels it is appropriate to look at the employees' motivations. The evidence suggests Mr. Spencer and Ms. Gotham believed their actions were condoned by GWD, as well as the police. The Court does not find this to be a "plain and indisputable" case of the employees acting outside their scope of employment. A determination as to whether they were acting within their scope of employment should be left to the jury. Accordingly, the Court **DENIES** GWD's motion for summary judgment as it pertains to Plaintiff's claim of intrusion upon seclusion.

D. Intentional infliction of emotional distress

Plaintiff, in her complaint, alleges GWD intentionally caused her to suffer extreme emotional distress. In order to recover for intentional infliction of emotional distress, a plaintiff must show: (1) intentional or reckless conduct (2) which is extreme and outrageous (3) causing the emotional distress (4) which is severe. Miraliakbari v. Pennicooke, 254 Ga. App. 156, 157, 561 S.E.2d 483, 486 (2002).

> [I]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go

> beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id. (quoting Northside Hosp. v. Ruotanen, 246 Ga. App. 433, 435, 541 S.E.2d 66 (2000)). "Evidence of a defendant's malicious purpose or of a defendant's wanton disregard of a plaintiff's rights may be considered in evaluating whether or not the objected-to behavior can reasonably be characterized as outrageous or egregious." Id. (quoting Gordon v. Frost, 193 Ga. App. 517, 521(1), 388 S.E.2d 362 (1989)). A "major outrage in the language or conduct complained of is essential to the tort." Id. (internal quotations omitted). "Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law." Id. (citing Yarbray v. Southern Bell Tel. & c. Co., 261 Ga. 703, 706(2), 409 S.E.2d 835 (1991)). "[T]he conduct also must be of such serious import as to naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress." Id. at 159, 561 S.E.2d at 487 (quoting Moses v. Prudential Ins. Co. &c., 187 Ga. App. 222, 225, 369 S.E.2d 541 (1988)). "[T]he existence of a special relationship in which one person has control over another, as in the employer-employee relationship, may produce a character of outrageousness that otherwise might not exist." Anderson v. Chatham, 190 Ga. App. 559, 567, 379 S.E.2d 793, 800 (1989).

GWD argues it should not be liable under a theory of intentional infliction of emotional distress for the actions of its employees, alleging that the employees did not *intend* to harm Plaintiff. However, this argument fails. The requisite level of intent required to

maintain a claim of intentional infliction of emotional distress is recklessness. Here, the actions of GWD's employees were arguably reckless. Further, the strip search of Plaintiff was extreme and outrageous as a matter of law. Evidence exists that the actions of the employees were directed at Plaintiff,[5] and that Plaintiff suffered emotional distress. Because the Court has already determined that there is a jury question as to whether GWD's employees were acting in the scope of their employment when they performed the strip search, the Court also concludes there is a jury issue as to whether GWD is liable for intentional infliction of emotional distress. Therefore, GWD's motion for summary judgment as to Plaintiff's claim of intentional infliction of emotional distress is **DENIED**.

E. False imprisonment (Count VII)

Plaintiff also alleges that GWD's employees falsely imprisoned her. "False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." O.C.G.A. § 51-7-20. "The restraint constituting a false imprisonment may arise out of words, acts, gestures or the like, which induce a reasonable apprehension that force will be used if plaintiff does not submit; and it is sufficient if they operate upon the will of the person threatened, and result in a reasonable fear of personal difficulty or personal injuries." Miraliakbari, 254 Ga. App. at

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[5]"Even malicious, wilful or wanton conduct will not warrant a recovery for the infliction of emotional distress if the conduct was not directed at the plaintiff." Jordan v. Atlanta Affordable Hous. Fund, Ltd., 230 Ga.App. 734, 737, 498 S.E.2d 104, 107 (1998) (citing Ryckely v. Callaway, 261 Ga. 828, 830, 412 S.E.2d 826, 827 (1992)).

161, 561 S.E.2d at 488 (quoting Greenbaum v. Brooks, 110 Ga. App. 661, 663(1), 139 S.E.2d 432 (1964)). "[T]he exercise of dominion over someone's property may serve as an exercise of dominion over that person." Id. (citing Wallace v. Stringer, 250 Ga. App. 850, 854(1)(b), 553 S.E.2d 166 (2001)).

GWD argues that its employees did not possess the requisite intent to falsely imprison Plaintiff. "To constitute a false imprisonment, the act of the defendant in confining the plaintiff must be done with the intention of causing a confinement." Stewart v. Williams, 243 Ga. 580, 581, 255 S.E.2d 699, 701 (1979) (quoting 1 Harper & James, The Law of Torts, § 3.7, p. 228 (1956)). Here, GWD's employees stripped Plaintiff of her clothes and left her naked in a bathroom stall. There is evidence Ms. Gotham told Plaintiff that if she did not comply, she would have to submit to a strip search by the police. (Catalano Dep., p. 75). Also, according to Plaintiff's deposition, Mr. Spencer told Plaintiff she would be arrested if she did not comply with his instructions. (Catalano Dep., p. 88). Based on this evidence, a jury could find GWD's employees intended and caused her to be confined, and that this confinement was unlawful. As noted before, whether or not GWD's employees were acting within the scope of their employment remains a question for the jury to decide. Accordingly, the Court **DENIES** GWD's motion for summary judgment on the claim of false imprisonment.

F. Negligent training (Count IX)

Plaintiff alleges GWD was negligent for failing to properly train its employees on how to react to the strip search scam. To establish a claim for negligence, a plaintiff must demonstrate "(1) a legal duty to conform to a standard of conduct raised by law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) loss or damage from the breach." Hodges v. Putzel Elec. Contractors, Inc., 260 Ga. App. 590, 594, 580 S.E.2d 243, 247 (2003). "Negligence is predicated on what should be anticipated, rather than on what happened, because one is not bound to anticipate or foresee and provide against what is unlikely, remote, slightly probable, or slightly possible." Id.

In the instant case, the likelihood that GWD would be vulnerable to an encounter with the degenerate caller was at best remote. Even if GWD had notice of the strip search scam, the chance that one of its ten restaurants would be targeted was extremely rare. According to Plaintiff, there were only fourteen known incidents involving this scam at McDonald's prior to the incident at hand.[6] There are, however, over 13,000 McDonald's restaurants in the United States. Because it was so unlikely that the caller would target one of GWD's restaurants, the Court cannot conclude GWD owed a duty to Plaintiff to train its employees with respect to such an incident. See Sapp v. Effingham County Bd. of Educ., 200 Ga. App. 695, 696, 409 S.E.2d 89, 91 (1991) (holding granting of motion for summary

[6]Defendant McDonald's maintains that, prior to this incident, there were only twelve known strip search hoaxes at McDonald's restaurants. (See Doc. 99, p.18.)

judgment on negligent training claim was proper as "it is impossible to provide a specific curriculum for all eventualities.") Accordingly, GWD's motion for summary judgment on Plaintiff's negligent training claim is **GRANTED**.

G. Punitive damages under Georgia law (Count XV)[7]

Plaintiff asserts she is entitled to punitive damages because GWD's intentional willful conduct and conscious disregard of the consequences caused Plaintiff severe emotional distress.

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). "Something more than the mere commission of a tort is necessary for the imposition of punitive damages. Negligence alone, even gross negligence, is insufficient to support punitive damages." MDC Blackshear, LLC v. Littell, 273 Ga. 169, 173, 537 S.E.2d 356, 361 (2000). "There must be circumstances of aggravation or outrage." Windermere, Ltd. v. Bettes, 211 Ga. App. 177, 178, 438 S.E.2d 406, 408 (1993).

[7] Plaintiff also seeks attorney's fees due to GWD's inappropriate conduct. Defendant GWD did not file a motion for summary judgment on the issue of attorney's fees, so the Court will not address the merits of the claim for attorney's fees against GWD at this time.

"In Georgia, employers or principals may be vicariously liable for punitive damages arising from the acts or omissions of their employees or agents if such tortious conduct is committed in the course of the employer's or principal's business, within the scope of the servant's or agent's employment, and is sufficient to authorize a recovery of punitive damages under OCGA § 51-12-5.1." Fowler v. Smith, 237 Ga. App. 841, 843, 516 S.E.2d 845, 847 (1999).

The record has not been fully developed at this time on the question of GWD's "conscious indifference to consequences." The Court, therefore, will defer its ruling on punitive damages until the trial of this case, or shortly beforehand. Accordingly, GWD's motion for summary judgment on the issue of punitive damages is **DENIED.**

III. McDonald's motion

A. Negligence – joint venture or alter ego (Count XI)

Plaintiff, using theories of alter ego and joint venture, alleges McDonald's exercised control over GWD to such an extent that it rendered itself liable for the alleged negligence and other state tort law violations of GWD. Specifically, Plaintiff points to the franchise agreement to establish such control.

1. Alter ego theory

According to Georgia law, "a franchise contract under which one operates a type of business on a royalty basis does not create an agency or a partnership relationship." McGuire v. Radisson Hotels Int'l, Inc., 209 Ga. App. 740, 742, 435 S.E.2d 51, 52 (1993).

To impose liability on a franchisor for the acts or obligations of a franchisee, a plaintiff must show that: "(a) the franchisor has by some act or conduct obligated itself to pay the debts of the franchisee; or (b) the franchisee is not a franchisee in fact but a mere agent or 'alter ego' of the franchisor." Id. (citation and punctuation omitted). Here, there is no evidence that McDonald's is obligated to pay the debts of GWD.[8] Therefore, any claims of vicarious liability will depend on whether or not GWD was either an agent or alter ego of McDonald's.

To determine whether a franchise agreement creates an agency relationship, Georgia courts look to "whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract." McGuire, 209 Ga. App. 742, 435 S.E.2d. at 53. When interpreting franchise agreements, Georgia courts have repeatedly noted the unique relationship between a franchisor and a franchisee.

> [A] franchisor is faced with the problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees.

Id. at 742, 435 S.E.2d at 53 (citations and punctuation omitted).

Because of this unique relationship, franchisors are permitted to maintain a significant amount of control over the franchisee's operations while still not reaching the

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[8]The franchise agreement states: "Franchisee is, and shall remain, an independent contractor responsible for all obligations and liabilities of . . .the Restaurant and its business . . . ." (Doc. 91, Ex. 15, ¶ 16).

level of control necessary for vicarious liability. "[A] franchisor may protect its franchise and its trade name by setting standards governing its franchisee's operations, including how its product is manufactured, packaged, prepared, or served." Schlotzsky's, Inc. v. Hyde, 245 Ga. App. 888, 890, 538 S.E.2d 561, 563 (2000). "Further, these standards may be quite detailed, specific, and strict." Id.

In this case, McDonald's, through it's O&T Manual, provides detailed standards for food preparation and cleaning, as well as security. Such standards are necessary to protect McDonald's reputation and to maintain a level of quality. While these measures may be specific and strict, they do not "control the time and manner of executing work."

As to Plaintiff's allegation that McDonald's has the right to control the hiring and firing of employees, the Human Resources section of the O&T Manual clearly tells independent operators, such as GWD, that they are "exclusively responsible for employment matters within [their] organization." (Doc. 91, Ex. 26, p. 6).[9] As to Plaintiff's claim that McDonald's should be vicariously liable because it retains the ability to inspect GWD's premises and financial performance, the Court also finds no merit. "A franchisor's reserving the right to inspect, monitor, or evaluate the franchisee's compliance with its standards and to terminate the franchise for noncompliance is *not* the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law." Hyde, 245

[9]The Court notes that this exhibit is subject to a Confidentiality Agreement. The Court feels, however, that the use of the exhibit in this Order has not revealed any material terms of the document.

Ga. App at 890, 538 S.E.2d at 563. The Court therefore concludes that Plaintiff is unable to show that McDonald's controls the time and manner of GWD's operations.

2. Joint Venture theory

"The theory of joint venturers arises where two or more parties combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control (provided the arrangement does not establish a partnership), so as to render all joint venturers liable for the negligence of the other." Kissun v. Humana, Inc., 267 Ga. 419, 420, 479 S.E.2d 751, 752 (1997). "Mere business interdependency does not create a joint venture." BP Exploration & Oil, Inc. v. Jones, 252 Ga. App. 824, 828, 558 S.E.2d 398, 404 (2001) (citing Pope v. Goodgame, 223 Ga.App. 672, 674(2)(c), 478 S.E.2d 636, 639 (1996)).

Because the Court concluded that McDonald's does not retain the right to control the time and manner of GWD's operations, the Court accordingly concludes there is no mutual control to support a claim of joint venture liability.[10] Furthermore, the franchise agreement expressly states, "Franchisee and McDonald's are not and do not intend to be partners, associates, or joint employers in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of Franchisee under any circumstances." (Doc. 91, Ex. 15, Franchise Agreement, ¶ 16). Accordingly, McDonald's motion for summary

[10]This same logic was applied in BP Exploration & Oil, Inc v. Jones, supra, where the Georgia Court of Appeals reasoned that because "BP reserved no right to control the time, manner, and method of the Byron BP's operations . . . it did not have 'mutual control as to the conduct of' the Byron BP." Id. at 829, 558 S.E.2d at 404. See also Wells v. Vi-Mac, Inc., 226 Ga. App. 261, 261-261, 486 S.E.2d 400 (1997).

judgment as to Plaintiff's claim of negligence based on a joint venture or alter ego theory is **GRANTED.**

B. Direct negligence claims (Counts X & XII)

Plaintiff alleges McDonald's was negligent for failing to properly warn Plaintiff and GWD about the strip search scam. Plaintiff argues that McDonald's had a duty to warn GWD and Plaintiff of the strip search scam because it was the owner of the land where the incident occurred, and because it assumed a duty to warn its franchisees of the hoax.

1. Premises Liability

Under Georgia law, "[w]here an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe." O.C.G.A. § 51-3-1. "A landlord's [tort] liability to a third person who is injured on property which was relinquished by rental or under a lease is determined by O.C.G.A. § 44-7-14." Martin v. Johnson-Lemon, 271 Ga. 120, 123, 516 S.E.2d 66, 68 (1999).

Pursuant to O.C.G.A. § 44-7-14, a landlord who has parted with possession and the right of possession "is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant." O.C.G.A. § 44-7-14. "[H]owever, the landlord is responsible for damages arising from defective construction or for damages

arising from the failure to keep the premises in repair." Id. "The code section makes it clear that a landlord who relinquishes possession of the premises cannot be liable to third parties for damages arising from the negligence of the tenant." Ray v. Smith, 259 Ga. App. 749, 749, 577 S.E.2d 807, 808 (2003)(quoting Colquitt v. Rowland, 265 Ga. 905, 906(1), 463 S.E.2d 491 (1995)). The landlord's retention of the right to inspect the leased premises "does not evidence such dominion and control of the premises so as to vitiate the landlord's limited liability imposed by O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1." Webb v. Danforth, 234 Ga. App. 211, 212, 505 S.E.2d 860, 861 (1998). Further, "[a] landlord's retention of the right to enter, inspect and repair is not inconsistent with a full surrender of possession to the tenant." Id.

The Court has determined, based on the evidence, that McDonald's has fully surrendered the premises to GWD. Plaintiff's arguments that McDonald's maintained control of the property are without merit. Plaintiff attempts to argue McDonald's has maintained control by pointing to the Franchise Agreement. Specifically, Plaintiff points to a line in the franchise agreement which says, "Franchisee agrees to promptly adopt and use exclusively the formulas, methods and policies contained in the business manuals." (Doc. 91, Ex. 15, ¶ 4). Plaintiff also points to testimony of James Harper, McDonald's Vice President for Worldwide Training, who stated that the policies in the O&T manual were required to be followed by the owner/operators. (Doc. 91, Ex. 20, p. 13). The Court has already established that the Franchise Agreement did not give McDonald's the right to

control GWD's operations, but rather was necessary to maintain the reputation and quality of McDonald's restaurants.

Plaintiff also attempts to argue that McDonald's, through its strip search policy, maintained control over the telephone as the instrumentality that facilitated the harm suffered by Plaintiff. This argument also fails. McDonald's only advised its owner/operator restaurants to adopt a strip search policy.[11] This does not show that McDonald's maintained control of GWD's phone system, and the Court therefore concludes that McDonald's qualifies as an out-of-possession landlord, and as such, is not liable under a premises liability theory.

2. Negligent undertaking

Although an out-of-possession landlord has no statutory duty to protect third parties, such a duty may arise in certain circumstances. "When a landlord acts to provide security, it must do so in a non-negligent manner," Sewell v. Hull/Storey Dev., LLC, 241 Ga. App. 365, 369, 526 S.E.2d 878, 882 (1999), because "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Hyde v. Schlotzsky's, Inc., 254 Ga. App. 192, 193, 561 S.E.2d 876, 878 (2002). "This principle is further articulated in Section 324A of the Restatement (Second) of Torts, which

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[11]The McDonald's Security Manual specifically states in its Security Regulations section, which includes its policy on strip searches, "McOpCo employees should consider these as company policy; independent owner/operators are encouraged to adopt appropriate policies for their restaurants." (See Doc. 91, Ex.19, p. 13.)

was adopted by the Georgia Supreme Court in Huggins v. Aetna Cas., etc., Co., 245 Ga. 248, 249, 264 S.E.2d 191 (1980)." Blossman Gas Co. v. Williams, 189 Ga. App. 195, 197, 375 S.E.2d 117, 119-20 (1988). Pursuant to § 324A, one may be liable to a third party for negligently performing a duty undertaken to protect the third party or the third party's things, if "(a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Huggins, 245 Ga. at 249, 264 S.E.2d at 192 (quoting Restatement 2d Torts § 324A). However,

> A landowner does not become an insurer of safety by taking some security precautions on behalf of invitees. Undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required. . . . [I]f a defendant undertakes to do more for the benefit of another person than the law requires, he or she may be held liable if he or she acts unreasonably or makes the situation worse, by increasing the danger, or by misleading the plaintiff into belief that it has been removed, or by depriving the plaintiff of the possibility of help from other sources.

Doe v. HGI Realty, Inc., 254 Ga. App. 181, 561 S.E.2d 450, (2002) (quoting Ritz Carlton Hotel Co. v. Revel, 216 Ga. App. 300, 303-304(2), 454 S.E.2d 183 (1995)).

Under the Huggins analysis, pursuant to § 324A(a), McDonald's could be liable to a third party for negligently performing a duty undertaken to protect a third party or the third party's things if McDonald's negligence increased the risk of harm. See BP Exploration & Oil, Inc. v. Jones, 252 Ga. App. 824, 830, 558 S.E.2d 398, 405 (2001).

"Liability, however, does not attach for failing to decrease the risk of harm." Id. Here, there is no evidence that McDonald's caused the risk of harm to Plaintiff to increase, and therefore there is no support for imposing liability under this subparagraph.

To establish liability under § 324A(b), McDonald's must have undertaken a duty owed by another party to Plaintiff. This subsection only applies "to those situations where the alleged tortfeasor's performance is to be substituted *completely* for that of the party on whose behalf the undertaking is carried out." Jones, 252 Ga. App. at 831, 558 S.E.2d at 405-406 (citing Huggins v. Standard Fire Ins. Co., 166 Ga. App. 441, 442, 304 S.E.2d 397, 398 (1983)). In the case at hand, there is no evidence that McDonald's *completely* took over the provisions of security for GWD. McDonald's supplied advice to GWD on security, (see Carman Dep., pp. 15, 54; Peaster Dep., p. 66; Gwynne Dep., p. 18); however, GWD was still responsible for many aspects of security. (See Stanberry Dep., p. 36 (testifying that store manager of GWD restaurants was responsible for security at the store)). Accordingly, the Court concludes McDonald's did not undertake a duty pursuant to § 324A(b).

Under § 324A(c), a finding of duty requires proof of actual reliance by either Plaintiff or GWD on McDonald's undertaking. See Huggins v. Aetna Cas., etc., Co., 245 Ga. 248, 249, 264 S.E.2d 191, 192 (1980) ("reliance by either the employee or the employer . . . is sufficient to give rise to a cause of action in tort"). "Georgia law requires that reliance be shown by a change in position." Hutcherson v. Progressive Corp., 984 F.2d 1152, 1157 (11th Cir. 1993)(citing Phillips v. Liberty Mutual Insurance Co., 813 F.2d 1173, 1175 (11th

Cir.1987). Plaintiff argues that GWD relied on McDonald's for security advice. However, Plaintiff has failed to produce any evidence that GWD changed or reduced its security practices in reliance on McDonald's practice of providing security advice. Accordingly, the Court concludes McDonald's owed no duty under § 324A(c).

Based on the foregoing, the Court concludes McDonald's owed no duty to warn GWD of strip search scams, and therefore **GRANTS** McDonald's motion for summary judgment as to the counts of direct negligence.

C. Punitive damages and attorneys' fees (Counts XIII & XV)

Plaintiff claims she is entitled to punitive damages from McDonald's because its alleged intentional willful conduct and conscious disregard of the consequences caused her severe emotional distress. As noted before, "[p]unitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). "Something more than the mere commission of a tort is necessary for the imposition of punitive damages. Negligence alone, even gross negligence, is insufficient to support punitive damages." MDC Blackshear, LLC v. Littell, 273 Ga. 169, 173, 537 S.E.2d 356, 361 (2000). "There must be circumstances of aggravation or outrage." Windermere, Ltd. v. Bettes, 211 Ga. App. 177, 178, 438 S.E.2d 406, 408 (1993). Plaintiff has been unable to present sufficient evidence to support her allegation that

Defendant acted in such a manner as to reach the level of culpability required to impose punitive damages, and so the Court **GRANTS** McDonald's motion for summary judgment on the issue of punitive damages.

Plaintiff seeks attorney's fees due to McDonald's alleged inappropriate conduct. To recover the expenses of litigation, a plaintiff must show that the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. O.C.G.A. § 13-6-11. "Bad faith refers to the transaction out of which the cause of action arose rather than the motive with which the defense is made." Cade v. Roberts, 175 Ga. App. 800, 801, 334 S.E.2d 379, 380 (1985). "'Bad faith' is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 49, 557 S.E.2d 420, 426 (2001) (quoting Vickers v. Motte, 109 Ga.App. 615, 619-620, 137 S.E.2d 77 (1964)).

Plaintiff has presented no competent evidence that shows McDonald's acted in bad faith. Accordingly, McDonald's motion for summary judgment on the issue of attorney's fees is **GRANTED**.

DISCOVERY MOTIONS

All parties filed discovery motions. Plaintiff filed a motion to compel discovery from McDonald's. (Docs. 60 and 69.) Defendants GWD and McDonald's filed motions to strike Plaintiff's affidavit of Kenneth L. Bryant. (Docs. 97 and 104.)

I. Motion to Strike Affidavit of Kenneth L. Bryant

Plaintiff filed the affidavit of Kenneth L. Bryant along with her responses to Defendants' motions for summary judgment. Defendants moved to have the affidavit stricken, arguing that it contained expert opinions, and as such, it failed to comply with Rule 26 of the Federal Rules of Civil Procedure and Rule 702 of the Federal Rules of Evidence.

After careful consideration, the Court determines Bryant's affidavit is not based on personal knowledge as required by Rule 602 of the Federal Rules of Evidence. Further, in paragraphs 6 and 8, the report contains opinions based on "specialized knowledge."[12] This affidavit is essentially providing expert testimony, and as Plaintiff has

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[12] In paragraph 6, Bryant states, "I am aware of psychological studies that have shown that once the 'set' and 'setting' and certain conditions are created and met, almost any human being will respond to authority and commit acts instructed to do so no matter how irrational the act may seem to the external observer. That is what happened in these strip searches."

In paragraph 8, Bryant states, ""Based on my experience, . . . I believe that a warning system and clear communication to management and employees about the nature of the problem can and does prevent this type of incident from occurring," and further, that "[o]nce management and staff are aware and have been trained about this hoax it is easily preventable . . . ."

These opinions proffered by Bryant do not fall under the category of "Opinion Testimony by Lay Witnesses" that is covered by Federal Rule of Evidence 701. See United States v. Marshall, 173 F.3d 1312, 1315 (11th Cir. 1999) ("Under [Rule 701], the opinion of a lay witness on a matter is admissible only if it is based on first-hand knowledge or observation--for example, a witness' opinion that a person with whom he

failed to completely and timely provide the expert report required by Rule 26, the Court **GRANTS** Defendants' motions to strike Bryant's affidavit for purposes of summary judgment.[13]

II. Motion to Compel Discovery

Plaintiff has filed a motion to compel discovery from Defendant McDonald's, alleging that McDonald's failed to respond to several interrogatories propounded by Plaintiff. Specifically, Plaintiff alleges McDonald's failed to respond to Plaintiff's First Interrogatories No. 17 and Plaintiff's Second Interrogatories No. 2.

In Plaintiff's Reply to McDonald's Response (Doc. 82), Plaintiff admits McDonald's finally complied with the two interrogatories at issue. Accordingly, the Motion to Compel is **DENIED AS MOOT**. Even though such compliance occurred only after Plaintiff sent numerous letters and filed a motion to compel, the Court **DENIES** Plaintiff's request for attorney's fees. Under Rule 37(a), the Court shall require the party to pay

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had spoken was drunk, or that a car he observed was traveling in excess of a certain speed.")

[13]Under Rule 37 of the Federal Rules of Civil Procedure, through a showing of substantial justification or harmlessness, a party may be able to still get in evidence that failed to meet the requirements of Rule 26. Fed. R. Civ. P. 37(c)(1). The Court, however, finds that for purposes of summary judgment Plaintiff has failed to show any justification for why she has not yet attempted to file a complete expert report, specifically one that details the bases for Bryant's expert opinions in paragraphs 6 and 8. Further, the Court notes that Plaintiff has not shown the failure to supply a complete and timely expert report was harmless when Defendants had already filed their summary judgment motions.

reasonable expenses incurred in making the motion, unless the objection was substantially justified. Fed. R. Civ. P. 37(a)(4)(A). The Court determines that McDonald's objections were substantially justified. Interrogatory No. 2 asks for names and addresses of other victims of strip searches at McDonald's restaurants. Given the sensitive nature of this case, the Court will not require McDonald's to disclose the names and addresses of other victims of similar incidents, some of which remained as Jane Doe in their lawsuits.

Further, the Court noted much of the dispute over Interrogatory No. 17 involved a certain memo that was provided to Plaintiff during discovery. It appears any misunderstandings involving the memo have been cleared up. The Court has also examined all the exhibits filed with these motions, and notes that very little new information was actually disclosed after Plaintiff filed her motion to compel, despite Plaintiff's assertion that, "McDonald's has finally responded to discovery requests." (See Doc. 82.) The Court finds that the majority of information sought by Plaintiff was disclosed during discovery, and that McDonald's was substantially justified in its objections to the information that was not disclosed during discovery. Therefore, the Court **DENIES** Plaintiff's request for attorney's fees in connection with the Motion to Compel.[14]

CONCLUSION

In conclusion, the Court hereby **ORDERS** that Defendant GWD's Motion for

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[14]The Court will not require McDonald's to use its email system to verify its responses to Plaintiff's interrogatories.

Summary Judgment (Doc. 52) is **GRANTED IN PART** and **DENIED IN PART.** Plaintiff's claims under Title VII and her claims against Defendant GWD for negligent infliction of emotional distress, invasion of privacy-false light, slander, negligent hiring and retention, and negligent training are dismissed. Defendant McDonald's Motion for Summary Judgment (Doc. 47) is **GRANTED**. All claims against Defendant McDonald's are dismissed. Defendants' Motions to Strike the affidavit of Kenneth L. Bryant (Docs. 97 and 104) are **GRANTED**, Plaintiff's Motion to Compel (Docs. 60 and 69) is **DENIED AS MOOT**, and Plaintiff's request for attorney's fees based on the Motion to Compel is **DENIED**.

The Court notes that it is now left with only state law claims. While the Court is aware that it is not required to keep Plaintiff's state law claims under 28 U.S.C. § 1367(c)(3), it will continue to entertain these claims, given its lengthy history with the case.

So **ORDERED**,

JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: March 30, 2005

UNITED STATES DISTRICT COURT
Southern District of Georgia

Case Number: 4:03-cv-00167
Date Served: March 30, 2005
Served By:

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___ Copy placed in Minutes
___ Copy given to Judge
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