At a Special Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, Binghamton, New York on the 18th day of September, 2019.

PRESENT: HON. MOLLY REYNOLDS FITZGERALD
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

MARYANN PIEDIGROSSI,

Plaintiff,

vs.

Aldi, Inc. (New York),

Defendant.

DECISION AND ORDER

Index No.: EF18-748

FACTS

On December 10, 2017, the plaintiff was shopping at an Aldi's store located at 908 NY 13, Cortland, NY. Shortly after entering the main aisle from a side aisle, plaintiff was struck by a hand cart being pushed by an Aldi's employee. As a result of the incident, plaintiff allegedly fractured her right humerus and tore a tendon. On July 9, 2018, plaintiff commenced an action against Aldi, Inc. (New York) (hereinafter referred to as Aldi's), alleging three causes of action for: (1) vicarious liability for its employee's negligence through the principle of respondeat superior; (2) negligent training and supervision; and (3) negligent hiring. On July 26, 2018, an amended complaint was filed solely amending defendant's name to Aldi, Inc. (New York).

Plaintiff's attorney served a Notice to Produce dated April 16, 2019, seeking: (1) Any

and all employee handbooks for Aldi's from 2017; (2) Any and all documents regarding Carrie Kelly's (sic Moss) employment with Aldi's including, but not limited to: sign in sheets, training and disciplinary documentation; (3) Any and all memos, correspondence, and emails by and between defendant and/or its employees, agents, representatives or independent contractors regarding hand trucks and/or stock carts and safety features for the hand trucks and/or stock carts; and (4) Any and all injury logs resulting from any and all injuries related to hand trucks and/or stock carts.

On April 22, 2019, defendant's attorney filed a response objecting to the second demand in its entirety arguing that since the employee was acting within her scope of employment, the causes of action for negligent training, supervision and hiring could not be maintained, and thus the any items pertaining to these causes of action are not discoverable. Defendant also objected to plaintiff's demands in paragraphs 3 and 4 as to hand trucks, contending that since the plaintiff was struck by a product cart, the demands as to hand trucks were irrelevant and immaterial. Additionally, defendant contended that the request was vague and overly broad.

Plaintiff filed a motion to compel on May 1, 2019 and submitted an affidavit by her counsel, Jesse P. Ryder, Esq., sworn to on May 1, 2019, with attached exhibits. Defendant filed a cross-motion to dismiss the second and third causes of action and for a protective order. Defendant's counsel, Eileen E. Buholtz, Esq., submitted an affirmation for summary judgment & protective order & against plaintiff's motion to compel dated July 8, 2019, with attached exhibits, and a memorandum of law. Plaintiff's counsel submitted an affidavit in opposition, sworn to on September 9, 2019, with attached exhibits, and a memorandum of law in opposition. Defendant's attorney filed a reply affirmation dated

September 13, 2019 and a reply memorandum of law.

LEGAL ANALYSIS

The court will address the motions in inverse order. Defendant moves to dismiss the second cause of action for negligent retention, supervision or training and the third cause of action for negligent hiring since the employee was acting within her scope of employment. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Defendant has submitted, inter alia, copies of the pleadings; an attorney's affidavit; excerpts of the transcripts of the examination before trial of plaintiff and of defendant's district manager; the notice to produce and response to notice to produce; and a disc of Aldi's video recording the incident. The amended complaint alleges that an Aldi's employee was moving merchandise on a product cart within the store, when she hit the plaintiff. Plaintiff further alleges the employee was careless and negligent and that defendant is vicariously liable for its employee's negligent and careless acts through the principle of respondeat superior. The defendant concedes that its employee, Carrie Moss, was operating the product cart within the scope of her employment. Lastly, the video shows two Aldi employees, Kristin, pulling a product cart in the store and Carrie Moss, pushing a product cart within the store.

Generally, where an employee is acting within the scope of her employment, the employer is liable under the theory of respondeat superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training, *McCarthy v Mario Enters., Inc.*, 163 AD3d 1135, 1137 (2018); *Coville v Ryder*

Truck Rental, Inc., 30 AD3d 744, 745 (2006); *Rosetti v Board of Educ. of Schalmont Cent. School Dist.*, 277 AD2d 668, 670 (2000). Since the defendant concedes that Ms. Moss was acting within the scope of her employment when the accident occurred, the plaintiff's second and third causes of action must be dismissed, *Ambroise v United Parcel Serv. of Am., Inc.*, 143 AD3d 929, 931 (2016). Once the defendant stipulated that the employee was acting within her scope of employment, no claim may proceed against the employer for negligent hiring or retention, *Rosetti* id at 670. Defendant has met its initial burden.

The burden then shifts to plaintiff to raise a material issue of fact, *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Plaintiff's attorney submits an affidavit in opposition, alleging the motion is premature and is nothing more than a veiled attempt to obstruct further discovery as to the gross and wanton nature of defendant's negligence. The court is unpersuaded by the argument that the motion is premature, *LMK Psychological Servs., P.C. v Liberty Mut. Ins. Co.*, 30 AD3d 727, 729 (2006); *Herba v Chichester*, 301 AD2d 822, 823 (2003). Initially, the defendant conceded that the employee was acting within her scope of employment, thus negating any issues of fact. Moreover, plaintiff would be hard pressed to prove that moving merchandise within a store on a product cart to restock the shelves, was not a duty of and within the scope of employment of a store associate.

As to plaintiff's additional argument that the motion is an attempt to obstruct discovery as to gross and wanton negligence, there are no allegations in the complaint as to gross or wanton negligence or punitive damages. A demand for punitive damages generally requires conduct that evidences a high degree of moral culpability, is so flagrant

as to transcend simple carelessness, or constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others. Not even the most liberal construction of the amended complaint supports gross or wanton negligence or a demand for punitive damages, *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 (2006). A new theory, presented for the first time in opposition to a motion for summary judgment, cannot bar relief which is otherwise appropriate, *Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 (2010). Defendant's motion for summary judgment is granted.

Turning to plaintiff's motion to compel, in light of the fact that plaintiff may not proceed with her causes of action for negligent hiring, supervision, retention and training, her request for information set forth in paragraph 2 of the Notice to Produce are not discoverable. Where there is no cause of action for negligent hiring, the personnel records of the employee are not otherwise relevant and are not discoverable, *Jordan v Blue Circle Atl.*, 296 AD2d 752, 753 (2002); *Reynolds v Vin Dac Pham,* 212 AD2d 991 (1995); *Neiger v City of New York,* 72 AD3d 663, 664 (2010).

Paragraphs 3 and 4 of the notice, request information related to a hand truck. Since the incident did not involve a hand truck all requests relating to a hand truck are irrelevant and immaterial. Plaintiff has conceded that the instrument which ran into plaintiff is a product cart. As to the request in paragraph 3 for any and all memos, correspondence and emails by and between defendant and/or its employees, agents, representative or independent contractors regarding a *cart* is over broad, nonspecific and burdensome, *Sullivan v Smith,* 198 AD2d 749, 750 (1993). The request in paragraph 4 for any and all injury logs resulting from any and all injuries related to *carts*, is not relevant or reasonably

calculated to lead to evidence relevant to the issue of Aldi's purported negligence related to this incident, *Schonbrun v DeLuke,* 160 AD3d 1100, 1102 (2018). The plaintiff's motion to compel is denied, without prejudice, to plaintiff's right to identify specific documents, with reasonable particularity. The defendant's motion for a protective order is granted. Defendant may submit a protective order.

In summary, plaintiff's motion to compel is denied; defendant's motion for summary judgment dismissing the second and third causes of action is granted; and defendant's motion for a protective order is granted. This constitutes the Decision and Order of the Court.

Dated: October 19, 2019

HON. MOLLY REYNOLDS FITZGERALD
SUPREME COURT JUSTICE

cc: Jesse P. Ryder, Esq.
Eileen E. Buholtz, Esq.
Emily Stith, Cortland County Chief Court Clerk