IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PATRICK GREER and TRACEY GREER,	)	
Plaintiffs,	)	
v.	)	**No. 21-cv-2474-MSN-tmp**
WASTE CONNECTIONS OF TENNESSEE, INC., PATRICK E. WATT, and JOHN/JANE DOEs 1-5,	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO QUASH

Before the court is a Motion to Quash Subpoenas to Third Parties filed by defendants Waste Connections of Tennessee, Inc., ("Waste Connections") and Patrick Watt (collectively "Defendants") on November 30, 2022. (ECF No. 74.) Plaintiffs filed their response on December 13, 2022. (ECF No. 78.) This motion was referred to the undersigned for determination on November 30, 2022. (ECF No. 76.) For the following reasons, the Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

On July 19, 2021, plaintiffs filed a complaint alleging that an automobile collision with one of Waste Connections' vehicles caused plaintiff Patrick Greer to suffer damage to property and

physical injuries, including permanent brain damage. (ECF No. 1.) Some time after this, plaintiffs learned that defendants were surveilling them when a private investigator trespassed at the workplace of plaintiff Tracey Greer, Patrick Greer's wife. (ECF No. 78.) Plaintiffs served requests for production of documents on the defendants and asked them to produce "any surveillance that Waste Connections and/or Patrick E. Watt has, or acquires in the future, on Patrick Greer." (ECF No. 74-1.) An identical request sought surveillance on Tracey Greer. (Id.) Defendants objected to both requests "to the extent that this request require[d] Defendant to disclose work product and request[ed] materials prepared in anticipation of litigation." (Id.) Furthermore, as to the request for surveillance of Tracy Greer, defendants stated: "Defendant has no documents responsive to this request in its possession, custody or control." (Id.) Defendants also provided a privilege log identifying a seventeen-page surveillance report, a twenty-seven page surveillance report, and surveillance video of the plaintiff as work product. (ECF No. 74-1 at PageID 173.)

On November 11, 2022, plaintiffs served third party Ruehrwein Investigations with a subpoena seeking "[a] copy of your complete investigative file including, but not limited to, all reports, notes, photographs, videos, etc. regarding Patrick Greer, Tracey Greer, their minor son and minor daughter." (Id. at PageID 553.) Ruehrwein Investigations is an LLC that was created by Christopher

Ruehrwein, a private investigator. (ECF No. 74-1 at PageID 562-63.) Ruehrwein responded to the subpoena by notifying plaintiffs that his investigative work had been performed while he was an employee at Larkins Investigations, and therefore any relevant material would be in their possession. (Id. at PageID 564.) Plaintiffs then served an identical subpoena on third party Larkins Investigations on November 18, 2022. (Id. at PageID 556.) An investigator from Larkins alerted plaintiffs that it had retained Powerhouse Investigations to perform investigative services in this case. (Id. at PageID 564.) According to defendants, plaintiffs have subsequently issued an identical subpoena to third party Powerhouse Investigations, but at the time of their motion it had not yet been served. (Id. at 559.)

On November 30, 2022, defendants filed a motion to quash all three third-party subpoenas. (ECF No. 74.) They argue that the subpoenas seek information that is both undiscoverable work product and privileged attorney-private investigator communications under Tenn. Code Ann. § 24-1-209. (Id.) They also argue that the subpoenas exceed the geographical limits permitted by Federal Rule of Civil Procedure 45. (Id.) The plaintiffs filed their response on December 13, 2022. (ECF No. 78.) Plaintiffs write that the court should order that the motion to quash be "granted in part and denied in part to the extent that all surveillance video of Mr. Greer must be produced." (Id.) Seemingly, the

plaintiffs concede that other requests for production made by the subpoenas ("all reports, notes, photographs . . . etc.") are impermissible and should be quashed. (ECF No. 74-1 at 553, 556, 559.) Plaintiffs' arguments center only on production of surveillance footage. They assert that the footage is not a communication covered by the statutory attorney-private investigator privilege. (Id.) They also argue that case law directs this court to order disclosure of the footage despite its work-product status. (Id.) Finally, they argue that defendants lack standing to challenge the geographical limits of the subpoena. (Id.)

II. ANALYSIS

A. Legal Standard

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the power to quash or modify a subpoena lies with the district court where compliance with the subpoena is required. Fed. R. Civ. P. 45(d)(3)(A). All the subpoenas in question require production to the Cochran Firm in Memphis, Tennessee. (ECF No. 74-1 at 553, 556, 559.) The undersigned is therefore empowered to quash or modify the subpoenas at issue. District courts are required to modify or quash a subpoena if it "requires a person to comply beyond the geographical limits specified in Rule 45(c)" or "requires disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(d)(3)(A).

B. Geographical Limits of the Subpoenas

Defendants argue that the subpoenas should be quashed because they exceed the geographical limits permitted by Rule 45. The Federal Rules of Civil Procedure provide that a subpoena may request production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A). Here, defendants contend that the subpoenas issued by plaintiffs required production at a location greater than 100 miles away from where the third parties do business. (ECF No. 74.) All three subpoenas request that documents be produced to the Cochran Firm in Memphis, Tennessee. (ECF No. 74-1 at 553, 556, 559.) Third party Ruehrwein Investigations is located in Lexington, Kentucky; Larkins Investigations is in Nashville, Tennessee; and Powerhouse Investigations, Inc., is in Tulsa, Oklahoma. (Id.) These cities are all over 100 miles from Memphis. Plaintiffs do not dispute that this distance is greater than 100 miles, but instead argue that defendants do not have standing to bring such a challenge. (ECF No. 78.)

Rule 45(c) "provides protection against undue impositions on nonparties," including "undue burden" and "significant expense." Fed. R. Civ. P. 45 advisory committee's note to 2006 amendment; see also Hackmann v. Auto Owners Ins. Co., No. CIV. A. 2:05-CV-876, 2009 WL 330314, at *1 (S.D. Ohio Feb. 6, 2009) ("Rule 45(c) is intended to protect nonparties to litigation from, in effect,

suffering inconvenience or expense from having to participate in someone else's quarrel.") These harms are not suffered by a party who is not the subject of a subpoena. For this reason, "[o]rdinarily, a party does not have standing to quash a subpoena directed to a non-party unless the party claims a privilege, proprietary interest, or personal interest in the information sought by the subpoena." Ajuba Int'l, LLC v. Saharia, No. 11-CV-12936, 2014 WL 4793846, at *2 (E.D. Mich. Sept. 25, 2014); see also Lyons v. Leach, No. 12-CV-15408, 2014 WL 823411, at *1 (E.D. Mich. Mar. 3, 2014). A party does not have standing to bring a claim on behalf of a nonparty to quash a subpoena on another basis, such as an assertion that a subpoena exceeds the geographical limits permitted by Rule 45. Hackmann, 2009 WL 330314, at *1. Defendants are therefore not permitted to raise this claim on behalf of the nonparty subjects of the subpoenas.

C. Work Product

Defendants also argue that the subpoenas should be quashed because the material they seek is protected work product. As explained above, a claim of privilege or personal interest creates standing for a party to move to quash a subpoena to a third party. Fusion Elite All Stars v. Varsity Brands, LLC, 340 F.R.D. 255, 260 (W.D. Tenn. 2022). A claim of work product satisfies this requirement. Moonbeam Cap. Invs., LLC v. Integrated Constr. Sols.,

Inc., No. 18-CV-12606, 2019 WL 2163133, at *1 (E.D. Mich. May 17, 2019).

"The work-product doctrine is a procedural rule of federal law; thus, Federal Rule of Civil Procedure 26 governs this diversity case." In re Professionals Direct Ins. Co., 578 F.3d 432, 438 (6th Cir. 2009). Rule 26 states that "[o]rdinarily, 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)." Fed. R. Civ. P. 26(b)(3). However, such materials may be discovered if a 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." Id. The undersigned therefore must undergo two inquiries: first, whether the surveillance footage at issue constitutes work product; and second, whether plaintiffs have established a substantial need for the footage.

The Sixth Circuit has not spoken on the issue of whether surveillance video of a party qualifies as protected work product. However, district courts throughout the Sixth Circuit have consistently found that it does. See Roa v. Tetrick, No. 1:13-CV-379, 2014 WL 695961, at *3 (S.D. Ohio Feb. 24, 2014); Liggins v. Mainstream Transp., Inc., No. 2:13-CV-2533-SHM-DKV, 2013 WL

12149652, at *2 (W.D. Tenn. Nov. 13, 2013); McCloskey v. White, No. 3:09 CV 1273, 2011 WL 6371869, at *3 (N.D. Ohio Dec. 20, 2011). For example, in Liggins, the court considered a motion to compel materials responsive to a request for "all reports, photographs, slides, videos, or motion pictures depicting Plaintiff's or the member of the family's activities [sic]." 2013 WL 12149652, at *1. The defendants in that case objected to production of the materials, claiming that they were "protected by Rule 26(b)(3) of the Federal Rules of Civil Procedure as material prepared by the Defendant, its agents, insurers, or attorneys in anticipation of litigation or in preparation for trial." Id. at *2. In analyzing prior cases on the subject, the court noted that "[c]ourts generally rule that surveillance video qualifies as work product," a qualified immunity that "is waived by the plaintiff's substantial need for the material." Id.

The same conclusion has been reached by district courts in other circuits. See Driscoll v. Castellanos, No. CV 19-527 JCH/KK, 2020 WL 7711869, at *8 (D.N.M. Dec. 29, 2020); Marchello v. Chase Manhattan Auto Fin. Corp., 219 F.R.D. 217, 219 (D. Conn. 2004); Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996). In Driscoll, plaintiffs served interrogatories requesting surveillance materials in defendants' possession. 2020 WL 7711869, at *5. They also served a subpoena on the defendants' private investigator seeking "[p]hotographs, videos, reports,

slides or motion pictures depicting Plaintiff or any member of the Driscoll family's activities." Id. at *6. Plaintiffs filed a motion to compel responses to the interrogatories, while defendants filed a motion to quash the subpoena. Id. In ruling on the motions, the court observed that "[s]uch materials clearly fall 'within the definition of work product since they are tangible and were prepared in anticipation of litigation by or for a party to the litigation.'" Id. at *8 (quoting Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995)).

These cases agree that surveillance video recorded after a plaintiff's injury is material "prepared in anticipation of litigation," fulfilling the definition of work product set forth in Rule 26. Marchello, 219 F.R.D. at 219. Furthermore, where individuals are hired by defendants to perform investigative services, "these investigators may fairly be said to constitute 'consultants' and/or 'agents' of defendants within the meaning of Rule 26(b)(3)(A)." Roa, 2014 WL 695961, at *3 (quoting Fed. R. Civ. P. 26(b)(3)). For these reasons, district courts are in accord that video surveillance footage of a party taken by a private investigator for the purposes of litigation constitutes work product.

Based on the party's submissions, the footage at issue is of a similar character. Defendants state that they hired Powerhouse Investigations, Inc., and that any materials generated from this

relationship were "created in anticipation of litigation." (ECF No. 74 at PageID 549.) Plaintiffs do not dispute this. (ECF No. 78.) Further, they note that surveillance began only after Patrick Greer suffered brain damage and initiated the present suit. (Id.) Thus, the undersigned finds that any surveillance footage created by the third-party investigators at the direction of the defendants is work product.

In general, "discovery is permissible of privileged matter to the extent it is contemplated that the privilege will be waived at trial." § 2016.6 Privileged Matter—Putting Privileged Material in Issue, 8 Fed. Prac. & Proc. Civ. § 2016.6 (3d ed.); see, e.g., Greene v. Sears, Roebuck & Co., 40 F.R.D. 14, 15-16 (N.D. Ohio 1966); Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430, 434 (N.D. Ohio 1962). "The basis for the waiver is obvious: you cannot have your cake and eat it too." Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 628 (4th ed. 2001). Put differently, "[t]he attorney-client privilege cannot at once be used as a shield and a sword." In re Lott, 424 F.3d 446, 454 (6th Cir. 2005) (quoting United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)) (internal quotations omitted). "[L]itigants cannot hide behind the privilege if they are relying upon privileged communications to make their case." In re Lott, 424 F.3d at 454. Thus, in this case, defendants may not assert work-product privilege to prevent the disclosure of the

surveillance footage if they contemplate using it during litigation.

Additionally, under Rule 26, defendants must disclose the footage if plaintiffs show that they have a "substantial need for the materials" and that they "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3). All courts addressing "substantial need" have found that it exists in cases where defendants intend to use surveillance footage in litigation. The "unique nature of surveillance photos and videos" renders them both "highly persuasive" but also "extraordinarily manipulable." Driscoll, 2020 WL 7711869, at *8 (citing Harrington v. Atl. Sounding Co., No. CV-06-2900 NG VVP, 2011 WL 6945185, at *1 (E.D.N.Y. Dec. 30, 2011); Papadakis v. CSX Transp., Inc., 233 F.R.D. 227, 229 (D. Mass. 2006)) (internal quotations omitted). "Video or film can sometimes be misleading or incomplete, depending on editing or other circumstances." Roa, 2014 WL 695961, at *3. Plaintiffs therefore have an interest in "not being subject to unfair surprise and in reviewing the surveillance for authenticity." Liggins, 2013 WL 12149652, at *3. Furthermore, "it would be impossible for [plaintiffs] to obtain the substantial equivalent of such evidence elsewhere, because videos and photos 'fix information available at a particular time and a particular place under particular circumstances, and therefore cannot be duplicated.'" Driscoll, 2020 WL 7711869, at

*11 (quoting Gutshall v. New Prime, Inc., 196 F.R.D. 43, 46 (W.D. Va. 2000)). These considerations all must be balanced against the interests of the defendant in potential impeachment of the plaintiff. Ford v. CSX Transp., 162 F.R.D. 108, 110 (D. N.C. 1995) (citing Wegner v. Viessman, Inc., 153 F.R.D. 154, 156 (N.D. Iowa 1994)). In weighing these considerations, courts have found that when the defendant intends to use surveillance footage in litigation, plaintiffs' substantial need for access justifies its disclosure. See, e.g., Herrera v. Berkley Reg'l Ins. Co., No. CV 20-142 CG/GBW, 2021 WL 354005, at *2 (D. N.M. Feb. 2, 2021); Gutshall, 196 F.R.D. at 46; Smith, 168 F.R.D. at 586.

Courts' findings of substantial need are largely justified by the impact that surveillance footage may have on the litigation and particularly the trial. For that reason, courts have held that such video need not be produced if the party has no plans to make use of it during litigation. See, e.g., Driscoll, 2020 WL 7711869, at *11; Roach v. Hughes, No. 4:13CV-00136-JHM, 2015 WL 13022290, at *4 (W.D. Ky. Apr. 14, 2015), objections to order sustained on other grounds, Roach v. Hughes, No. 4:13-CV-00136-JHM, 2015 WL 13548427, at *8 (W.D. Ky. Aug. 4, 2015); Wegner, 153 F.R.D. at 156; Fisher v. Nat'l R.R. Passenger Corp., 152 F.R.D. 145, 155 (S.D. Ind. 1993). This is consistent with general principles of work-product privilege, which permit discovery of protected work product that will be used in litigation.

Based on these findings, the undersigned holds that if defendants intend to use the footage during litigation, then plaintiffs have a substantial need to review the footage prior to its use. Conversely, if defendants do not intend to use the footage, then no substantial need exists. Thus, the undersigned orders as follows: If the defendants intend to use the footage during the litigation, then they shall contact the third parties and direct them to produce any video surveillance of plaintiffs within fourteen days of entry of this order. Defendants may also produce any such footage to plaintiffs themselves during the same time frame if doing so would be more expeditious. If defendants do not intend to use the footage during the litigation, they are not required to produce the footage. However, if the footage is not produced to plaintiffs within fourteen days of the entry of this order, defendants will be prohibited from making use of the footage during the remainder of this litigation.

D. Attorney-Investigator Privilege

Finally, defendants argue that the materials requested are protected under the attorney-private investigator privilege. Under the Federal Rules of Evidence, "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. The instant case is before the court through its exercise of diversity jurisdiction, and therefore Tennessee state law regarding privilege applies.

Tennessee state law provides that "[c]ommunication between an attorney and a private detective or investigator hired by such attorney, while acting in their respective professional capacities shall be privileged communications." Tenn. Code Ann. §24-1-209. According to defendants, this statute bars the disclosure of "any communications between Defendants' counsel and Powerhouse Investigations, Inc. contained in the investigative file, which would also encompass any reports." (ECF No. 74 at PageID 551.) However, in their response, the only material that plaintiffs argue may be permissibly subpoenaed is surveillance video. (ECF No. 78.) Defendants make no argument that any video footage would qualify as an attorney-private investigator communication. (ECF No. 74.) Therefore, the court need not reach the issue of whether the attorney-private investigator privilege applies in this case.

III. CONCLUSION

For the reasons above, defendants' Motion to Quash is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
Chief United States Magistrate Judge

January 19, 2023
Date