**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

DENNIS ROA, et al.,
Plaintiffs,

v.

DARRELL TETRICK, et al.,
Defendants.

Case No. 1:13-cv-379

Beckwith, J.
Litkovitz, M.J.

**ORDER**

This diversity action is before the Court following an informal telephonic discovery conference held on February 12, 2014. Plaintiffs seek documentation generated by surveillance of plaintiffs and their family and request permission to take the depositions of the individuals who performed the surveillance. After review of the parties' position letters and consideration of argument by counsel, the Court grants in part and denies in part plaintiffs' requests for discovery.

This is a personal injury action arising from an automobile accident involving plaintiff Dennis Roa and a truck driven by defendant Tetrick and owned by defendant Commercial Transport, Inc. Plaintiffs seek an order compelling production of the following information related to video surveillance of plaintiffs and their family:

> 1. Defendants to produce the individuals surveilling Deputy Dennis Roa for a Deposition, including but not limited to Navara and Coates at least two surveilors known to be involved.;
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> 2. Defendant's be ordered to produce all records; notes; bills; memorandums, etc. that have been generated by all surveilors;
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> 3. All photograph and audiograph evidence;
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> 4. All billing statements, referencing the dates and times that Deputy Roa and his family were surveilled and the cost; and
>
> 5. Any and all other aspects of the surveillance.

(Doc. 19 at 2).

Defendants state that in response to plaintiffs' discovery requests, they produced a DVD containing video of multiple days of surveillance of plaintiff Dennis Roa taken between October 23, 2013 and November 9, 2013. (See attached position statement of defendant).[1] Defendants represent that the DVD contains all of the unedited recordings of plaintiff Roa and fully encompasses all media containing surveillance of plaintiff Roa. Defendants assert that the surveillance videos, reports, and the investigative file are protected by the work product doctrine. Recognizing that the federal courts have permitted discovery of surveillance videos given a plaintiff's "substantial need" for the videos under Fed. R. Civ. P. 26(b)(3), defendants produced the requested video in an effort to avoid a discovery dispute. Nevertheless, defendants maintain that the reports prepared for counsel by the investigators as well as the investigative and billing files of the investigators are protected as work product and need not be produced. Defendants also argue that any deposition of the investigators must be limited to essentially a "records" deposition so as not to reveal attorney work product through the questioning of the deponent.

Plaintiffs contend that the testimony of the investigators, as well as their notes, billing records and other documents, are relevant evidence and production thereof is supported by the case law. In addition, plaintiffs argue that defendants' voluntary disclosure of the video surveillance tapes waives the work product protection for the undisclosed information held by defendants.

An attorney's work product is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . ." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Work product is protected to ensure that a lawyer can "work with a certain degree of privacy, free from unnecessary

[1] Plaintiffs' position statement was filed as Document 19 on the Court's docket.

intrusion by opposing parties and their counsel," and to allow the attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 510-11. "The work-product doctrine protects an attorney's trial preparation materials from discovery to preserve the integrity of the adversarial process." *In re: Professional's Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) (citing *Hickman*, 329 U.S. at 510-14).

With certain exceptions, Rule 26(b)(3)[2] protects from disclosure all: (1) "documents and tangible things"; (2) "prepared in anticipation of litigation or for trial"; (3) "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)(A). Under the Federal Rules, the work product protection under Rule 26(b)(3) is not limited to attorneys, but has been extended to documents and tangible things prepared by or for the party and the party's representative, as long as such documents were prepared in anticipation of litigation. *Id. See Eversole v. Butler County Sheriff's Office*, No. 1:99-cv-789, 2001 WL 1842461, at *2 (S.D. Ohio Aug. 7, 2001) ("Rule 26(b)(3) is not limited solely to attorneys" and "documents and things prepared by the party or his agent fall within the work product rule.") (citing 8 Wright & Miller, Federal Practice & Procedure, § 2024). Rule 26(b)(3) excludes from work product protection "[m]aterials

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[2] Rule 26(b)(3) provides:

> (A) Documents and Tangible Things. Ordinarily, 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). But, subject to Rule 26(b)(4), those materials may be discovered if:
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> > (i) they are otherwise discoverable under Rule 26(b)(1); and
> >
> > (ii) the 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.

Fed. R. Civ. P. 26.

assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." Advisory Committee Notes to the 1970 Amendments of Rule 26.

Whether a document has been prepared "in anticipation of litigation" and is protected work product depends on: "(1) whether that document was prepared 'because of' a party's subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable." *In re Professionals Direct Ins. Co.*, 578 F.3d at 439 (quoting *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006)).

Opinion work product is entitled to near absolute protection against disclosure, while fact work product may be discoverable upon a showing by a party of substantial need for the materials to prepare its case and that it cannot, without undue hardship, obtain substantially equivalent materials by other means. Fed. R. Civ. P. 26(b)(3)(A). *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

There is no dispute that the surveillance videos, reports, and investigative files are documents and/or tangible things under Rule 26(b)(3)(A). The surveillance videos were prepared by individuals hired by defendants to provide investigative services, and these investigators may fairly be said to constitute "consultants" and/or "agents" of defendants within the meaning of Rule 26(b)(3)(A). Nor is there a dispute that the surveillance materials were prepared "because of" existing litigation to document Mr. Roa's activities. Therefore, the surveillance videos and related information constitute work product under Rule 26(b)(3)(A). *See Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 586 -587 (S.D. Tex. 1996) (surveillance evidence gathered in anticipation of litigation is generally protected as work product). *Accord Bryant v. Trucking*, No. No. 4:11-cv-2254, 2012 WL 162409, at *5 (D.S.C.

Jan. 18, 2012); *Bachir v. Transoceanic Cable Ship Co.*, No. 98 Civ. 4625, 1998 WL 901735, at *1-2 (S.D.N.Y. Dec. 28, 1998); *Ward v. CSX Transportation, Inc.,* 161 F.R.D. 38, 40-41 (E.D.N.C. 1995); *Wagner v. Cliff Viessman, Inc.,* 153 F.R.D. 154, 156 (N.D. Iowa 1994); *Snead v. American Export Isbrandtsen Lines,* 59 F.R.D. 148, 150 (E.D. Penn. 1973).

As defendants point out, courts have uniformly ordered the discovery of surveillance videos in cases like this despite their status as work product. *Id. See also Papadakis v. CSX Transp., Inc.*, 233 F.R.D. 227, 228 (D. Mass. 2006) (and cases cited therein). Courts ordering the discovery of surveillance videos have done so recognizing that video or film can sometimes be misleading or incomplete, depending on editing or other circumstances. *Papadakis,* 233 F.R.D. at 229. *See also Smith,* 168 F.R.D. at 586 ("[A] truthful plaintiff may well be surprised by the content of a surveillance tape, given the photographer's ability to manipulate surveillance evidence, for example, by filming only the plaintiff's lifting of a heavy bag of groceries, but not the plaintiff's pain-riddled grimace. Thus, truthful plaintiffs, and not just potential perjurers, have a legitimate reason to inquire about the existence of such evidence."). Because of the highly persuasive nature of video evidence, its use as substantive and impeachment evidence at trial, and the inability of a plaintiff to reproduce or discover video evidence by another means, courts have routinely ordered the production of such video evidence after the deposition of the plaintiff has occurred. *See Harrington v. Atlantic Sounding Co., Inc.*, No. CV-06-2900, 2011 WL 6945185, at *1 (E.D.N.Y. Dec. 30, 2011) (and cases cited therein). As explained by the court in *Smith*:

> In a personal injury case, surveillance of the plaintiff can be a very important aspect of the defendant's case, if the surveillance tends to discredit the plaintiff's description of the extent and effects of his injuries. Obviously, surveillance evidence is gathered in anticipation of litigation and thus is generally protected as work product. *See, e.g., Wegner v. Cliff Viessman, Inc.,* 153 F.R.D. 154, 156 (N.D. Iowa 1994); *Snead v. American Export-Isbrandtsen Lines,* 59 F.R.D. 148,

> 150 (E.D. Penn. 1973). However, given the impact of surveillance evidence and its importance at trial, personal injury plaintiffs in general have a substantial need for any surveillance evidence when preparing their cases for trial. Moreover, the surveillance evidence, available only from the one who obtained it, "fixes information available at a particular time and place under particular circumstances, and therefore cannot be duplicated." *Wegner,* 153 F.R.D. at 159. Accordingly, because the substantial need/undue hardship requirements of Rule 26 for the discovery of work product materials is satisfied, the Court concludes that surveillance evidence is discoverable, its work product status notwithstanding. *Id.; see also Ward v. CSX Transportation, Inc.,* 161 F.R.D. 38, 40-41 (E.D.N.C. 1995) (while surveillance films are work product materials, they are discoverable under the Rule 26 substantial need/undue hardship standard); *accord Smith v. CSX Transportation, Inc.,* 1994 WL 762208 (E.D.N.C. 1994).

68 F.R.D. at 586.

Defendants state that in recognition of this caselaw, they produced the surveillance video to plaintiffs in an effort to prevent a discovery dispute. Nevertheless, defendants assert that plaintiffs are not entitled to the other materials related to the surveillance video. Plaintiffs contend that by voluntarily producing the surveillance video, defendants have waived the work product protection for all of the materials on the "same subject," *i.e.,* on all matters related to the surveillance.

Rule 502 of the Federal Rules of Evidence governs the issue of whether an intentional waiver by a party of a document protected by the attorney-client privilege or work-product doctrine constitutes a general subject matter waiver as to other similar documents:

> When the disclosure is made in a federal proceeding . . . and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal . . . proceeding only if:
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> (1) the waiver is intentional;
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> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
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> (3) they ought in fairness to be considered together.

Fed. R. Evid. 502(a).

There is no question that defendants voluntarily waived the work product protection for the surveillance video by intentionally disclosing the surveillance video to plaintiffs in discovery. Fed. R. Evid. 502(a)(1). The reports, notes, photographs, and other materials plaintiffs seek "concern the same subject matter" as the surveillance video already disclosed. Fed. R. Evid. 502(a)(2). The only remaining question is whether in fairness the undisclosed reports or materials should be disclosed. Fed. R. Evid. 502(a)(3).

The Advisory Committee Notes to Subdivision (a) of Rule 502 explain that "a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Advisory Committee Notes to the 2007 Amendments of Rule 502. "The idea is to limit subject matter waiver to situations in which the privilege holder seeks to use the disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials." 8 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2016.2 (3d ed., 2010 update).

Here, any photographic or audio information or materials taken in conjunction with the surveillance of plaintiffs and their family are similar to the video evidence already produced and should in fairness be disclosed to plaintiffs. Like video evidence, photographic or audio evidence is potentially subject to distortion or manipulation and may be misleading depending on the context in which it was produced or presented. *Smith*, 168 F.R.D. at 586-87. In fairness, plaintiffs should be given the opportunity to examine these materials to prevent the potential for selective and misleading presentation of the evidence. Fed. R. Evid. 502(a)(3).

However, defendants need not produce "all records; notes; bills; memorand[a], etc. that have been generated by all surveilors"; "[a]ll billing statements, referencing the dates and times that Deputy Roa and his family were surveilled and the cost"; and "any and all other aspects of the surveillance." (Doc. 19 at 2). Plaintiffs have not presented any legal authority demonstrating they are entitled to these documents or why in fairness they ought to be considered along with the video and photographic evidence. Fed. R. Evid. 502(a)(3). Aside from the waiver issue, much of this information is likely to contain opinion work product and reveal the thought processes of counsel or the investigator, which is entitled to near absolute protection. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294. To the extent such information constitutes non-opinion work product, plaintiffs have not demonstrated a substantial need for such evidence. Fed. R. Civ. P. 26(b)(3).

Plaintiffs' request for a deposition of the individuals who recorded the surveillance video is granted. While the work product doctrine protects both tangible and intangible things and documents, *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980) (citing *Hickman*, 329 U.S. at 511), it does not protect the disclosure of underlying facts, regardless of who obtained those facts. *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981). *See Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 628-31 (N.D. Okla. 2009) (and numerous cases cited therein). *See also Fresenius Medical Care Holdings, Inc. v. Roxane Laboratories, Inc.*, No. 2:05-cv-889, 2007 WL 543929, at *3 (S.D. Ohio Feb. 16, 2007) (to the extent documents contain strictly factual information, as opposed to legal conclusions or opinions, "that factual information cannot be immunized from discovery simply by incorporating it into a document which is entitled to work-product protection"). As noted by one court, "the observations of Defendant's investigators, as well as relevant information with respect to the mechanics of the surveillance,

are fair game for inquiry" in a deposition. *Papadakis v. CSX Transp., Inc.*, 233 F.R.D. 227, 229 (D. Mass. 2006). However, because a deposition of defendants' investigators may reveal counsel's tactical or strategic thoughts, deposition questions by opposing counsel must be carefully tailored to elicit specific factual information and "avoid broad based inquiries . . . which could lead to the disclosure of trial strategies." *Bear Republic Brewing Co. v. Central City Brewing Co.*, 275 F.R.D. 43, 45 (D. Mass. 2011) (internal citations and quotations omitted). While the Court will not limit the questioning to a so-called "records" deposition as requested by defendants, the Court cautions plaintiffs to carefully craft their deposition questions so as not to elicit "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

**IT IS SO ORDERED.**

Date: 2/24/14

Karen L. Litkovitz
United States Magistrate Judge

February 11, 2014

**Sent via e-mail only litkovitz_chambers@ohsd.uscourts.gov**
The Honorable Magistrate Judge Karen L. Litkovitz
United States District Court, Southern District of Ohio
Potter Stewart U.S. Courthouse
101 East Fifth Street
Cincinnati, Ohio 45202

Re: *Dennis Roa, et al. v. Darrell Tetrick, et al.*
Case No. 1:12-CV-379

Dear Magistrate Judge Litkovitz:

Please let this correspondence serve as the position statement of Defendants Darrell Tetrick and Commercial Transport, Inc. in advance of the informal discovery conference scheduled for February 12, 2014 at 2:30 pm.

Plaintiff Dennis Roa submitted for his deposition on October 1, 2013, and testified extensively as to how the alleged injuries caused by the subject accident have affected his life and resulted in disabling neck and back pain. Notwithstanding three (3) family vacations taken since the accident, Plaintiff described his typical day as waking up and trying to help with his children so his wife can go to work. However, more than half of the time, he does not get up and sometimes sleeps until mid-afternoon. Once his children leave for school, he sits at his computer and goes through photographs and, if he does not have a doctor's appointment, he might go back to bed. He describes his sleep as interrupted due to pain. Although Plaintiff returned to work after the accident for a significant period of time, he testified that he suffered from severe pain while on the job.

On December 23, 2013, Plaintiffs propounded their Second Set of Interrogatories, Request for Production of Documents, and Request for Admissions, regarding surveillance of Plaintiff Dennis Roa. On January 17, 2014, Defendants responded, and produced a DVD containing a video of multiple days of surveillance of Plaintiff Roa. The DVD contains videos of Plaintiff, taken between October 23, 2013 and November 9, 2013, which show Plaintiff running errands, getting in and out of his full-size pick-up truck, loading building materials into his truck at Home Depot, and assisting another motorist with a disabled vehicle, during which Plaintiff pushed the car, carried a bag of tools, and crawled underneath the car to assist in repairs. The DVD contains all of the unedited recordings of Plaintiff and fully encompasses all media containing surveillance of Plaintiff.

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As this Court is aware, the work product doctrine protects from discovery documents and tangible items that are prepared by or for an attorney in anticipation of litigation or for trial. Civ. R. 26(b)(3)(A). The surveillance videos, reports, and the investigative file are protected by the work product doctrine. *McCloskey v. White*, 2011 U.S. Dist. LEXIS 147090, *7 (N.D. Ohio); *Wightman v. Reassure America Life Ins. Co.*, 2006 U.S. Dist. LEXIS 101371, *6 (S.D. Ohio); *Snead v. American Expert-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 152 (1973 E.D. Pa.).

Although the Northern District of Ohio has held that the surveillance videos are not discoverable at all, *McCloskey*, 2011 U.S. Dist. LEXIS 147090, *10, other Federal cases hold that surveillance videos must be produced if they will be used at trial, even for impeachment purposes. However, disclosure need not occur until after the plaintiff's deposition. *Wightman*, 2006 U.S. Dist. LEXIS 101371, *6; *Papadakis v. CSX Trans., Inc.*, 233 F.R.D. 227, 229 (D. Mass. 2006.); *Snead*, 59 F.R.D. at 152. Therefore, and in an effort to avoid a discovery dispute, Defendants produced the requested video.

Plaintiffs, however, have insisted upon disclosure of the reports prepared for the undersigned by the investigators as well as the investigative and billing files of the investigators. Federal law is clear that such discovery is improper as the only materials that are discoverable are the surveillance videos. *Aboeid v. Saudi Arabian Airlines, Inc.*, 2012 U.S. Dist. LEXIS 119040, *8 (E.D. N.Y.); *Mealy v. Ryan Environ., Inc.*, 2009 U.S. Dist. LEXIS 21227, *7 (W.D. Pa.); *Papadakis*, 233 F.R.D. at 229.

In an attempt to resolve the issue, the undersigned requested supporting authority for Plaintiffs' position. The only authority provided are the cases which were also cited in Plaintiffs' Brief in Support (Doc. #19). However, **none** of those cases provide support for Plaintiffs' quest for the investigative and billing files. In *Snead*, the Court ordered the production of surveillance films after plaintiff's deposition, but noted that there was "no substantial need for plaintiff's counsel to be informed of the times, dates and results of the investigation". *Snead*, 59 F.R.D. at 152. In *Papadakis*, the Court held that the surveillance video was discoverable, but also specifically held that the reports were not. *Papadakis*, 233 F.R.D. at 228-29. In *Chiasson*, the only issue was the discoverability of the surveillance video. *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993). Finally, *Smith v. Chen*, 2013 Ohio 4931 (10th Dist.) is inapplicable as this Court is required to use Federal law to resolve work product claims, not state law. See, *In re Powerhouse Licensing*, 441 F. 3d 467, 472 (6th Cir. 2006). Nevertheless, it should be noted that in *Smith*, the dispute centered on the production of the videos themselves.

Additionally, Plaintiffs have advised the undersigned that they will subpoena the investigators for their depositions if they are not voluntarily produced by the undersigned. Although such depositions may be proper, the areas of inquiry must be very narrow. *Bear Republic Brewing Co. v. Central City Brewing Co.*, 275 F.R.D. 43, 45 (2011 Mass.) (at a deposition of an investigator, counsel must carefully tailor his questions so as to elicit factual material and avoid broad based inquiries, which could lead to the disclosure of trial strategies); *Papadakis*, 233 F.R.D. at 229 ("the observations of Defendant's investigators, as well as relevant information with respect to the mechanics of the surveillance, are fair game for inquiry.").

> Although a deposition of the investigator would not in itself be a document or tangible thing that falls within the precise definition of work-product, to permit a deposition of an investigator for the purpose of learning what the investigator put in his or her report to counsel would eviscerate the protection afforded to work-product and undermine the purpose of the doctrine, i.e. to protect the files and mental processes of attorneys preparing their cases.

*Aboeid*, 2012 U.S. Dist. LEXIS 119040, *8. Therefore, any such deposition of an investigator hired by the undersigned to prepare for trial would be essentially a records deposition. As such, Defendants request that a Protective Order be issued by the Court prior to any such depositions to specifically restrict the areas of inquiry to a records deposition.

Plaintiffs have been provided with all surveillance videos and Plaintiffs have not provided this Court with any legal authority demonstrating that they are entitled to additional information and documents from the investigators hired by the undersigned. Specifically, Plaintiffs have failed to provide any case law that they are entitled to documents and intangible information that is protected by the work product doctrine. None of the supposed bases for Plaintiffs' request for the documents and information, as set forth in the first paragraph of page two (2) of Plaintiffs' Brief in Support, are valid exceptions to the work product doctrine. Plaintiffs have provided no support for the proposition that they are entitled to invade the work-product privilege just because they have named the investigators as witnesses.

Lastly, if Plaintiff Dennis Roa wishes to testify as to how the videos are somehow misleading, untrue, or inaccurate, he is certainly able to do so. Mr. Roa has, and presumably will, testify how the accident affected his life. Such possible testimony by the Plaintiff does not entitle him to discovery of documents and information that are protected by the work product doctrine. "A party can be assumed to have knowledge of his own capabilities without engaging in discovery on the subject." *Day v. Hill*, 2007 U.S. Dist. LEXIS 48626, *10 (N.D. Indiana).

Should you have any questions, please feel free to contact me. Thank you for your attention to this matter.

Very truly yours,

JURCA & LASHUK, LLC

Jeffrey J. Jurca

JJJ:tcs
cc: Jeffrey S. Bakst, Esq.