

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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|-------------------------------|---|---------------------------|
| SARAH DYE, |) | |
| DOUGLAS MACKEY, |) | |
| SCHOONER CREEK FARM, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | No. 1:20-cv-00518-RLY-DML |
| |) | |
| CITY OF BLOOMINGTON, INDIANA, |) | |
| MARCIA VELDMAN, |) | |
| PAULA MCDEVITT, |) | |
| JOHN HAMILTON, |) | |
| |) | |
| Defendants. |) | |

Order on Defendants' Motion to Compel (Dkt. 70)

The defendants (collectively, "Bloomington" or the "City") move to compel the plaintiffs (collectively, "Schooner Creek")¹ to produce information about money and cryptocurrency any of the plaintiffs received from soliciting funds via Schooner Creek's website and Facebook page, a GoFundMe campaign, and/or television interviews. Schooner Creek filed an opposition to the motion to compel; the City did not file a reply brief.

The court first describes the claims in this case, sets forth the parties' contentions about their discovery disputes, and then resolves them. The court's decision is guided by Fed. R. Civ. P. 26(b)(1), which permits the discovery of nonprivileged matter "that is relevant" to a party's claim or defense and

¹ Defendant Schooner Creek Farm is an unincorporated business association owned and managed by the individual plaintiffs, Sarah Dye and Douglas Mackey.

"proportional" to the needs of the case, considering the importance of the issues at stake, the importance of the discovery in resolving those issues, the amount in controversy, and the weighing of burdens and benefits. *See* Rule 26(b)(1).

Analysis

I. The plaintiffs seek damages for alleged violations of their rights under the First and Fourteenth Amendment.

This description of the litigation is derived from the complaint and other filings. These are not binding factual findings but are provided to give context to the discovery dispute.

Schooner Creek is engaged in farming, mostly growing vegetables such as snap peas, cucumbers, and sweet potatoes. For years, it has rented vendor space at the City of Bloomington's summer weekends' Farmers' Market. In May 2019, rumors began swirling on social media that Schooner Creek through the individual plaintiffs (and perhaps any others connected with the business) was a Nazi and white supremacist sympathizer organization. At the June 8, 2019 market day, some persons began protesting in front of Schooner Creek's vendor space and urged persons to boycott the business. The following week, the City's mayor issued a statement that the City was aware of allegations that a market vendor had white supremacist affiliations and would not tolerate vendor displays or behaviors that threaten the market's welcoming environment, but it would respect the First Amendment's prohibitions against government restrictions on people's rights to speak and believe as they choose. The City also published its "Clarification of Long-standing Rules of Behavior" for the market; its "time, place, and manner" rules

which create a "free speech" zone at the market and prohibit, *inter alia*, speech interrupting the commerce of the market. Over the ensuing market weekends, opponents and supporters of Schooner Creek's alleged white supremacist beliefs took additional action to make their voices heard, and there was some unruliness at the market. The City closed the market for two weeks and in connection with announcing the closure, the mayor issued a statement "condemning connections to white supremacy in our market." Upon the market's reopening, protesters gathered in front of Schooner Creek's vendor space; they wore t-shirts that read "Boycott Schooner Creek – Defund White Supremacy."

Schooner Creek's complaint alleges that the City took additional actions in policing the market to punish it for its alleged beliefs and to favor persons protesting Schooner Creek and interfering with its business. It alleges that the City is liable under 42 U.S.C. § 1983 for violating its First Amendment free speech and association rights and Fourteenth Amendment due process rights. Schooner Creek seeks compensatory damages, including compensation for financial losses to the business, and it seeks attorneys' fees under 42 U.S.C. § 1988, the statute allowing recovery of attorneys' fees to a prevailing party in a Section 1983 suit.

In connection with and after filing suit against the City, Schooner Creek sought to raise funds for litigation. It solicited funds through the business's website and Facebook page and via a GoFundMe drive. In addition, plaintiff Sarah Dye was interviewed at least twice on "Red Ice TV," which apparently is known as a white nationalist, far-right media company. During the second interview, she expressed

gratitude for the support Schooner Creek had received after the first interview, including financial donations.

II. The City requested documents about funds solicitations and receipts.

Five document requests by the City to Schooner Creek seek information about the receipt of funds from solicitations made by Schooner Creek related to this litigation. They are:

Request No. 44, seeking all documents reflecting the identity of accounts into which contributions to the plaintiffs' legal defense fund have been deposited.

Request No. 45, seeking all documents reflecting monthly expenditures to and from the legal defense fund.

Request No. 48, seeking all documents showing contributions to any GoFundMe account initiated for monetary support to the plaintiffs in 2019 and 2020.

Request No. 49, seeking all documents from individuals, groups, and organizations that provided monetary support to the plaintiffs in 2019 and 2020.

Request No. 51, seeking all documents reflecting money, including in the form of cryptocurrency, received as a result of the plaintiffs' "Fighting for our Rights" fundraising.

The City contends this discovery is relevant to their defense to the plaintiffs' damages theory. It seeks this information to establish that Schooner Creek did not lose money as a result of the City's alleged actions (even if found to have violated the plaintiffs' constitutional rights) but used and amplified the City's actions to raise money, resulting in Schooner Creek's having profited and perhaps even made more money than it allegedly lost. Relatedly, the City also contends that attorneys' fees under Section 1988 should not be awardable to the plaintiffs because the fees

have been paid via the donations; allowing recovery of fees would result in an underserved windfall, the City contends.

Schooner Creek objected to all of these discovery requests on the grounds that the information is not relevant and is protected from disclosure by the attorney-client privilege. The privilege assertion is based on Schooner Creek's representation that all of the solicited funds were earmarked to pay the plaintiffs' legal fees and that purpose imbues information about the funds with the privilege. In its response to the City's motion to compel, Schooner Creek provided an affidavit from Ms. Dye that all money that was contributed to Schooner Creek via GoFundMe, the website and Facebook pages, and as a result of the television interviews "has gone solely towards financing this lawsuit." *See* Dkt. 72-1, ¶ 6. It also explained that its relevance objection is grounded in the collateral source doctrine. It abandoned any argument that the attorney-client privilege applies, and the court does not address that contention.

As noted at the outset, the City did not file a reply brief.

III. The collateral source doctrine makes the City's discovery requests irrelevant.

Schooner Creek's response brief relies on the collateral source doctrine and a separate contention that third-party funding of litigation is generally not discoverable. As explained below, the court agrees that the collateral source doctrine applies; it need not address in any detail Schooner Creek's cases about the

discoverability of third-party litigation funding information.² The City's only relevance argument—that the funding information affects the plaintiffs' damages and attorneys' fees recovery—directly implicates the collateral source doctrine.

The collateral source doctrine is a common law rule though it is codified in many states. Because the claims in this case mainly implicate federal constitutional law and there is no federal collateral source statute, the common law rule applies. As the Seventh Circuit stated in *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986), the collateral source rule "applies to § 1983 actions." *Id.* at 286.

The purpose of the rule is to prevent a tortfeasor from paying twice, but it is *not* to prevent a plaintiff from being overcompensated. *Id.* Thus, a defendant who caused injury to the plaintiff is not permitted to benefit from payments the plaintiff also receives for those injuries from a source that did not cause the injuries. *Id.* (police department that wrongfully terminated the plaintiff's employment not permitted to offset unemployment benefits the plaintiff received from state program). The doctrine has been applied in other cases brought under federal law,

² Schooner Creek provides a string cite of eight cases (without parenthetical information) for the proposition that "courts across multiple jurisdictions have held that third party funding information is not automatically discoverable." Dkt. 72 at p. 5. None of these cases implicates the collateral source rule. Instead, they all generally espouse a non-controversial stance that third-party lawsuit funding information is proportional discovery only if a non-speculative argument for its relevance is made, such as that the third-party funder will be a testifying witness and the information is relevant to bias or that the third party is funding class action litigation and there is evidence that the plaintiff has outsourced strategic decision making to the funder, thus making the plaintiff and its counsel inadequate class representatives. The City has not made any argument that the funds information it seeks relates to anything other than its damages mitigation and "windfall" theories.

consistently on the same basis—that a defendant is not entitled to the benefit of collateral payments and is responsible for all injuries it caused. *See ADM Investor Services, Inc. v. Collins*, 515 F.3d 753, 755 (7th Cir. 2008) (fact that plaintiff receives reimbursement or payment from a third party (which did not contribute to its injuries) for all or part of the injuries the plaintiff incurred because of the defendant's conduct "does not disable the injured person" from recovering all of the damages caused by the defendant); *Thomas v. Shelton*, 740 F.2d 478, 484 (7th Cir. 1984) (plaintiff's damages are not reduced "merely because all or part of his loss" was covered by a third-party source). *See also Sethy v. Alameda County Water Distr.*, 602 F.2d 894, 897 (9th Cir. 1979) (rejecting argument that recovery of attorneys' fees under Section 1988 should be denied on ground that recovery results in a "windfall" to the plaintiff); *Restatement (Second) of Torts* §920A and comment b (benefits or payments conferred on plaintiff by sources other than tortfeasor "do not have the effect of reducing recovery against the defendant").

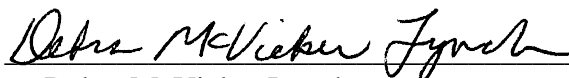
The court thus rejects the City's argument that the funding documentation it seeks will assist it to show either that the plaintiffs did not suffer as great of financial losses to their farming business as they may claim or that they have not personally "incurred" or paid legal fees. Because the City is not entitled to the benefit of any "windfall" the plaintiffs may have gained because third parties paid them money or other benefits that cover some or all of the monetary relief they seek from the City, their discovery requests are not relevant for the purposes they seek the information.

Conclusion

For the foregoing reasons, the City's motion (Dkt. 70) to compel is DENIED.

So ORDERED.

Dated: July 9, 2021



Debra McVicker Lynch
United States Magistrate Judge
Southern District of Indiana

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