

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JANICE A. ST. GERMAIN, :
Plaintiff, :
 :
v. : C.A. No. 12-113S
 :
UNITED STATES OF AMERICA, :
Defendant. :

MEMORANDUM AND ORDER

The Plaintiff in this medical malpractice case seeks the discovery of cancer screening policies and information regarding every medical malpractice lawsuit filed against Thundermist Health Center since 2000. The resulting Motion to Compel More Responsive Answers to Interrogatories and Document Production (ECF No. 12) implicates Rule 26(b)(1), which limits the scope of what is discoverable. The Motion is before the Court for determination. 28 U.S.C. § 636(b)(1)(A), DRI LR Cv 72(a). A hearing on the Motion was held on February 14, 2013.

As with any motion under Rule 26(b)(1), the inquiry must begin with Plaintiff's claims and Defendant's defenses. In this case, they are simple: Plaintiff Janice A. St. Germain's claim boils down to whether the failure of her primary care provider, Thundermist Health Center ("Thundermist"), to refer her for colorectal screening in accord with its own policy caused her rectal cancer to go undetected until it had reached Stage IV. Plaintiff became a primary care patient at Thundermist in 2000, shortly after she turned fifty. Despite Thundermist's policy, which recommends screening for colorectal cancer beginning at age fifty, Plaintiff claims – and her medical records do not contradict her – that she was never advised about any form of colorectal screening until late 2009; ultimately, her Stage IV rectal cancer was diagnosed by colonoscopy in 2010. Also pertinent to the scope of permissible discovery in the case is the

factual dispute regarding whether Plaintiff's primary treating physician advised her of the need for screening, but failed to note the advice in her medical record, despite making notations about recommendations that Plaintiff be screened for other cancers, such as breast cancer. Since Thundermist is a federally-supported health center, see 42 U.S.C. § 233(g), Plaintiff sued the United States as Defendant pursuant to the Federal Tort Claims Act ("FTCA"). See 28 U.S.C. § 2671, et seq.

The parties have commendably followed the letter and spirit of Rule 37(a)(1) and resolved most of their discovery disputes without court involvement. Two sticking points remain, each turning on the scope of permissible discovery under Rule 26(b)(1). First, in Interrogatory No. 8 and Document Request No. 2, Plaintiff seeks the identification and production of all Thundermist's cancer screening policies¹ from 2000 to the present, not just the colorectal cancer policy that Defendant has already produced. Second, Interrogatory No. 9 demands the identification of all lawsuits or claims against Thundermist that allege medical negligence from 2000 to 2012, even if the suits have nothing to do with referral for colonoscopies or other cancer screening. Plaintiff is unsatisfied with Defendant's current response, which certifies "there were no lawsuits or claims made against Thundermist pertaining to failure to order colonoscopies for rectal and colon cancer." See ECF No. 12 at 4.

I pause to focus on the operative procedural Rule. Since the 2000 amendment of Rule 26(b)(1), the "claims" and "defenses" are the touchstone of what is discoverable: "the scope of discovery is as follows: Parties may obtain discovery regarding any . . . matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The amendment deleted the loosely

¹ Through inadvertence, Plaintiff's Interrogatory actually asks only about three of the four cancers for which routine screening is recommended. She names breast, prostate and colon cancer, but omits cervical cancer. In the interest of efficiency, this omission is disregarded. The discovery is analyzed as if all four were the subject of the inquiry as clearly was the intent.

written “subject matter” version of the Rule, which had spawned generations of unwieldy litigation bogged down by the sheer volume of material with some bearing on the “subject matter.” Fed. R. Civ. P. 26(b)(1) advisory committee’s note (2000); see In re Subpoena to Witzel, 531 F.3d 113, 118 (1st Cir. 2008). Since the amendment, courts must more actively regulate the breadth of sweeping or contentious discovery to reduce the expense of litigation without interfering with the fair resolution of disputes. Id. Information relevant to claims and defenses is discoverable so long as it appears reasonably calculated to lead to the discovery of admissible evidence. Id. A party seeking broader discovery “of any matter relevant to the subject matter” of the action must now show good cause. Id. Whether discovery is relevant to a claim or defense is a fact-specific inquiry that depends on the specific circumstances of the case. Dees v. Hyundai Motor Mfg. Ala., LLC, 524 F. Supp. 2d 1348, 1350 (M.D. Ala. 2007); In re PE Corp. Sec. Litig., 221 F.R.D. 20, 23 (D. Conn. 2003). The Court has broad discretion to determine relevance and tailor discovery appropriately. Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Dees, 524 F. Supp. 2d at 1350.

With this guidance and with laser focus on the claims and defenses in this case, I return to the requests.

Request for Cancer Screening Policies. Unhappy with Thundermist’s colorectal screening policy, Plaintiff says she needs Thundermist’s screening policies on other cancers because Thundermist’s general screening policy might be triangulated from the specific policies. The Court has reviewed Thundermist’s Policy on Colorectal Cancer Screening Guidelines and Standing Orders for Colorectal Screening already produced, (ECF No. 14-1 at 6-8); they contain no general cancer screening policies and are specific to colorectal cancer. If the screening policies for the other cancers are similar, they have no relevance to the parties’ claims or

defenses because the suit is based solely and specifically on colorectal cancer screening. See Gautieri v. United States, 167 F. Supp. 2d 207, 209 (D.R.I. 2001) (in FTCA actions brought in Rhode Island, the standard of care is a reasonably competent practitioner acting in the same or similar circumstances).

Plaintiff has glibly stated that all of Thundermist's cancer screening is relevant, but she has made no showing that the standard of care for the screening of breast, cervical and prostate cancer is similar enough to screening for colorectal cancer to be relevant to the parties' claims and defenses. Under these circumstances, Plaintiff has not met her burden to demonstrate relevance to any claim or defense. See Caouette v. OfficeMax, Inc., 352 F. Supp. 2d 134, 136 (D.N.H. 2005) (party moving to compel must show relevance to claim or defense). Nor has Plaintiff argued that good cause exists to broaden the scope of discovery; even if Plaintiff tried, injecting irrelevant discovery into the case would subject Defendant to the annoyance and unnecessary expense of answering questions that are tangentially related at best and very likely to confuse the issues. See Fed. R. Civ. P. 26(c)(1); see also In re Subpoena to Witzel, 531 F.3d at 118 (court not required to address whether discovery is relevant to subject matter when party does not argue good cause and it is not apparent from the record).

On the other hand, Plaintiff has clearly established the Rule 26(b)(1) relevance of Thundermist's general cancer screening policies. Therefore, Thundermist is ordered to turn over any policy in the relevant time period that is related to the general topic of cancer screening. If a specific policy about screening for, say, breast cancer, has a preamble that is focused on cancer screening in general, it must be provided.

Plaintiff has also drawn a clear link between her claim and any policies related to the duty of the provider to document in the medical record any discussion of cancer screening with the

patient. The evidence establishes that Plaintiff's medical record reflects when she was advised about screening for other cancers because a note was made in her record. Thundermist appears to contend that she may have been advised about colorectal screening yet no note was made. This expands the scope of what is relevant to the parties' claims and defenses to include any policy related to documentation of communications with patients regarding medical advice, including not only a general policy, but also one specifically addressing the need to document that a patient was advised of the need for cancer screening, either in general or with respect to any specific cancer. Such policies, if they exist, must be produced.

Request for All Lawsuits Asserting Medical Malpractice Claims. Plaintiff seeks the identification of all suits against Thundermist since 2000 that allege medical negligence.² Plaintiff says the suits might show Thundermist was on notice about inadequate cancer testing and screening. The United States narrowly responds by asserting that Thundermist has never been sued for the failure to order a colonoscopy to screen for rectal or colon cancer. Plaintiff is right that Defendant's response to Interrogatory No. 9 is too narrow – the Court will order Defendant to identify suits against Thundermist (if any) that involve any form of screening for colorectal cancer. See Fed. R. Civ. P. 26(b)(1) advisory committee's note 2000 ("other incidents of the same type" can be relevant to a claim or defense and are therefore properly discoverable). The balance of Plaintiff's request strays too far from the claim asserted in the Complaint.

"Discovery of other lawsuits is not a subject that is amenable to a per se rule." Kormos v. Sportsstuff, Inc., No. 06-CV-15391, 2007 WL 2571969, at *2 (E.D. Mich. Sept. 4, 2007); see also Brown v. Sun Healthcare Grp. Inc., No. 06-CV-240, 2007 WL 2963951, at *4 (E.D. Tenn. Oct. 9, 2007). Considerations include the nature of the claims, the time the events took place,

² Plaintiff expressed the willingness to narrow her request from all medical negligence lawsuits filed against Thundermist to those filed in this District. In light of the disposition of her Motion, this stricture is not necessary.

and the precise involvement of the parties, among other considerations. Kormos, 2007 WL 2571969, at *2 (citing Payne v. Howard, 75 F.R.D. 465, 469 (D.D.C. 1977)).

Here, the request for every medical malpractice claim is an example of the much maligned fishing expedition that did in the “subject matter” standard in pre-2000 Rule 26(b)(1). Plaintiff has not shown any similarity between her suit and the standard of care for the medical treatments at issue in other suits. The Court is left to speculate about what information relevant to these claims conceivably might be uncovered. See Sanchez ex rel. D.R.-S. v. United States, 671 F.3d 86, 99 (1st Cir. 2012) (district court well within its discretion in refusal to allow a “fishing expedition” by granting the plaintiffs’ “inherently speculative” discovery request). Even assuming (without deciding) that other negligence suits against Thundermist are discoverable within the broader bandwidth of relevancy to the subject matter, Plaintiff has not shown good cause to require their disclosure. See Fed. R. Civ. P. 26(b)(1).

A separate reason for declining to order discovery of lawsuits beyond the narrow set plainly relevant to these claims is that the information is in the public sphere, where Plaintiff can access it and make her own judgment regarding what is useful. Plaintiff complains that public availability is ersatz where she cannot identify suits against Thundermist because the United States is the defendant in FTCA actions and suits against the United States are too numerous to search. One of the luxuries of the federal court, however, is the ease of searching court filings in PACER by party and type of case. Suits against Thundermist filed in this District can just as easily be identified by Plaintiff as Defendant. “It is well established that discovery need not be required of documents of public record which are equally accessible to all parties.” Kormos, 2007 WL 2571969, at *2 (quoting SEC v. Sloan & Co., 369 F. Supp. 994, 995 (S.D.N.Y. 1973)); see also Brown, 2007 WL 2963951, at *4. Plaintiff cannot show good cause when a few hours

of searching public documents on PACER will achieve the result she seeks. Cf. Kormos, 2007 WL 2571969, at *2 (requesting party can pursue publicly-filed documents requested in discovery on its own when identifying information available).

Based on the foregoing, Plaintiff's Motion is granted in part and denied in part as follows:

- a. Plaintiff's Interrogatory No. 8 and Document Request No. 2.
 - i. Defendant shall identify and produce any protocols or guidelines from 2000 to the present used at Thundermist that address: (1) cancer screening or early cancer detection generally, and (2) documentation or recording of advice to or discussions with patients regarding cancer screening generally or for specific cancers.
 - ii. Defendant is not required to identify and produce screening protocols or guidelines that are specific to cervical, breast or prostate cancer, except to the extent that such documents are covered by item (i) above.
- b. Plaintiff's Interrogatory No. 9.
 - i. Defendant shall identify all lawsuits brought from 2000 to 2012 against Thundermist that allege negligent provision of medical care arising from the failure to refer patients for any form of screening for colorectal cancer.

In light of these parties' history of cooperation, I leave to them the establishment of a deadline for the discovery that is the subject of this Order.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 21, 2013