IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAY J. SCHINDLER, M.D.,

Plaintiff,

v.

MARSHFIELD CLINIC,

Defendant.

ORDER

05-C-705-C

One multipart discovery motion (plaintiff's motion to compel, dkt. 226, sealed) needs court action on the residual disputes. Defendant's motion to compel expert depositions (dkt. 229) is moot, having been resolved by the parties after the court changed the calendar. Also under advisal is defendant's request for expenses on a previous discovery motion (dkt. 260).

For reasons stated below, I am denying all remaining portions of plaintiff's motion to compel. I am partially shifting costs on this motion. I also am requiring plaintiff to pay $5000 of defendant's costs on its motion to strike plaintiff's expert. I will begin with this last issue:

Dkt. 260: Defendant's Request for Expenses

As a result of plaintiff's failure to answer defendant's damages interrogatory and his abysmal initial expert report on economic losses, I shifted defendant's motion costs to plaintiff pursuant to F.R. Civ. Pro. 37(a)(4). *See* dkt. 248 at 7. Defendant submitted an itemized bill claiming 19.9 hours of work at a rate of between $255/ hr. and $370/hr., plus $256.81 in computer research charges for a total of $5,779.81. *See* dkt. 260. Plaintiff responds by seeking reconsideration, then argues as a fallback that because the court granted defendant only partial

relief on its motion, only partial cost-shifting is justified. One of plaintiff's main points is that he did not willfully violate any discovery rule or court order. *See* dkt. 264. This is correct: plaintiff has demonstrated gross negligence in his discovery management but his missteps were not willful.

This, however, misses the point: Rule 37(a)(4) is a fee-shifting rule, not a sanction for being wrong or acting willfully. The "operative principle" of Rule 37(a)(4) is that "the loser pays," *Rickels v. City of South Bend, Ind.*, 33 F.3d 785, 786, 787 (7th Cir. 1994); *see also In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 320, 330 (N.D. Ill. 2005). As noted in my earlier order, plaintiff has played fast and loose with his obligations, he has violated the spirit of Rule 26(a)(2) and this court's previous orders, and he only escaped having his expert's report completely stricken by lucky timing coupled with this court's unrelated *sua sponte* decision to push back the trial date. Plaintiff still does not realize how close this court came to striking Dr. Seaman's testimony in its entirety due to plaintiff's failure to provide useful information in a timely fashion.

Having reconsidered my earlier order on cost shifting, I conclude that plaintiff still is the "loser" on this motion. As I stated in my earlier order:

> Plaintiff violated Rule 37(a)(2)(B) by failing ever to answer defendants' Interrogatory No. 10; then on the last day to disclose experts, plaintiff foisted on defendants a useless shell of a damages calculation. With time running very short, defendants not only were justified to file their motion to strike, they almost were compelled to do so in order to protect their rights at trial. The make-whole philosophy undergirding Rule 37(a)(4) militates toward shifting onto plaintiff the costs of defendants' motion to strike. Plaintiff ordinarily would not be

> responsible for defendants' second brief (because the court's standing order does not allow reply briefs), but he fashioned his response a "cross motion for fees and costs" that required a response from defendants. So plaintiff will have to reimburse defendants for this work as well.

Dkt. 248 At 7.

Plaintiff correctly observes that in some cases, a split decision on a discovery motion results in a partial payment of costs or the court declaring each side responsible for its own costs. But this is not one of those cases and this was not one of those motions. Plaintiff continually has aggravated the opposition and tested this court's patience by flouting rules, procedures and deadlines.[1]

Having reviewed defendant's itemized bill, I am rounding it down to $5000, which is the upper limit of the court's notion of what would be reasonable under the circumstances. Plaintiff and his attorney are jointly and severally responsible to pay $5000 to defendant's attorneys within 30 days, namely by April 25, 2007.

Dkt. 226: Plaintiff's Motion To Compel

At the court's request, the parties have reported which discovery disputes still require court resolution. *See* dkt. 263 at 4. I address these disputes in the order the parties listed them:

[1] That said, I intend to shift only part of the costs of the instant motion onto plaintiff because some of the positions he took on the discovery disputes were substantially justified.

(1) Risk management and patient care information

Plaintiff asserts that he still does not have all the documents to which he is entitled pursuant to his March RFP Nos. 3, 4, & 8, and his June RFP Nos. 24, 30, 31 and 33. Defendant disagrees, repeatedly claiming that

> Dr. Schindler has every piece of paper submitted to, considered by, and prepared by the Professional Review and Executive Committees in connection with his professional review. There is nothing else to provide.

Brief in Opposition, dkt. 238 (sealed) at 28.

More specifically, defendant argues that it already had met all its obligations to disclose the information provided to the PRC regarding patients M.J., R.S., W.K. and T.S., which is what plaintiff actually asked for in his RFPs; even so, defendant has provided copies of complete medical records to take this non-issue off the table, without conceding any obligation to do so. Duly noted.

Defendant, however, will *not* produce the complete medical records of the "other six" patients on the list of ten provided to the PRC and EC because neither the PRC nor the EC relied on plaintiff's treatment of any of these six patients as a basis to terminate plaintiff. I conclude that these medical files are irrelevant, and that producing them would raise unnecessarily confidentiality concerns and would create an unnecessary production burden on defendant. Therefore, defendant need not produce them.

Defendant then distinguishes between the Risk Management files *generated* for patients M.J., R.S., W.K. and T.S. and the information *actually provided* to the PRC and the EC, which

is what plaintiff actually requested in his RFPs. According to defendant, only a list of ten cases involving plaintiff actually was provided to either committee, and plaintiff has that list. Therefore, claims defendant, it has no other disclosure obligations under plaintiff's March RFPs, and plaintiff's motion to compel is an attempt to bootstrap separate risk management investigations into his professional review. According to defendant, although its risk management attorneys and personnel may have investigated and evaluated these cases, the information so generated never was provided to the PRC or the EC. Therefore, this information is irrelevant to plaintiff's contract claim and is not discoverable.

Plaintiff disagrees, claiming that defendant's own risk management lawyer (Attorney Sandefort) stated that around December 2, 2003, Dr. Liss asked for, and Sandefort provided information regarding all incidents involving plaintiff that had been reported to the RMC. But there is no reason to conclude that Sandefort is referring to anything beyond the list of ten patients that defendant contends is the only document provided to the PRC and the EC. The issue at trial will be what the PRC and the EC actually had at their disposal and considered when disciplining plaintiff. I am satisfied that defendant has met its discovery obligations in this regard. Therefore the court will not require further disclosures by defendant.

In light of this, there is no need to explore the parties' disagreement about whether any privilege protects the requested documents.

(2) All polices and procedures requested by plaintiff

Plaintiff contends that defendant has not sufficiently responded to his June RFP Nos. 29, 38, 41 and 44, which deal with how defendant monitors and evaluates physician performance, and with defendant's policies and procedures for disciplining and terminating physicians. Specifically, plaintiff complains that defendant has failed to produce all of its policies and procedures related to its "Risk Management function" except for "a two-page incident report form used for insurance purposes, and alleged to be a relevant 'policy.'" Plaintiff complains that defendant also has failed to provide any documents relating to quality assurance and evaluation of physician performance. Mem. in Support, dkt. 227 (sealed) at 22, 26. Plaintiff contends that all information provided to or generated by the Risk Management team is discoverable, even if this information was not conveyed to the PRC or the EC.

Defendant responds that it has not held anything back: the two-page document is defendant's only written policy on risk management. Defendant's explanation as to why this is so is logical. Plaintiff's dismissive disbelief in response is mere editorializing.

Also contrary to plaintiff's assertion, defendant had produced these documents:

> Professional Review Action Policy
> Corrective Action Policy
> Policy for the Associate Evaluation Process
> Incident Reporting Policy
> Bylaws.

According to defendant, there simply isn't anything else to disclose. Duly noted. The court will not order any further disclosures from defendant on this point.

(3) All documents and information requested by Plaintiff involving other ("comparison") physician employees at Marshfield Clinic.

In his March RFP Nos. 20 and 21, plaintiff seeks disclosure of all documents indicating infection rates and blood loss data from all surgeries performed at the Clinic by neurosurgeons from January 1, 2001 to the present. Defendant provided a small amount of information on blood loss rates for two other neurosurgeons but otherwise deems the requested information irrelevant. Plaintiff argues that this information is relevant because it pertains to: the terms in his Agreement regarding "good cause" and "other misconduct"; how defendant generally evaluates and monitors physician work performance, competency and patient care; defendant's procedures or criteria for disciplining or firing employees; and to defendant's written policies regarding peer investigations, discipline and termination. Dkt. 227 (sealed) at 228.

In his June RFP Nos. 25, 34-37, 52-53 and Interrogatory 4, plaintiff names other surgeons by name and asks for all risk management information, patient comments, complaints, criticisms, *etc.*, about them; he also asks why four of them were not fired or disciplined after lawsuits, patient deaths and complications. Plaintiff cites to employment discrimination lawsuits to establish that he is entitled to compare his treatment at defendant's hands to that of similarly situated individuals. To prove that his peer review was a sham, plaintiff wishes to prove that the PRC and EC treated him much worse that other neurosurgeons whose performance was as bad as or worse than his.

Defendant opposes production of any responsive information on grounds of relevance, confidentiality, and trial efficiency. As a starting point, defendant observes, that this is not an

employment discrimination lawsuit, it is an employment contract lawsuit governed by contract law, not Title VII. In any event, defendant points out that the surgeons identified by plaintiff are not comparable to him: all of them are "directors," not "associates" like plaintiff, and therefore are subject to different policies and contractual requirements. Therefore, even if evidence about "similarly situated" neurosurgeons at the Clinic were relevant, there actually aren't any to whom plaintiff accurately could compare himself. Similarly, argues defendant, state law provides that defendant's termination decision cannot be overturned unless it is arbitrary, capricious, or based on an improper motive. Given this broad deference, it becomes that much harder to compare the defendant's treatment of one surgeon's to its treatment of another. This is particularly true when evaluating the quality of surgical care: defendant contends that nothing short of expert testimony vetted under *Daubert* would allow the court–or the jury–to determine whether plaintiff's situation actually was comparable to another surgeon's. Segueing from this point is the question of how to determine *procedural* comparability: what did the defendant know about a particular surgeon, when did it know it, how appropriate was its response, and how comparable was this response to defendant's treatment of plaintiff?

Also, argues defendant, peer review proceedings are supposed to be confidential, and cites state law to that effect. Such confidentiality frequently would be compromised if any former who sued over the procedures employed in his termination could review his former colleagues' performance evaluations, disciplinary proceedings, and similar documents.

In reply, plaintiff clearly spells out his point:

> [this evidence] will demonstrate . . . that physicians who have faced complications and related events far more serious than those alleged with respect to Dr. Schindler, and have not been subjected to peer review. Such disclosures go directly . . . to the decision making criteria and workplace standards applicable to the termination of a physician for good cause and/or other misconduct (the core of the breach of contract claim.)

Plaintiff's Reply, dkt. 246 (sealed), at 10.

There is some surface logic to plaintiff's argument, but this isn't enough to get him what he wants. First, his requests are much too sweeping and inclusive. As is his habit, plaintiff has overreached in his discovery demands rather than tailored his requests to the information most relevant and least burdensome to produce. Second, any attempt at comparing neurosurgeon performance and discipline is almost completely irrelevant, confusing and a waste of time because the issue at trial is not whether defendant had good cause to discipline other neurosurgeons, it is whether defendant had good cause to discipline plaintiff.

That said, perhaps there is room to impeach defendant's definition of "good cause" as applied to defendant. But to the extent that the comparisons plaintiff wishes to draw might call into question whether defendant acted in good faith toward plaintiff, this potential relevance is substantially outweighed by daunting substantive and procedural qualifiers that more likely will render this evidence irrelevant at trial. Attempting to compare plaintiff's surgical decisions, performance, outcomes and his subsequent interaction with defendant's PRC and EC, to the decisions, performance, outcomes and interactions of other surgeons would be tortuously complex to the point of being unresolvable. Who's to say how comparable plaintiff's treatment

of one specific patient is to a different neurosurgeon's treatment of a different patient, or whether defendant's response to this alleged difference is based on valid or invalid criteria? Only experts are qualified to answer such questions and the experts already have disclosed their opinions. Perhaps this evidence might have been discoverable if plaintiff's liability experts actually had needed it to draw their conclusions and offer their opinions, but that is not the posture of the instant motion to compel.

Having carefully considered all of the arguments presented by both sides, I conclude that under the circumstances, this evidence is not discoverable.

(4) All documents and information requested by Plaintiff concerning complaints, policies and other information relating to Marshfield Clinic's Ambulatory Surgery Center (ASC).

In his June RFP Nos. 50-51 plaintiff demanded production of all documents describing, explaining or referring to any of defendant's policies, protocols, procedures and/or guidelines pertaining to the ASC, as well as any staff or patient complaints about, or other documents referencing staff or patient concerns about the ASC. Plaintiff claims this information is relevant to his breach of contract claim because: he and other people complained about the ASC; therefore, this evidence might show that his contract problems were payback for rocking the boat; these documents "pertain to the issue of how Defendants evaluate and monitor work performance, physician competency, and quality of patient care (particularly at the ASC);" and they "pertain to the written policies or other directives which Defendants have in place with respect to peer investigations, discipline and termination." Dkt. 227 (sealed) at 38. In his reply

brief, plaintiff is more direct, asserting that these documents will show that his complaints about the ASC generated "political animosity" against him, which was one reason for his termination. Dkt. 246 at 24. Plaintiff offers no other argument in support of these speculative assertions; apparently his view is that he may obtain swaths of irrelevant information merely to see if any of it might support his hunch about a secondary (or tertiary) agenda against him.

Defendant responds that "Dr. Schindler's argument that these documents are relevant does not make any sense." Dkt. 238 (sealed) at 33. Defendant is correct. These issues are 100% irrelevant to plaintiff's contract claim, and his cursory arguments to the contrary are a waste of time for all concerned. Plaintiff should have abandoned his claim for this unnecessary discovery when the parties met and conferred after the court's summary judgment ruling.

(5) Answer to Plaintiff's June [Requests for] Admissions

As defendant observes, when plaintiff first filed his 150 requests for admission, all of the defendants involved filed a motion for a protective order. The issue was stayed pending a decision on the HCQIA immunity order. Plaintiff renews his request; defendant has cut and pasted its first opposition arguments into its renewed opposition.

Defendant was correct before and remains correct now. Plaintiff has brainstormed a large batch of RFAs veined with scurrilous assertions and confidential information, including the names of patients who were not part of defendant's employment action against plaintiff. It is difficult to believe that an attorney qualified to litigate a federal civil lawsuit of this scope and nature would have signed off on this mess. Such palpable overreaching need not be dignified

with defense responses to *any* of plaintiff's RFAs. The taint imbuing plaintiff's RFAs is fatal to the entire discovery request. If plaintiff wishes to establish any of the points contained in his RFAs, he will have to prove them up at trial, assuming the court finds any of these points relevant and admissible under the applicable Rules of Evidence.

(6) Privilege log information

In response to defendant's claim of privilege in Point (1) above, plaintiff asserted that defendant had failed to follow the privilege log requirements of Rule 26(b)(5). Defendant claims that plaintiff cannot raise this claim for the first time in a reply brief.

Because I have found that this information is irrelevant and never reached the privilege question, the dispute over a privilege log is moot. For the purpose of the cost-shifting analysis, however, it was proper for plaintiff to invoke Rule 26(b)(5)'s requirement of a privilege log, even if he did so for the first time in his reply brief. It was not plaintiff's job to anticipate and innoculate against every possible argument in defendant's opposition; only after defendant renewed its claim of privilege was the question of a log back in play.

Cost-shifting on Plaintiff's Motion To Compel

Although I have ruled against plaintiff on all six issues, pursuant to F.R. Civ. Pro. 37(a)(4)(B) I am shifting only some of defendant's costs to plaintiff because plaintiff's position on Points (3) and (6) was substantially justified, although ultimately unpersuasive and

unsuccessful. As noted at the outset, cost-shifting is not a punishment, it is a make-whole provision that is virtually automatic without any finding of fault.

ORDER

For the reasons stated above, it is ORDERED that:

(1) Defendant's request for costs on its motion to strike plaintiff's experts is GRANTED IN PART. Plaintiff and his attorney are jointly and severally liable to pay $ 5000 to defendant's attorneys not later than April 25, 2007.

(2) Plaintiff's motion to compel is DENIED in all parts for the reasons stated above.

(3) Not later than April 2, 2007, defendant may submit its itemized bill of costs incurred responding to plaintiff's Points (1), (2), (4) and (5). Plaintiff may have until April 9, 2007 within which to respond to the reasonableness of the amount claimed.

Dated: March 26, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge