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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA ex rel. DEBORAH PARADIES, et al.,	]	
Plaintiffs,	]	
	]	**2:12-cv-245-KOB**
v.	]	
ASERACARE INC., et al.,	]	
Defendants.	]	

ORDER

From the very beginning more than a decade ago,[1] this case has always involved whether AseraCare knowingly submitted *false* claims to Medicare by certifying the 123 patients now at issue as eligible for hospice. The case never involved objectively false claims, such as billing for services not rendered, or submitting claims for phantom patients. Instead, the Government has always asserted that AseraCare certified patients as terminally ill and eligible for hospice when they were not eligible.

After the Eleventh Circuit's remand in this case for this court to reconsider its sua sponte summary judgment based on all of the evidence in the summary judgment and trial court record, the Government asks the court to reopen "limited" medical expert discovery (doc. 577). For the following reasons, the court will DENY the Government's motion to reopen limited discovery at this juncture.

[1] This case began in 2008 in the Eastern District of Wisconsin and was transferred to this court on January 24, 2012 (doc. 100).

Background

After recognizing that it did not instruct the jury on the correct law regarding falsity in reaching its verdict, the court granted AseraCare's motion for a new trial; the court then, after full briefing, sua sponte granted summary judgment in AseraCare's favor. The court found that, when hospice certifying physicians and medical experts look at the very *same* medical records and disagree about whether the medical records support hospice eligibility, the opinion of one medical expert *alone* cannot prove falsity. (Doc. 497 at 1-2). Because the Government had limited its proof of falsity to the testimony of its medical expert Dr. Liao and produced no other objective evidence of falsity for any of the 123 patients at issue, the court found that the Government could not prove falsity as a matter of law based on the trial record and granted summary judgment in AseraCare's favor.

The Eleventh Circuit affirmed this court's grant of a new trial, but vacated the sua sponte, post-verdict grant of summary judgment in favor of AseraCare and remanded the case. *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019). The Circuit Court agreed with this court that it failed to properly instruct the jury on falsity in Phase One and held that "to show objective falsity as to a claim for hospice benefits, the Government must show more than the mere difference of reasonable opinion concerning the prognosis of a patient's likely longevity." *Id*. at 1297.

The Circuit Court held that "to properly state a claim under the FCA in the context of hospice reimbursement, a plaintiff alleging that a patient was falsely certified for hospice care must identify facts and circumstances surrounding [each] patient's certification that are inconsistent with the proper exercise of a physician's clinical judgment." *Id*. "Where no such

facts or circumstances are shown, the FCA claim fails as a matter of law." *Id*.

And the Eleventh Circuit set out a variety of ways in which the Government could prove this objective falsity in the hospice certification context: (1) a "certifying physician fails to review a patient's medical records or otherwise familiarize himself with the patient's condition before asserting that the patient is terminal"; (2) a certifying physician "did not, in fact, subjectively believe that his patient was terminally ill at the time of certification"; *or* (3) "expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records." *Id*. The Circuit Court stressed that "crucially, on remand the Government must be able to link [any] evidence of improper certification practices to the specific 123 claims at issue in its case." *Id*. at 1305.

But the Circuit Court remanded for this court "to reconsider [its summary judgment decision] in light of all the relevant evidence *proffered* by the Government," including "all evidence *presented* at both the summary judgment and trial stages." *AseraCare*, 938 F.3d at 1304-05 (emphasis added). The Circuit Court's mandate on remand leads to the current filing before the court: the "United States' Motion for a Limited Reopening of Medical Expert Discovery" (doc. 577).

On remand, the United States asks this court to reopen discovery for the limited purpose of obtaining an additional medical expert to testify that no reasonable physician would have certified the 123 patients at issue for hospice care. The Government argues that the Eleventh Circuit's mandate does not specifically preclude the court from reopening discovery, and that the court should exercise its discretion to find that the Government had "good cause" to not pursue medical expert testimony along the "no reasonable physician" line. The Government claims that

it reasonably interpreted the "Medicare statute, regulations, and case law at the time to support proof of falsity through medical expert testimony that a patient's medical records did not support a terminal prognosis." (Doc. 577 at 11).

AseraCare filed a response and argued that reopening discovery would violate the Eleventh Circuit's mandate; the Government waived its request for additional discovery;[2] and the Government has not shown good cause for reopening discovery. (Doc. 579).

For the following reasons, the court will DENY that the Government's motion to reopen limited medical expert discovery.

The Mandate is Clear

This court must follow the Eleventh Circuit's exact and specific mandate in this case. "When an appellate court issues a clear and precise mandate, . . . the district court is obligated to follow that instruction." *Litman v. Mass. Mutual Life Ins. Co.*, 825 F.2d 1506, 1516 (11th Cir. 1987). The court, "when acting under an appellate court's mandate, cannot vary it, or examine it for any other purpose than execution; or *give any other further relief*. . . ." *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1299 (11th Cir. 2018) (internal quotations and citations omitted) (emphasis added). This mandate rule applies to "all issues decided expressly *or by necessary implication*" in the Circuit Court's decision. *Winn Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 847 (11th Cir. 2018) (internal quotations and citations omitted) (emphasis added). This court must "implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Cambridge Univ. Press*, 906 F.3d

[2] The court does not address the waiver issue because the other grounds upon which the court denies the motion to reopen limited discovery are clear.

at 1299 (internal quotations and citations omitted).

The Eleventh Circuit's clear mandate vacated this court's "post-verdict grant of summary judgment to AseraCare" and remanded "for the court to reconsider that matter based on the entirety of the evidence, not just that evidence presented at trial nor just the evidence denominated as being offered to prove falsity." *Aseracare*, 938 F.3d at 1305. In the "Conclusion" section of the opinion, the Eleventh Circuit stated that it remanded "for the district court to reconsider [its sua sponte summary judgment] decision in light of all the relevant evidence *proffered* by the Government." *Id*. (emphasis added).

In explaining its decision, the Circuit Court stated that this court should have allowed the Government to "rely on the entire record, not just the trial record, in making its case that disputed issues of fact, beyond just the difference of opinion between experts, existed sufficient to warrant denial of [this court's] post-verdict sua sponte reconsideration of summary judgment on the falsity question." *Id*. at 1281. Further, the Eleventh Circuit stated that "it is only fair that the Government be allowed to have summary judgment considered based on all the evidence *presented* at both the summary judgment and trial stages, and *we direct that this occur*." *Id*. at 1304 (emphasis added).

Based on the Circuit Court's clear mandate, this court must reconsider its sua sponte summary judgment based on *all* of the evidence *currently in the record*, not just the Phase One record on falsity. The Government claims that because the mandate is *silent* as to reopening discovery, the court should exercise its discretion and allow limited medical expert discovery. But the language from the Circuit Court to reconsider "all evidence *proffered* by the Government" speaks loud and clear that the court must consider evidence already in the record,

not evidence possibly obtained and offered by the Government in the future. The Eleventh Circuit's use of past tense—"proffered" and "presented"—indicates previously discovered and disclosed evidence—not new evidence to be uncovered during more discovery.

But the Government attempts to read the Eleventh Circuit's mandate to allow this court discretion to reopen limited discovery for the Government to obtain a medical expert to say that no reasonable physician would have certified the 123 patients at issue as eligible for hospice. To support its supposed need for an additional medical expert, the Government relies on *one* of the Eleventh's Circuit's listed ways to show an objective falsehood: "expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records." (Doc. 577 at 6, 15). But, given the Circuit Court's own skepticism regarding this specific way of proving objective falsity in this case, this court finds that reopening limited discovery and allowing an additional expert for this purpose would thwart the spirit of the mandate.

After spelling out that, "crucially, on remand the Government must be able to link [any] evidence of improper certification practices to the specific 123 claims at issue in this case" and that such linkage would be "necessary to demonstrate both falsehood and knowledge," the Circuit Court in a footnote indicated that a medical expert's opinion using the "no reasonable physician" standard would be futile given the current record in this case:

> [a]lternatively, the Government could meet its burden under the falsity standard now adopted by the district court, and endorsed by this Court, if it could establish through expert testimony that no reasonable physician reviewing the medical records at issue could have concluded that a particular patient was terminally ill. ***The Court, however, is unaware that any such evidence exists.*** Indeed, as noted, Mary Jane Schultz, the former head of Palmetto's medical review department, testified that "two doctors using their clinical

> judgment could come to different conclusions about a patient's prognosis and neither be right or wrong." Also, . . . Dr. Liao himself changed his opinion concerning the eligibility of certain patients over the course of the proceeding but testified at trial that both sets of opinions remained "accurate to a reasonable degree of certainty." To explain these reversals, Dr. Liao stated that he "was not the same physician in 2013 as [he] was in 2010." As the district court observed, if Dr. Liao can form contradictory opinions based on the same medical records and yet claim not to have been wrong on either occasion, then it is difficult to explain how his difference of opinion with AseraCare's physicians concerning other patients would demonstrate that no reasonable physician could agree with AseraCare, ***absent some additional evidence to warrant that inference***.

AseraCare, 938 F.3d at 1305 fn 18 (emphasis added).

Although the Circuit Court did not specifically instruct this court to *not* allow additional medical expert discovery, the spirit of the mandate suggests that allowing such evidence at this point would not shed any light on the falsity issue in this case. In fact, having a medical expert opine at this point that no reasonable physician would have certified the 123 patients at issue for hospice would only further muddle the Government's case. This court cannot ignore the evidence from Dr. Liao and Mary Schultz already in the summary judgment and trial record and simply adopt a new medical expert's opinion that no reasonable physician would have certified for hospice the patients at issue. This court cannot "undo" this blaring evidence from Dr. Liao and Mary Schultz in the record that would undermine any additional medical expert who might now question the reasonableness of any physician's clinical judgment as to any patient.

This court cannot allow an additional medical expert at this point to opine that no reasonable physician would have certified the 123 patients at issue for hospice when the Government's current expert witness Dr. Liao admitted that he changed his own mind about whether some of the patients' medical records supported hospice eligibility, but at all times was a

"reasonable" physician. As the Eleventh Circuit pointed out, the record in this case contains "no allegation that AseraCare submitted claims that were not, in fact, based on a physician's properly formed clinical judgment, nor is there an allegation that AseraCare failed to abide by each component of the claim requirements." *Aseracare*, 938 F.3d at 1296. Instead, the Government's allegations in this case "focus solely on the accuracy of the physician's clinical judgment regarding terminality." *Id*. So, the court agrees with the Eleventh Circuit and questions whether "any such evidence exists" that no reasonable physician would have certified the patients at issue for hospice given the evidence already in the record that this court must reconsider for summary judgment purposes.

Also, the Eleventh Circuit seemed to stress in the mandate, and in footnote 18 of the opinion, that expert testimony would not be the way the Government might prove objective falsity *in this case* given the current record. The Circuit Court specifically instructed that the Government must link any of its improper certification evidence currently in the record to the specific patients at issue. This court has been asking for any evidence to link improper conduct or certification methods to any of the 123 patients at issue since the case arrived in this court. The Eleventh Circuit mandates that this court reconsider its sua sponte summary judgment decision based on whether the summary judgment or trial record contains any improper certification evidence directly linked to any of the patients at issue to create a genuine issue of material fact as to falsity and knowledge. That is what this court plans to do. The Government has another opportunity to link any of its improper certification evidence to the specific 123 claims at issue in this case; if it cannot do so, its case will fail as a matter of law because it will be unable to show a false claim.

Re-opening of Limited Medical Discovery Not Warranted

Even if the Circuit Court's mandate would allow this court to exercise its discretion to reopen limited medical expert discovery, this court refuses to do so.

The Eleventh Circuit has applied the factors espoused by the Supreme Court to determine whether the Government has shown good cause and excusable neglect for the court to reopen discovery. *See Ashmore v. Sec'y Dep't of Transp.*, 503 F. App'x 683, 685-86 (11th Cir. 2013) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Those factors include (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. Considering all these factors, the court finds that all of the relevant factors weigh in favor of *not* reopening limited medical expert discovery.

The danger of prejudice to AseraCare in reopening discovery at this point is great. As explained above, not only would allowing limited medical expert discovery be futile at this point, it would also greatly burden AseraCare by forcing it to obtain yet another reasonable medical expert to again disagree with the Government's new medical expert. And, if AseraCare obtained an additional medical expert to counter the Government's additional medical expert, the court would once again have another difference of opinion between medical experts. As this court and the Eleventh Circuit have made clear, that difference of opinion, *without more*, is not enough to prove objective falsity. *Aseracare*, 938 F.3d at 1297.

Moreover, the Government asks for another *full year* to obtain this limited medical expert discovery and complete additional briefing. Yet, the Government has not shown an adequate

reason for not pursuing the "no reasonable physician" standard with medical expert discovery until now. The court agrees with AseraCare that "[l]ong before [the Government] disclosed a single opinion from Dr. Liao, the Government knew AseraCare's position on the legal standard for falsity." (Doc. 579 at 11).

As AseraCare pointed out in its brief, this case began in 2008 in the Eastern District of Wisconsin. (Doc. 579 at 11). After lengthy discovery and disclosure of medical expert opinions in the Eastern District of Wisconsin, but *before the Government intervened in the case*, AseraCare moved for summary judgment on January 13, 2012, arguing that "'absent proof that no physician acting in good faith reasonably could have concluded that the patients in question were eligible for the hospice benefit and that AseraCare knew that no physician reasonably could have reached such a conclusion, plaintiffs are unable to sustain their False Claims Act against AseraCare.'" (Doc. 76). Then, while the motion for summary judgment was pending, the district judge in the Eastern District of Wisconsin transferred this case to this court on January 24, 2012 (doc. 100), and the Government moved to intervene on February 20, 2012 (doc. 108).

And after the Government chose to intervene, this court deemed AseraCare's first summary judgment motion moot (doc. 140) and extended the deadlines for additional medical expert discovery and filing dispositive motions (docs. 180, 183, 197, 216). Not only did AseraCare raise the "no reasonable physician" standard in its first summary judgment motion in January 2012 *before the Government intervened in this case*, the Government had until the end of its expert medical discovery in September 2013 to decide how it would proceed with its case. Knowing full well AseraCare's position regarding the falsity standard, the Government had a choice as to how to prepare its case through discovery and after. Its decision not to ask Dr. Liao

to testify that no reasonable physician would have certified the 123 patients at issue was a strategic one that the Government made at its own peril—or one that the evidence would not support.

In preparing its case, the Government should have been aware of the possibility that the court could have adopted that standard or a similar one. With no Eleventh Circuit authority or federal district court opinions within the Circuit on this particular issue at that time, the Government should have prepared its case for the worst-case scenario in terms of what it would have to prove. The Government should have been aware of case law outside the Circuit to see what it might be facing, including *United States ex rel. Geschrey v. Generations Healthcare, LLC*, 922 F. Supp. 695 (N.D. Ill. 2012). But the Government chose to proceed from the beginning without preparing its case in a way to link any of AseraCare's alleged improper certification methods to any of the 123 patients at issue and without a medical expert to testify that no reasonable physician would have certified the 123 patients for hospice. As AseraCare stated, now the Government "must accept the consequences of its strategy." (Doc. 579 at 11).

Let us go back to the second summary judgment filed by AseraCare in this case on April 25, 2014 (doc. 225). What if this court at that stage held the Government to the standard for falsity that this court has now applied and the Eleventh Circuit has approved. If this court had granted AseraCare's motion for summary judgment, the Government appealed, the Eleventh Circuit agreed with the court's falsity standard, and the Supreme Court let that standard stand, what recourse would the Government have at that point for new discovery? None. The Government would have no basis to then ask this court to reopen discovery because it prepared its case the way it did and chose not to link the alleged improper certification methods to

particular patients at issue or have a medical expert testify that no reasonable physician would have certified the patients at issue. The only difference now is that this case took a little different journey to arrive at this point.

After weighing all of the relevant *Pioneer* factors, this court finds that the Government's failure to develop medical expert discovery on the "no reasonable physician" standard was not the result of excusable neglect, and no good cause exists to reopen limited medical expert discovery. The current record is sufficient for this court to carry out the Eleventh Circuit's clear mandate for it to reconsider its sua sponte summary judgment decision based on all of the evidence currently in the summary judgment and trial record.

Therefore, the court DENIES the Government's motion to reopen discovery. (Doc. 577).

DONE and ORDERED this 4th day of December, 2019.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE