

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GERALDINE DARDEN,
Plaintiff,
vs.
TODD SPENCER, et al.,
Defendants.

1:12-cv-01001-LJO-EPG-PC
ORDER FOLLOWING TELEPHONIC HEARING HELD ON APRIL 25, 2016
ORDER GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL (ECF No. 47.)
ORDER FOR DEFENDANT TO SERVE RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS ON OR BEFORE MAY 24, 2016, AS INSTRUCTED BY THIS ORDER
ORDER DENYING PLAINTIFF'S MOTION TO EXTEND THE DEADLINE TO AMEND PLEADINGS, WITHOUT PREJUDICE TO RENEWAL OF THE MOTION WITHIN THIRTY DAYS, AS INSTRUCTED BY THIS ORDER (ECF No. 49.)
ORDER FOR PLAINTIFF TO SIGN AND RETURN CONSENT/DECLINE FORM WITHIN FOURTEEN DAYS

I. BACKGROUND

Geraldine Darden ("Plaintiff"), a state prisoner proceeding *pro se*, filed this civil rights action pursuant to 42 U.S.C. § 1983 on June 21, 2012. (ECF No. 1.) The case now proceeds

1 on the First Amended Complaint filed on February 11, 2013, against defendant Dr. Scott H.
2 Driscoll (“Defendant”), for inadequate medical care in violation of the Eighth Amendment.
3 (ECF No. 19.)¹

4 On October 27, 2015, Defendant consented to Magistrate Judge jurisdiction pursuant to
5 28 U.S.C. § 636(c). (ECF No. 39.) Plaintiff has not consented to or declined Magistrate Judge
6 jurisdiction.

7 This case is in the discovery phase, with a deadline of May 24, 2016 for the parties to
8 complete discovery, including the filing of motions to compel. (ECF No. 33.)

9 On March 4, 2016, Plaintiff filed a motion to compel responses to interrogatories. (ECF
10 No. 47.) On March 24, 2016, Defendant filed an opposition to the motion. (ECF No. 48.) On
11 April 14, 2016, Plaintiff filed a reply to the opposition. (ECF No. 56.)

12 On March 24, 2016, Plaintiff filed a motion to extend the deadline to amend pleadings.
13 (ECF No. 49.) On April 7, 2016, Defendant filed an opposition. (ECF No. 55.) On April 20,
14 2016, Plaintiff filed a reply to the opposition. (ECF No. 59.)

15 On March 24, 2016, Defendant filed a motion for summary judgment based on
16 Plaintiff’s failure to exhaust remedies before filing suit. (ECF No. 50.) On April 18, 2016, the
17 Court granted Plaintiff a thirty-day extension of time to file an opposition. (ECF No. 57.)

18 **II. APRIL 25, 2016 TELEPHONIC HEARING**

19 On April 25, 2016 at 11:00 a.m., a telephonic hearing was held before Magistrate Judge
20 Erica P. Grosjean to informally discuss the status of this case, Plaintiff’s motion for extension
21 of the deadline to amend pleadings, and discovery including Plaintiff’s Motion to Compel filed
22 on March 4, 2016. Plaintiff appeared telephonically on her own behalf, and Nicole M. Jaffee of
23 Donnelly, Nelson, Depolo & Murray appeared telephonically on behalf of Defendant.

24 **A. Magistrate Judge Jurisdiction**

25 The Court discussed the parties’ option to consent to Magistrate Judge jurisdiction in
26 this case pursuant to 28 U.S.C. §636(c). Defendant has consented, but Plaintiff has not

27
28 ¹ On June 18, 2015, the Court issued an order dismissing all other claims and defendants from
this action based on Plaintiff’s failure to state a claim. (ECF No. 30.)

1 consented or declined. The Clerk shall send Plaintiff the Court's form for consent/decline of
2 Magistrate Judge jurisdiction, and Plaintiff shall sign and return the form within fourteen days.

3 **B. Plaintiff's Motion to Compel**

4 The Court heard Plaintiff's motion to compel filed on March 4, 2016. (ECF No. 47.)
5 Plaintiff requests further responses to Interrogatories nos. 2, 4, 5, 6, 8, 9, and 10.

6 **INTERROGATORY NO. 2**

7 Explain each incident where you have either provided a "false negative"
8 or an incorrect diagnosis.

9 **RESPONSE TO INTERROGATORY NO. 2**

10 Defendant objects to this interrogatory on the grounds that it is
11 overbroad, vague and ambiguous as to the term "incident." It is also
12 argumentative. It further seeks information protected by the attorney-
13 client privilege and/or work-product doctrine and expert opinion. It also
14 seeks information that is not reasonably calculated to lead to the
15 discovery of relevant or admissible information.

16 **Ruling**

17 Plaintiff's motion to compel is granted in part. Defendant must respond to this
18 interrogatory as narrowed by the Court to include only incidents of public filings of a complaint
19 or otherwise, including lawsuits, alleging there was a false negative, incorrect diagnoses, or
20 other malpractice by Defendant.

21 ///

22 **INTERROGATORY NO. 4**

23 How many times did you supposedly use the CAD on any patient at
24 Central California Women's Facility before and after Incident.

25 **RESPONSE TO INTERROGATORY NO. 4**

26 Defendant objects to this interrogatory on the grounds that it is
27 overbroad, vague and ambiguous generally and specifically regarding the
28 term "Incident." It is also argumentative. It further seeks information

1 protected by the attorney-client privilege and/or work-product doctrine.
2 It also seeks information that is not reasonably calculated to lead to the
3 discovery of relevant or admissible information. Further, it requests
4 confidential information regarding individuals not named as parties to
5 the action, which, if disclosed, may constitute an unwarranted invasion
6 of privacy.

7 **Ruling**

8 Plaintiff's motion to compel is granted in part. Defendant shall respond to this
9 interrogatory in a declaration under oath, to his best recollection, how many times he used a
10 CAD on any patient at CCWF before and after the incident. Defendant must do a reasonable
11 search and answer according to his best memory. If no records are available, Defendant's
12 declaration giving his best estimate is sufficient.

13 ///

14 **INTERROGATORY NO. 5**

15 Do you treat the patients in prison with the same care as those in society.
16 Explain.

17 **RESPONSE TO INTERROGATORY NO. 5**

18 Defendant objects to this interrogatory on the grounds that it is
19 overbroad, vague and ambiguous. It is also argumentative. It further
20 seeks information protected by the attorney-client privilege and/or work-
21 product doctrine and expert opinion. It also seeks information that is not
22 reasonably calculated to lead to the discovery of relevant or admissible
23 information. Further, it requests confidential information regarding
24 individuals not named as parties to the action, which, if disclosed, may
25 constitute an unwarranted invasion of privacy.

26 **Ruling**

27 Plaintiff's motion to compel is granted in part. Defendant shall respond to this
28 interrogatory by stating his understanding of his duty of care to patients at CCWF and to

1 patients in the general public. Defendant shall also respond whether he treats his patients at
2 CCWF the same as his patients in the general public.

3 ///

4 **INTERROGATORY NO. 6**

5 What is the course of action required in order to meet the standards of
6 adequate medical care for a patient with a history of breast [cancer] that
7 shows a macrocalcification in her breast.

8 **RESPONSE TO INTERROGATORY NO. 6**

9 Defendant objects to this interrogatory on the grounds that it is
10 overbroad, vague, ambiguous and nonsensical. It is also argumentative.
11 It further seeks information protected by the attorney-client privilege
12 and/or work-product doctrine and expert opinion. It also seeks
13 information that is not reasonably calculated to lead to the discovery of
14 relevant or admissible information. Further, it requests confidential
15 information regarding individuals not named as parties to the action,
16 which, if disclosed, may constitute an unwarranted invasion of privacy.

17 **Ruling**

18 Plaintiff's motion to compel is granted, with a modification to the interrogatory.
19 Defendant shall respond to the question, "What, if anything, do you contend was the standard
20 procedure to follow in 2009 for treating a patient with a diagnosis of microcalcification in a
21 breast, and did you follow the standard procedure?"

22 ///

23 **INTERROGATORY NO. 8**

24 Identify each misdemeanor of which you have been convicted.

25 **RESPONSE TO INTERROGATORY NO. 8**

26 Defendant objects to this interrogatory on the ground that it seeks
27 information that is not reasonably calculated to lead to the discovery of
28 relevant or admissible information.

1 **Ruling**

2 Plaintiff’s motion to compel is granted in part. Under Rule 404 of the Federal Rules of
3 Evidence, evidence of Defendant’s convictions of misdemeanors, if any, may not be used to
4 show Defendant’s character. However, such evidence may be admissible for other purposes,
5 including the impeachment of testimony.

6 In opposition to Plaintiff’s motion to compel, Defendant cites the Ninth Circuit’s
7 decision in U.S. v. Colbert, 116 F.3d 395 (9th Cir. 1997) that a witness’s prior misdemeanor
8 conviction for lewd conduct was inadmissible for impeachment purposes under the Federal
9 Rules of Evidence governing impeachment by prior conviction, to wit:

10 “Federal Rules of Evidence 608 and 609 limit a defendant’s
11 ability to impeach an adverse witness with his prior criminal
12 record during cross-examination. Rule 609(a) allows a witness to
13 be impeached with a prior conviction if (1) ‘the crime was
14 punishable by death or imprisonment in excess of one year under
15 the law under which he was convicted,’ or if (2) the crime
16 ‘involved dishonesty or a false statement, regardless of the
17 punishment.’ Rule 608(b) prohibits the introduction of specific
18 acts of conduct for the purpose of impeaching a witness’s
19 credibility unless the district court finds such acts to be ‘probative
20 of truthfulness or untruthfulness.’”

21 Colbert, 116 F.3d at 395. The Court found the witness’s misdemeanor conviction inadmissible
22 under Rule 609(a)(1) because the witness was only subject to a maximum imprisonment term
23 of six months as a result of the misdemeanor conviction, and under Rule 609(a)(2) because the
24 conviction did not involve dishonesty or false statement. The Court adopted the Fifth Circuit’s
25 holding that “a conviction for prostitution does not involve dishonesty or false statement and is
26 not admissible under 609(a)(2) for impeachment purposes.” Id. (citing United States v.
27 Walker, 613 F.2d 1349, 1354 (5th Cir. 1980)).

28 Here, Plaintiff’s facts are distinguishable from those in Colbert. As in Colbert, Plaintiff
requests evidence of misdemeanor convictions, which are not admissible under Rule 609(a)(1)
if the imprisonment term is less than one year. However, unlike the witness in Colbert, whose
misdemeanor conviction for prostitution did not involve dishonesty or false statement,
Defendant’s misdemeanors, if any, may involve dishonesty or a false statement, and would be
admissible under Rule 609(a)(2). Therefore, the decision in Colbert that the witness’s

1 misdemeanor was not admissible under Rule 609(a)(2) is not applicable to all misdemeanors,
2 but only to those that do not involve dishonesty or a false statement. Therefore, Defendant
3 shall be required to respond to this interrogatory by identifying any misdemeanor for which he
4 was convicted of a crime involving dishonesty or a false statement.

5 Plaintiff is cautioned that under Rule 404(b)(1), he may not use evidence of a
6 misdemeanor to prove Defendant's character "in order to show that on a particular occasion
7 [Defendant] acted in accordance with the character." However, as discussed above, this
8 evidence may be admissible for impeachment of Defendant's character for truthfulness under
9 Rule 609(a)(2), which permits a witness's character for truthfulness to be attacked with
10 evidence of "any crime regardless of the punishment, [and] the evidence must be admitted if
11 the court can readily determine that establishing the elements of the crime required proving--or
12 the witness's admitting--a dishonest act or false statement."

13 **INTERROGATORY NO. 9**

14 Are you privy to the growing rate of an aggressive ductal breast cancer.

15 Please describe.

16 **RESPONSE TO INTERROGATORY NO. 9**

17 Defendant objects to this interrogatory on the grounds that it is
18 overbroad, vague and ambiguous generally and specifically regarding the
19 term "privy." It is also argumentative. It further seeks information
20 protected by the attorney-client privilege and/or work-product doctrine
21 and expert opinion. It also seeks information that is not reasonably
22 calculated to lead to the discovery of relevant or admissible information.

23 **Ruling**

24 Plaintiff's motion to compel is granted with modification to the interrogatory.
25 Defendant is required to respond to the question, "In 2009, were you aware of research
26 indicating a growing rate of an aggressive ductile breast cancer?"

27 ///

28 ///

1 **INTERROGATORY NO. 10**

2 Do you allege that you made a non-prejudicial decision in not ordering
3 further tests on plaintiff's left breast macrocalcification on July 02, 2009.

4 **RESPONSE TO INTERROGATORY NO. 10**

5 Defendant objects to this interrogatory on the grounds that it is
6 overbroad, vague, ambiguous and nonsensical. It is also argumentative.
7 It further seeks information protected by the attorney-client privilege
8 and/or work-product doctrine and expert opinion. It also seeks
9 information that is not reasonably calculated to lead to the discovery of
10 relevant or admissible information.

11 **Ruling**

12 Plaintiff's motion to compel is granted with modification to the interrogatory. On or
13 before August 4, 2016, Defendant is required to provide a response to the question, "In
14 hindsight, do you contend that you made any errors, intentional or unintentional, by not
15 ordering further tests on Plaintiff's left breast microcalcification on July 2, 2009?"

16 **C. Other Discovery Issues**

17 **1. Plaintiff's Motion for Production of Documents**

18 At the hearing, Plaintiff stated that she filed a motion for production of documents and
19 did not receive a response from Defendant. Defense counsel denied receiving such motion, and
20 the Court found no record of such motion on the Court's docket. Plaintiff described the
21 documents she had requested in the motion, which the Court narrowed to three categories: (1)
22 documents related to Plaintiff's medical treatment, (2) documents related to the Victim's
23 Compensation Claims Board, and (3) documents related to CAD procedures for
24 microcalcification of a breast.

25 Defense counsel stated that she had subpoenaed Plaintiff's prison records and received
26 sixteen volumes of documents containing thousands of pages, most which are not relevant to
27 this case. The Court proposed that Defendant either (1) provide Plaintiff with the documents
28 received by Defendant that are related to Plaintiff and her treatment for breast cancer, (2) take

1 the sixteen volumes of documents to Plaintiff and allow her at least two hours to review the
2 documents, or (3) make copies of the sixteen volumes of documents and provide the copies to
3 Plaintiff. At the hearing, the parties agreed that Defendant will either (1) provide all of the
4 sixteen volumes of documents to Plaintiff for her review, or (2) provide only the documents
5 concerning Plaintiff and her breast, with a statement explaining which of the documents from
6 the sixteen volumes were removed by Defendant and not provided to Plaintiff.

7 Plaintiff also seeks medical records from Spencer Radiology in Madera, California, and
8 R2Technologies. The Court allowed Plaintiff time to subpoena records from these third
9 parties. Plaintiff must file a motion with the Court on or before May 24, 2016, for issuance of
10 a subpoena, and serve a copy of the motion on the third party.

11 Defense counsel stated that she subpoenaed records from California's Victims
12 Compensation and Government Claims Board regarding Plaintiff's claim, and received letters
13 advising her that the claim was rejected. The Court ordered defense counsel to provide copies
14 of the Claims Board documents that she has to Plaintiff. Plaintiff was advised that in order to
15 request documents from the Claims Board, which is a third party, she must file a motion with
16 the Court for issuance of a subpoena.

17 With respect to Plaintiff's request for documents concerning CAD (computer aided
18 detection) and breast microcalcification, Defendant is required to produce documents
19 addressing this topic that he has in his possession, custody, and control, including reference
20 materials and records at the prison, and other reference materials and guides that he would refer
21 to, limited to those documents available in 2009 when Defendant treated Plaintiff.

22 The Court granted Plaintiff leave to file a motion to compel but recommended she wait
23 until after Defendant has provided documents and Plaintiff has pursued any documents by
24 subpoena.

25 **D. Plaintiff's Motion to Extend Time to Amend Pleadings**

26 Plaintiff seeks leave to extend the Court's March 24, 2016 deadline to amend pleadings
27 (ECF No. 33). Defendant argues that Plaintiff should not be permitted to amend the complaint
28 at this late stage of the proceedings. Defendant contends that the Court's screening order

1 limited Plaintiff's deliberate indifference claim to the allegation that Defendant falsified a claim
2 to have used computer aided detection (CAD) in Plaintiff's treatment. The Court took
3 Plaintiff's motion to extend the deadline under submission.

4 The Court now denies Plaintiff's motion to extend the deadline to amend pleadings,
5 without prejudice. There is no amended complaint before the Court upon which to base a
6 decision. Plaintiff is not precluded from renewing the motion within thirty days, together with
7 submission of a proposed amended complaint for the Court's review.

8 **E. Scope of the Complaint**

9 During the April 25, 2016 hearing, the parties discussed the scope of the complaint.
10 Notably, the Court's screening order of April 9, 2015 provides that:

11 Plaintiff has a family history of breast cancer. Plaintiff alleges
12 that on June 27, 2009, she underwent a mammogram with a
13 finding of "retroareolar macrocalcification left breast." The
14 report was authored by Dr. Driscoll, who Plaintiff alleges
15 "breached the standard of care by inadequately misdiagnosing a
16 cancerous lump as a cyst. He showed deliberate indifference by
17 falsifying a claim to have used computer aided detection (CAD),
18 a more thorough technique that shows images in greater detail."
19 Dr. Driscoll failed to recommend a biopsy for Plaintiff's "benign
20 calcification." The falsified claim resulted in Plaintiff eventually
21 "losing" her left breast, a permanent disfigurement.

17 **B. Eighth Amendment Claims**

18 "[T]o maintain an Eighth Amendment claim based on prison
19 medical treatment, an inmate must show 'deliberate indifference
20 to serious medical needs.'" *Jett v. Penner*, 439 F.3d 1091, 1096
21 (9th Cir. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97
22 S.Ct. 295 (1976)). The two part test for deliberate indifference
23 requires a plaintiff to show (1) "'a serious medical need' by
24 demonstrating that 'failure to treat a prisoner's condition could
25 result in further significant injury or the unnecessary and wanton
26 infliction of pain,'" and (2) "the defendant's response to the need
27 was deliberately indifferent." *Jett*, 439 F.3d at 1096 (quoting
28 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),
overruled on other grounds, *WMX Techs., Inc. v. Miller*, 104
F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations
omitted)).

Plaintiff has sufficiently alleged the need for medical care for her
condition and the failure of Defendant Driscoll to adequately
address her treatment. Accordingly, Plaintiff states a claim for
violation of the Eighth Amendment.

(ECF No. 22 at 2.)

1 Based on this order, and Plaintiff's statement in her May 13, 2015 notice to the Court
2 (ECF No. 25) agreeing to go forward with claims found cognizable, the Court understands that
3 Plaintiff's claim is for deliberate indifference to serious medical needs by inadequately
4 misdiagnosing a cancerous lump as a cyst. The basis for finding that Plaintiff met the standard
5 for deliberate indifference focused on Defendant's falsifying a claim to have used a computer
6 aided detection method, but Plaintiff's deliberate indifference claim in this case also includes
7 inadequately misdiagnosing a cancerous lump as a cyst more generally.

8 **F. Settlement Conference**

9 The Court intends to schedule a settlement conference for this case after resolution of
10 Defendant's motion for summary judgment. If the motion is denied, the Court shall schedule
11 another status conference.

12 **III. CONCLUSION**

13 Based on the foregoing, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff's motion to compel, filed on March 4, 2016, is GRANTED in part;
- 15 2. Defendants shall serve responses to Plaintiff's interrogatories and request for
16 production of documents on or before May 24, 2016,² as instructed by this
17 order;
- 18 3. Plaintiff's motion to extend the deadline to amend pleadings, filed on March 24,
19 2016, is DENIED without prejudice to renewal of the motion within thirty days,
20 as instructed by this order;
- 21 4. The Clerk of Court is DIRECTED to send Plaintiff the Court's form for
22 consent/decline of Magistrate Judge jurisdiction;
- 23 5. Within fourteen days of the date of service of this order, Plaintiff shall complete
24 the consent/decline form and return it to the Court; and

25 ///

26 ///

27
28 ² Except for Defendant's response to Interrogatory no. 10, which is due on or before August 4, 2016. (See this order at p. 8 lines 11-12.)

