

1 On October 15, 2020, Defendant Romero filed a motion for summary judgment. (ECF No.
2 27.)

3 On October 28, 2020, Plaintiff filed a motion for summary judgment. (ECF No. 31.)
4 Plaintiff filed an opposition to Defendant's motion for summary judgment on November 4,
5 2020. (ECF No. 32.) Defendant filed a reply on November 13, 2020. (ECF No. 33.)

6 On November 18, 2020, Defendant filed an opposition to Plaintiff's motion for summary
7 judgment. (ECF No. 34.)

8 Plaintiff filed a sur-reply on December 7, 2020. (ECF No. 35.)

9 On December 17, 2020, Plaintiff filed a reply to Defendant's opposition. (ECF No. 36.)

10 II.

11 LEGAL STANDARD

12 A. Summary Judgment Standard

13 Any party may move for summary judgment, and the Court shall grant summary judgment if the
14 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.
16 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed
17 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including
18 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials
19 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot
20 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).
21 The Court may consider other materials in the record not cited to by the parties, but it is not required to
22 do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th
23 Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

24 In judging the evidence at the summary judgment stage, the Court does not make credibility
25 determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984
26 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the light most
27 favorable to the nonmoving party and determine whether a genuine issue of material fact precludes entry
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1 of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d at 942
2 (quotation marks and citation omitted).

3 In arriving at these Findings and Recommendations, the Court carefully reviewed and considered
4 all arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses
5 thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument,
6 document, paper, or objection is not to be construed to the effect that this Court did not consider the
7 argument, document, paper, or objection. This Court thoroughly reviewed and considered the evidence
8 it deemed admissible, material, and appropriate.

9 III.

10 DISCUSSION

11 A. Summary of Plaintiff's Relevant Allegations

12 On April 27, 2015, Dr. Romero prescribed Lipitor 40 mg daily for high cholesterol in
13 combination with Gemfibrozil, which is contraindicated. Plaintiff objected to taking Lipitor because
14 of a television commercial indicating it causes diabetes. Dr. Romero told Plaintiff that her concerns
15 were not true, despite knowledge of Plaintiff's family history of diabetes. Dr. Romero did not inform
16 Plaintiff of the risks of diabetes or kidney failure due to taking Lipitor or the combination of Lipitor
17 with Gemfibrozil.

18 In early May 2015, Plaintiff began to experience pain in her arms that moved to her knees,
19 wrists, ankles, shoulders and neck.

20 Plaintiff was seen by Dr. Showalter who told her to stop taking Lipitor and ordered blood work
21 to determine if Plaintiff had diabetes.

22 On May 11, 2015, the lab work revealed the fasting blood glucose was high and triglycerides
23 was higher than on Gemfibrozil alone.

24 On June 1, 2015, a blood test revealed Plaintiff had diabetes.

25 Plaintiff was seen by Dr. Showalter on June 22, 2015, who informed Plaintiff that she had type
26 2 diabetes. Plaintiff contends she would not have diabetes if she had not been prescribed Lipitor by
27 Dr. Romero.

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1 **B. Plaintiff’s Motion for Summary Judgment**

2 Plaintiff’s motion for summary judgment is procedurally deficient as it does not include a
3 statement of undisputed facts properly supported by evidence as required by Rule 56(c) of the Federal
4 Rules of Civil Procedure and Local Rule 260(a). See ECF No. 31. Rather, Plaintiff simply sets forth
5 various factual allegations relating to her treatment and concludes that Dr. Romero is liable.
6 Accordingly, Plaintiff’s motion for summary judgment should be denied as procedurally deficient.

7 **C. Plaintiff’s Sur-reply**

8 A party does not have the right to file a sur-reply and motions are deemed submitted when the
9 time to reply has expired. Local Rule 230(I). The Court generally views motions for leave to file a sur-
10 reply with disfavor. Hill v. England, No. CVF05869 REC TAG, 2005 WL 3031136, at *1 (E.D. Cal.
11 2005) (citing Fedrick v. Mercedes-Benz USA, LLC, 366 F.Supp.2d 1190, 1197 (N.D. Ga. 2005)).
12 However, district courts have the discretion to either permit or preclude a sur-reply. See U.S. ex rel.
13 Meyer v. Horizon Health Corp., 565 F.3d 1195, 1203 (9th Cir. 2009) (district court did not abuse
14 discretion in refusing to permit “inequitable sur-reply”); JG v. Douglas County School Dist., 552 F.3d
15 786, 803 n.14 (9th Cir. 2008) (district court did not abuse discretion in denying leave to file sur-reply
16 where it did not consider new evidence in reply); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir.
17 1996) (new evidence in reply may not be considered without giving the non-movant an opportunity to
18 respond).

19 Although Plaintiff does not have a right to file a sur-reply, in this instance the Court will
20 exercise its discretion and consider the sur-reply in ruling on Defendant’s motion for summary
21 judgment.

22 **D. Defendant’s Motion for Summary Judgment**

23 Defendant Dr. Romero moves for summary judgment on the ground that Plaintiff’s claim is
24 nothing more than a disagreement with her medical opinion as to the appropriate course of evaluation
25 and treatment.

26 Plaintiff opposes Defendant’s motion and argues that a genuine issue of material fact exists as
27 to whether Dr. Romero was deliberately indifferent by prescribing Atorvastatin (also known as
28 Lipitor) which she contends caused her diabetes.

1 **E. Statement of Undisputed Facts¹**

2 1. At all relevant times, Plaintiff was incarcerated by the California Department of
3 Corrections and Rehabilitation (CDCR) at Central California Women’s Facility (CCWF).
4 (Declaration of Romero (Romero Decl.) ¶ 4, Ex. A, ECF No. 27-3.)

5 2. Plaintiff received regular treatment for a number of medical conditions, including high
6 cholesterol and dyslipidemia, while incarcerated at CCWF. (Romero Decl. ¶ 5, Ex. A.)

7 3. On April 27, 2015, Dr. Romero examined Plaintiff to address her high cholesterol,
8 dyslipidemia, and related health concerns. Dr. Romero reviewed Plaintiff’s medical history and
9 considered various treatment options. Dr. Romero noted that Plaintiff’s cholesterol and dyslipidemia
10 were not improving. Dr. Romero concluded that Plaintiff’s cholesterol levels and weight gain were
11 placing her at an increased risk for heart disease and other cardiovascular complications. Dr. Romero
12 prescribed Atorvastatin on April 27, 2015 in order to mitigate those risks. (Romero Decl. ¶ 6, Ex. B.)

13 4. Shortly after beginning to take the Atorvastatin, Plaintiff began to complain of pain in
14 her arms. Plaintiff indicated that this pain began when she started taking atorvastatin. On May 26,
15 2015, another physician at CCWF, Dr. Showalter, signed an order stopping Plaintiff’s prescription for
16 atorvastatin. (Romero Decl. ¶ 10, Exs. A, B.)

17 5. Dr. Showalter also noted that Plaintiff’s blood sugar measurements were high on
18 December 2, 2014 and May 11, 2015. In light of these measurements, Dr. Showalter ordered an
19 HgA1C test which came back at a level diagnostic of diabetes. (Romero Decl. ¶ 11, Exs. A, B.)

20 **F. Analysis of Defendant’s Motion**

21 Defendant argues that Plaintiff’s medical records document frequent and continuing care in
22 response to Plaintiff’s conditions.

23 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual punishment
24 in violation of the Eighth Amendment unless the mistreatment rises to the level of “deliberate
25 indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting
26 Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part test for deliberate indifference requires
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28 ¹ Hereinafter referred to as “UDF.”

1 Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that failure to treat a prisoner’s
2 condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain,’”
3 and (2) “the defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096. A
4 defendant does not act in a deliberately indifferent manner unless the defendant “knows of and
5 disregards an excessive risk to inmate health or safety.” Farmer v. Brennan, 511 U.S. 825, 837 (1994).
6 “Deliberate indifference is a high legal standard,” Simmons v. Navajo County, Ariz., 609 F.3d 1011,
7 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is shown where there
8 was “a purposeful act or failure to respond to a prisoner’s pain or possible medical need” and the
9 indifference caused harm. Jett, 439 F.3d at 1096.

10 Negligence or medical malpractice do not rise to the level of deliberate indifference. Broughton
11 v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-106). “[A]
12 complaint that a physician has been negligent in diagnosing or treating a medical condition does not
13 state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
14 not become a constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106;
15 see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995). Even gross negligence is
16 insufficient to establish deliberate indifference to serious medical needs. See Wood v. Housewright,
17 900 F.2d 1332, 1334 (9th Cir. 1990). Additionally, a prisoner’s mere disagreement with diagnosis or
18 treatment does not support a claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th
19 Cir. 1989).

20 Further, a “difference of opinion between a physician and the prisoner—or between medical
21 professionals—concerning what medical care is appropriate does not amount to deliberate indifference.”
22 Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012) (citing Sanchez v. Vild, 891 F.2d at 242, overruled
23 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082–83 (9th Cir. 2014); Wilhelm v. Rotman,
24 680 F.3d 1113, 1122–23 (9th Cir. 2012) (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)).
25 Rather, Plaintiff “must show that the course of treatment the doctors chose was medically unacceptable
26 under the circumstances and that the defendants chose this course in conscious disregard of an excessive
27 risk to [his] health.” Snow, 681 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal quotation marks
28 omitted).

1 As an initial matter, there is no dispute and Defendant does not argue that Plaintiff's medical
2 conditions were serious. Therefore, the only issue to decide is whether Defendant Dr. Romero was
3 deliberately indifferent to Plaintiff's medical conditions.

4 It is undisputed that Dr. Romero prescribed Atorvastatin (Lipitor) on April 27, 2015. (UDF 3.)
5 At that time, Dr. Romero was not aware of any potential link between the use of Atorvastatin and an
6 increased risk of diabetes. (Romero Decl. ¶ 8.) Indeed, the data on the potential link between
7 Atorvastatin and diabetes was extremely limited at the time. (Id.) Moreover, the current data suggests
8 that the benefits of statin therapy in treating high cholesterol and dyslipidemia outweigh the potential
9 increased risk of developing diabetes. (Id.) Furthermore, even if Plaintiff could establish that there is
10 an association between Atorvastatin (Lipitor) and diabetes (i.e., that Lipitor increases the risk of
11 diabetes) and that Lipitor is capable of causing diabetes, it does not necessarily follow that Lipitor
12 caused the development of diabetes in Plaintiff, absent evidence to the contrary, not present here. In
13 addition, Dr. Romero unequivocally states that she would continue to prescribe Atorvastatin today
14 because the benefits outweigh the potential increased risk of diabetes. (Romero Decl. ¶ 8.)

15 It is undisputed that one of the other common side effects of statin therapy is muscle pain.
16 (Romero Decl. ¶ 9.) When a patient experiences muscle pain after beginning statin therapy, the
17 appropriate course of action is to consider the use of alternative statins. (Id.) This is exactly what
18 happened in this case. Shortly after beginning to take the Atorvastatin, Plaintiff began to complain of
19 pain in her arms that began when she started taking the medication. (UDF 4.) On May 26, 2015,
20 another physician at CCWF, Dr. Showalter, signed an order stopping Plaintiff's prescription for
21 Atorvastatin. (Id.) It appears Dr. Showalter noted that Plaintiff's blood sugar measurements were
22 high on December 2, 2014, and May 11, 2015. (UDF 5.) Therefore, Dr. Showalter ordered an
23 HgA1C test which came back at a level diagnostic of diabetes. (Id.) However, there is no evidence
24 that Plaintiff's diabetes was caused by her taking Atorvastatin for one month in 2015, or that Plaintiff
25 was previously diagnosed or treated for diabetes. In fact, on July 30, 2015, Plaintiff was restarted on
26 statin therapy which is indicative of the importance of statin therapy in treating Plaintiff's high
27 cholesterol and dyslipidemia. (Id. at ¶ 12.)

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1 In opposition, Plaintiff essentially argues that because she was never diagnosed with diabetes,
2 prior research and her prior history increased her risk of contracting diabetes from Atorvastatin, and
3 she was subsequently diagnosed with diabetes after taking Atorvastatin, Dr. Romero is liable.
4 However, “simply because a person takes drugs and then suffers an injury does not show causation.
5 Drawing such a conclusion from temporal relationships leads to the blunder of the *post hoc ergo*
6 *propter hoc* fallacy.” McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1243 (11th Cir.2005); see also
7 Roche v. Lincoln Prop. Co., 278 F.Supp.2d 744, 752 (E.D.Va.2003) (“Dr. Bernstein's reliance on
8 temporal causation as the determinative factor in his analysis is suspect because it is well settled that a
9 causation opinion based solely on a temporal relationship is not derived from the scientific method and
10 is therefore insufficient to satisfy the requirements of Rule 702.”) (internal quotes omitted).

11 Plaintiff submits that Dr. Romero’s prescription of Atorvastatin was not merely a medical
12 opinion because there was a “large study done on Lipitor by experts in medical and science according
13 to that tv ad. Defendant’s claim that she was not aware of the link between Lipitor and diabetes at the
14 time is incorrect and false considering the aforementioned points plaintiff made.” (ECF No. 32, Opp’n
15 at 3.) Plaintiff’s personal opinion about what happened to her and why it happened is not competent
16 evidence sufficient to defeat Dr. Romero’s motion for summary judgment. Matsushita Elec. Indus. Co.
17 v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In addition, the declaration of inmate Mary Jo
18 Meyers does not serve to create a genuine issue of material fact. In support of her arguments, Plaintiff
19 submits, inter alia, a declaration by fellow inmate Mary Jo Meyer, who claims that prior to
20 incarceration she was a registered nurse for 32 years. (ECF No. 32, Opp’n at Ex. E.) Ms. Meyer
21 opines that Plaintiff became diabetic after she took a high dose of Atorvastatin. (Id.) It appears that
22 Ms. Meyer is providing testimony regarding the purported side effects of Atorvastatin. (Id.)
23 However, besides the declaration itself, Plaintiff fails to submit any evidence to support the contention
24 that Ms. Meyer is qualified to provide expert medical opinion on the issue pursuant to Federal Rule of
25 Evidence 702.

26 Although Ms. Meyer declares that she was previously employed as a registered nurse, she has
27 not been qualified as a medical expert pursuant to Federal Rule of Evidence 702. As such, Ms.
28 Meyer's non-expert testimony is limited to statements “(a) rationally based on the witness's perception;

1 (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c)
2 not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed.
3 R. Evid. 701. Therefore, she may not offer medical testimony regarding Plaintiff's medical status,
4 diagnosis or medication side effects. She also may not provide testimony regarding causation.
5 “[G]enerally plaintiff must prove causation by expert medical testimony except where there is an
6 obvious causal relationship-one where injuries are immediate and direct.” Walker v. Contra Costa
7 County, Nos. C03-3723 TEH, C05-2800 TEH, 2006 WL 3371438, at (9 (N.D. Cal. 2006), quoting In
8 re Baycol Products Litigation, 321 F.Suapp.2d 1118, 1125 (D.Minn.2004) (citation omitted) (internal
9 quotation omitted).

10 In addition, Plaintiff's submission of a medical article obtained from the UpToDate website,
11 even if deemed admissible, is insufficient to demonstrate a genuine issue of material fact because there
12 is simply no evidence to show that the prescription of Atorvastatin posed a risk to *her* diabetic
13 diagnosis.² (ECF No. 32, Opp'n at Ex. C.) Accordingly, Plaintiff has not met her burden of showing
14 that Defendant Dr. Romero knew of a risk to her serious medical condition posed by Atorvastatin and
15 was deliberately indifferent thereto via any potential heightened risk for contracting diabetes. Even if
16 Plaintiff had shown that the prescription of Atorvastatin posed a risk to his diabetic condition, she has
17 failed to present any evidence that Dr. Romero acted with deliberate indifference towards her.
18 Plaintiff has shown that she disagrees with prison officials over his prescription of Atorvastatin.
19 However, mere differences of opinion between a prisoner and prison medical staff as to proper
20 medical care do not give rise to a § 1983 claim. See Jackson v. McIntosh, 90 F.3d at 332; Sanchez v.
21 Vild, 891 F.2d at 242; Franklin v. Oregon, 662 F.2d 1337, 1334 (9th Cir.1981). Thus, there is

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24 ² “[I]t is well established that medical textbooks, treatises and professional articles are not freely admissible in evidence to
25 prove the substantive or testimonial facts stated therein, since they are subject to the hearsay rule.” Hickock v. G.D. Searle
26 & Co., 496 F.2d 444, 446 (10th Cir. 1974). A statement from a medical textbook, treatise or professional article may be
27 admissible if the statement is established to be from a reliable medical authority and is relied upon an expert witness. See
28 Fed. R. Evid. 803(18); Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982). Plaintiff has not shown the article from the
UpToDate website is reliable medical authority, and Plaintiff has not shown that he has any medical expertise and has not
presented any expert witness who relied upon the article.

1 insufficient evidence from which a trier of fact could conclude either that Defendant Dr. Romero
2 knew, based on Plaintiff's medical condition, that the prescription of Atorvastatin would pose a
3 substantial risk of serious harm to Plaintiff, but disregarded that risk anyway. Accordingly, Defendant
4 Dr. Romero's motion for summary judgment should be granted.

5 **IV.**

6 **ORDER AND RECOMMENDATIONS**

7 Based on the foregoing, it is HEREBY ORDERED that the Clerk of Court shall randomly
8 assign a Fresno District Judge to this action.

9 Further, it is HEREBY RECOMMENDED that:

- 10 1. Plaintiff's motion for summary judgment be denied as procedurally deficient;
11 2. Defendant's motion for summary judgment be granted; and
12 3. The Clerk of Court be directed to enter judgment.

13 These Findings and Recommendations will be submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
15 being served with these Findings and Recommendations, the parties may file written objections with
16 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
17 Recommendations." The parties are advised that failure to file objections within the specified time
18 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
19 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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21 IT IS SO ORDERED.

22 Dated: January 6, 2021



23 UNITED STATES MAGISTRATE JUDGE