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**\*E-FILED 11-19-2009\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LAILA BATTS,

No. C08-00286 JW (HRL)

Plaintiff,

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SANCTIONS**

v.

**[Re: Docket No. 43]**

COUNTY OF SANTA CLARA, PETER  
CRANDALL, CHRISTINA ARQUERO, and  
DOES 3-20,

Defendants.

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Plaintiff Laila Batts claims that during her 10-day incarceration at the Elmwood Women's Facility ("Elmwood") from January 5-14, 2007, defendants failed to diagnose and provide appropriate medical care for her ectopic pregnancy. She seeks damages for alleged violation of her civil rights (42 U.S.C. § 1983), failure to summon medical care (Cal. Gov. Code § 845.6), and professional negligence. (Amended Complaint, Docket No. 63).

Plaintiff moves for sanctions for alleged deposition misconduct by the County. The County opposes the motion. Upon consideration of the moving and responding papers, as well as the arguments of counsel, this court denies the motion.

A. Deposition of Nurse Palza

Palza is identified as a Kaiser nurse who treated plaintiff after plaintiff's release from Elmwood. Plaintiff has disclosed Palza as a non-retained expert. The parties dispute whether

1 plaintiff may elicit certain opinions from Palza without first providing a written expert report  
2 under Fed. R. Civ. P. 26(a)(2).

3 A party must disclose the identity of all persons it may use to present expert testimony at  
4 trial. Unless otherwise stipulated or ordered by the court, however, written reports are required  
5 only for an expert (1) who is “retained or specially employed to provide expert testimony in the  
6 case” or (2) “whose duties as the party’s employee regularly involve giving expert testimony.”  
7 FED.R.CIV.P. 26(a)(2)(B). Under the so-called “treating physician rule,” a treating physician  
8 may testify as to matters based on her treatment of plaintiff, without providing an expert report  
9 beforehand. See Fielden v. CSX Transp., Inc., 482 F.3d 866, 869 (6th Cir. 2007). However,  
10 when the physician’s proposed opinion testimony extends beyond the facts made known to her  
11 during the course of the care and treatment of the patient and the witness is specially retained to  
12 develop specific opinion testimony, the physician is required to provide an expert report. Ordon  
13 v. Karpie, 223 F.R.D. 33, 36 (D. Conn. 2004); see also Hall v. Sykes, 164 F.R.D. 46, 48-49  
14 (E.D. Va. 1995).

15 In this case, there seems to be no dispute that the “treating physician” rule may be  
16 extended to any treating provider. See FED. R. CIV. P. 26 advisory committee’s note (1993) (“A  
17 treating physician, *for example*, can be deposed or called to testify at trial without any  
18 requirement for a written report.”) (emphasis added). However, the parties disagree whether  
19 plaintiff has or will elicit testimony from Palza that extends beyond Palza’s treatment of  
20 plaintiff. Although plaintiff says she will do no such thing, the record presented indicates  
21 otherwise. (See, e.g., Friedman Decl., Ex. A (Plaintiff’s Rule 26(a)(2) Disclosure”); Harris  
22 Decl., Ex. B (Palza Depo.)). Batts may, without providing a report, elicit Palza’s testimony as  
23 to her course of treatment of plaintiff and why Palza made the choices that she did in connection  
24 with that treatment. However, if Batts seeks Palza’s opinion on matters beyond her own care  
25 and treatment of plaintiff, plaintiff must first provide a written report from Palza under Fed. R.  
26 Civ. P. 26(a)(2).

27 Plaintiff’s motion with respect to Palza’s deposition is denied.  
28

1 B. The Fed. R. Civ. P. 30(b)(6) deposition of the County

2 Pursuant to Fed. R. Civ. P. 30(b)(6), plaintiff served a notice for the County's  
3 deposition. The notice required the County to designate "Deponent A" to testify about the  
4 County's document preservation and production:

5 Deponent A: County manager, supervisor or employee with most  
6 knowledge of defendant's search, preservation and production of documents  
7 in this litigation, and in particular, the County medical records of plaintiff  
8 produced in this case.

9 (Friedman Decl., Exh. C). The County produced Nurse Manager Marian Anderson to testify  
10 on its behalf. Plaintiff says that Anderson was unprepared. The County maintains that  
11 Anderson was prepared to testify as to the subjects Batts identified for "Deponent A." It  
12 contends that Batts frequently posed questions that were outside the topics for which Anderson  
13 was designated to testify.

14 Plaintiffs' motion is denied. Although the County's instructions for Anderson not to  
15 answer were generally improper, *see, e.g., Deto v. City and County of San Francisco*, 196  
16 F.R.D. 362, 367 (N.D. Cal. 2000), some of plaintiff's questions were so far afield of the subject  
17 matter for which Anderson was designated to testify as to deprive the County of fair notice as to  
18 the scope of the examination. (*See Harris Decl., Ex. E at 51:1-53:16*). Moreover, plaintiff has  
19 not convincingly demonstrated that Anderson was unprepared to testify as to the topics for  
20 which she was designated by the County.

21 C. Other Alleged Deposition Misconduct


22 Plaintiff contends that throughout this litigation, defendants have engaged in alleged  
23 deposition misconduct – e.g., coaching witnesses, making improper instructions not to answer,  
24 and taking unscheduled breaks while questions are pending. As discussed at the motion  
25 hearing, this court finds that neither side's conduct has been particularly commendable.  
26 Plaintiffs' motion for sanctions therefore is denied. Nevertheless, because the parties appear  
27 unable (or unwilling) to deal reasonably with one another, this court finds it necessary to  
28 provide some general guidelines:

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- a. Counsel shall refrain from instructing deponents not to answer pending questions, except as authorized under Fed. R. Civ. P. 30(c)(2);
- b. Counsel shall avoid speaking objections and shall state objections concisely in a non-argumentative and non-suggestive manner, Fed. R. Civ. P. 30(c)(2);
- c. No breaks shall be taken while a question is pending;
- d. Breaks taken during the depositions shall not count against the time limit for the examination; and
- e. Colloquy between counsel on the record shall not count against the time limit for the examination.

SO ORDERED.

Dated: November 19, 2009

  
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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

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5:08-cv-00286-JW Notice has been electronically mailed to:

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Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.