UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

COUNTESS CLEMONS *Plaintiff,* v. CORRECTIONS CORPORATION OF AMERICA, *et al.* *Defendants.*	)))))))	Case No. 1:11-cv-339 *Collier/Carter*

G. MICHAEL LUHOWIAK *Plaintiff,* v. TERESA SMITH, *et al.* *Defendants.*	))))))	Case No. 1:11-cv-340 *Collier/Carter*

REPORT and RECOMMENDATION

I. Introduction

Plaintiffs' Second Motion for Sanctions [Doc. 86] is pending before the undersigned Magistrate Judge for a report and recommendation. This motion concerns a document referred to as a "Lesson Plan" entitled "Basic Training—First Aid" (the Lesson Plan) which defendant Corrections Corporations of America (CCA) has submitted in response to the plaintiffs' motions for partial summary judgment (Responses) and which CCA intends to use at the trial of these cases. Because of an unintentional mistake by CCA, plaintiffs were not provided a copy of this Lesson Plan until the last day of discovery. To properly address the prejudice plaintiffs would suffer if CCA were allowed to use this Lesson Plan in its Responses or at trial would require permitting plaintiffs to re-depose all the witnesses, a formidable task which would be expensive and time consuming. Consequently, the undersigned RECOMMENDS that the Lesson Plan be STRICKEN from CCA's Responses and DEEMED INADMISSIBLE for purposes of trial.

II. Relevant Facts

The nature, issues, and allegations of both cases are described in detail in the undersigned's report and recommendation entered on April 10, 2014 and is incorporated herein.

On September 13, 2012, plaintiffs served their first set of interrogatories. Interrogatory 13 and CCA's response to it was as follows:

> **INTERROGATORY NO. 13:** Please state with specificity all training provided to any employee, agent or contractor with respect to the treatment and care of inmates who are pregnant and their unborn children.
>
> **ANSWER:** CCA objects to this Interrogatory on grounds that it is overbroad, unduly burdensome, and seeks information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, CCA hires doctors and nurses to provide medical treatment to inmates incarcerated at Silverdale. CCA does not train doctors or nurses. Doctors and nurses are educated, trained and licensed before CCA hires them. CCA does provide general training to all employees. For examples of general training CCA provides all employees, see the personnel and training files of the following individuals: Corrections Officer Brenda Badger, Corrections Officer Daniel Garcia, Warden Paul Jennings, Corrections Officer Juanita Montgomery, and Teresa Smith, L.P.N.

(Page ID # 2124). Plaintiffs' counsel conferred with defendants' counsel regarding the completeness of the answer to Interrogatory 13 and, after reaching an impasse, plaintiffs filed a motion to compel on April 25, 2013. The undersigned found CCA's response to the interrogatory to be inadequate and ordered CCA to answer the interrogatory in full in an order entered on May 21, 2013. CCA thereafter did further respond by attaching a document, another lesson plan entitled "Communicable Diseases, Bloodborne Pathogens, Infection Control, HIPPA, Medical Psychiatric Referral, Special Needs Inmates." On November 19, 2013, CCA used the Lesson Plan to cross-examine its expert, Mr. Deland, during his deposition. Plaintiffs' counsel objected on the ground that he had not been provided the Lesson Plan. CCA's counsel thought the Lesson Plan had been provided. CCA provide a complete copy of the Lesson Plan to

plaintiffs on November 20, 2013. This was the first-time the plaintiffs were provided a copy of the Lesson Plan.

According to CCA, it had intended to produce the Lesson Plan to the plaintiffs after the undersigned granted plaintiffs' motion to compel, but the attorney who was coordinating discovery was working from home while on maternity leave and the Lesson Plan was inadvertently put in the wrong folder where it remained instead of being produced. The undersigned accepts CCA's explanation. Much of the Lesson Plan is concerned with the proper procedures to follow when an inmate is bleeding. The Lesson Plan is not addressed to medical professionals but to lay people employed by CCA.

III. Discussion

CCA offers several arguments to support its assertion that the inadvertent failure to produce the Lesson Plan was harmless and prejudiced the plaintiffs in no way. First, CCA argues that from the time the Court granted plaintiffs' motion to compel and ordered CCA to produce the Lesson Plan from the time it was actually produced, plaintiffs deposed only two witnesses and the Lesson Plan was relevant only to one of those witnesses, Dr. Deland. As to Dr. Deland, CCA notes plaintiffs' counsel was given the opportunity to review the Lesson Plan and question Dr. Deland about it during the deposition.

In response, plaintiffs' counsel stated he would have questioned each of the defendants and the witnesses in their depositions about this Lesson Plan had he known it existed. Whether CCA had an appropriate policy to address a situation when a pregnant inmate is bleeding is a key issue in both cases. It makes sense to the undersigned that plaintiffs would want to question the defendants and any other corrections officers involved in the incident with Countess Clemons about the Lesson Plan. Plaintiffs further argue CCA should have produced the Lesson Plan thirty

days after it was initially requested which would have been October 12, 2013. The undersigned did not find CCA's objections to Interrogatory 13 to be well-taken and granted plaintiffs' motion to compel. Furthermore, asserts plaintiffs, had CCA produced the Lesson Plan promptly after the Court granted the plaintiffs' motion to compel there would still have been time to re-depose the individual defendants and other CCA employees who are witnesses, but discovery was closed before plaintiffs could carefully examine the Lesson Plan.

Second, CCA argues that it produced the education and training records of the individual defendants and that those training records indicate "each individual Defendant received the training contained within the Lesson Plan." (Page ID # 2245). I have examined the training records and conclude they do not provide the specific content of the training the individual defendants received, nor can one determine from the records themselves that such a document entitled "Basic Training—First Aid" exists. (Page ID # 2053 – 2088).

Third, CCA argues that plaintiffs' counsel questioned Assistant Warden Jennings about training provided to CCA employees regarding medical emergencies. (Page ID # 2246). While Jennings testified in his deposition that CCA employees did receive training on what to do in a medical emergency, there are very few details in his deposition about the substance of the training – certainly not the same details as are in the Lesson Plan. Moreover, the Lesson Plan itself, the fact of its existence, is important evidence which plaintiffs needed to know about to adequately prepare their motions for partial summary judgment and for trial.

IV. Conclusion

The undersigned finds CCA's failure to timely produce the Lesson Plan was not intentional, but it was highly prejudicial to the plaintiffs. While the undersigned always prefers to seek out means to correct any prejudice suffered by a party and therefore permit the evidence

to be admitted, in this case, absent opening up discovery for a significant period of time, allowing a new dispositive motions deadline and moving the trial date, it is not possible to counteract the prejudice to the plaintiffs. Consequently, pursuant to Fed. R. Civ. P. 37(b)(2)(A), it is RECOMMENDED[1] that the Lesson Plan be stricken from CCA's responses to plaintiffs' motions for partial summary judgment and that the Lesson Plan be deemed inadmissible in the trial of these cases.

S /William B. Mitchell Carter
UNITED STATES MAGISTRATE JUDGE

[1] Any objections to this Report and Recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).