

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01177-LTB-NYW

DAKOTA TYLER MCGRATH,

Plaintiff,

v.

FORT COLLINS POLICE SERVICES OFFICER NICK RODGERS, in his individual
capacity,

Defendant.

CIVIL SCHEDULING ORDER

1. DATE OF SCHEDULING CONFERENCE AND APPEARANCES OF COUNSEL

Date/Time/Place of Conference: Tuesday, September 7, 2017, 09:30 a.m.,
before Magistrate Judge Nina Y. Wang, Courtroom C-204, Byron Rogers United States
Courthouse, 1929 Stout Street, Denver, Colorado 80294.

Appearing on Behalf of Plaintiff:

Anthony Viorst, Esq.
VIORST LAW OFFICES, P.C.
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Denver, CO 80246
(303) 759-3808

Appearing on Behalf of Defendant:

Thomas J. Lyons, Esq.
Matthew J. Hegarty, Esq.
HALL & EVANS, L.L.C.
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(303) 628-3300

2. STATEMENT OF JURISDICTION

Plaintiff asserts, and Defendant does not contest, the presence of jurisdiction in
the United States District Court for the District of Colorado based on a federal question,
pursuant to 28 U.S.C. § 1331.

Further, the events giving rise to the claims against Defendant, namely the injury Plaintiff contends he suffered, occurred within the jurisdiction of the United States District Court for the District of Colorado. Thus, venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2).

3. STATEMENT OF CLAIMS AND DEFENSES

a. Plaintiff: On October 20, 2016, Defendant was dispatched to the scene prompted by a 911 call made by Plaintiff's brother. Defendant observed Mr. McGrath taking things out of his vehicle. Plaintiff was wearing headphones and walked away from Defendant as he did not hear Defendant's calls out to him. Defendant followed Plaintiff into an alley with the intent to arrest Plaintiff for the crime of third degree assault, a misdemeanor. When Defendant caught up to Plaintiff, he struck Plaintiff from behind with his baton in the area of his head and neck. Plaintiff was rendered briefly unconscious, causing him to drop to the ground and hit his head. Plaintiff rolled onto his back, still dazed, but not actively resisting or obstructing Defendant. Defendant struck Plaintiff's right leg multiple times with the steel baton. Plaintiff sustained multiple fractures including an open fracture of the proximal end of his right tibia. Plaintiff was transported by ambulance to the hospital where his open tibial fracture was diagnosed. Despite the need for immediate follow-up treatment, Plaintiff was arrested and detained in the Larimer County Detention Center where he was denied medical care as well as prescribed medications. Further, for a period of several days, Mr. McGrath was confined to a blood-soaked bed, and forced to urinate in a bottle, as the Detention Center staff would not respond to his multiple pleas for assistance. Plaintiff underwent

extensive medical care, including surgery to forcefully drive a titanium nail/rod down the center of the entire length of the tibia, and screwed in place. Plaintiff incurred significant medical expenses in order to treat the injuries caused by Defendant Rodgers. Plaintiff also experienced significant noneconomic damages due to these injuries, including pain, suffering, emotional distress, and loss of quality of life. Plaintiff continues to suffer from permanent physical impairment and disfigurement of his right leg.

b. **Defendant:**

In regard to Plaintiff's claims, Defendant acted in accordance with all constitutional, common law, and statutory duties and without any intent to cause Plaintiff harm.

Defendant's position as set forth above is in addition to the following affirmative defenses, which will be pursued by Defendant:

i. The Complaint may fail to state a claim on which relief may be granted.

ii. Plaintiff may not be entitled to any relief being sought or claimed in the Complaint under one or more of the legal theories asserted therein.

iii. To any extent the Court concludes Defendant acted under color of state law with respect to Plaintiff, Defendant is entitled to absolute immunity or qualified immunity, or both such immunities, as well as common law and statutory immunities, with respect to some or all of Plaintiff's claims against him.

iv. Plaintiff's claims against Defendant, or some of them, are barred in whole or in part by the failure of personal participation on the part of Defendant.

v. On information and belief, Plaintiff failed to mitigate his damages, if any.

vi. On information and belief, some or all of Plaintiff's injuries and damages, if any, were either due to a preexisting condition, or were not aggravated by any act or omission of Defendant, or were not proximately caused by or related to any act or omission of Defendant.

vii. All or part of Plaintiff's claims never achieved the level of any constitutional violation sufficient to state a claim under 42 U.S.C. § 1983.

viii. At all relevant times, Defendant acted in accordance with all common law, statutory, and constitutional obligations, and without any intent to cause Plaintiff harm.

ix. At all relevant times, Defendant lacked the requisite intent to establish any claim against him of willful and wanton conduct, and indeed Defendant also possesses or possessed a reasonable good faith belief in the lawfulness of all his conduct, and Plaintiff's claims fail to establish any basis to conclude Defendant acted in a willful and wanton manner.

x. Plaintiff's injuries, damages, or losses, if any, may have been proximately caused in whole or in part by his own acts or omissions, either in combination with one another or independent of one another.

xi. Plaintiff's injuries, damages, or losses, if any, may have been proximately caused by the acts or omissions of third parties over whom Defendant possessed no ability to control or right of control.

xii. To any extent, any act or omission on the part of Defendant was in any way involved in any detention of Plaintiff by anyone, any act or omission by Defendant was privileged under applicable law, including the privilege of police officers to use reasonable physical force to effect an arrest, keep a subject in custody, and defend himself or others.

xiii. In all respects, Defendant behaved in accordance with applicable legal authority in all acts or omissions associated with Plaintiff, negating any claim of liability asserted by Plaintiff against him.

xiv. Plaintiff is not entitled to, and may not recover, duplicative damages.

xv. Plaintiff's claims may be barred in whole or in part by the doctrines of consent, estoppel, waiver, or unclean hands.

xvi. Defendant never breached any obligation or responsibility to anyone associated with any property or liberty interest of any party in relation to this matter.

xvii. Defendant acted in accordance with all contractual and legal obligations.

xviii. To any extent Plaintiff seeks equitable or injunctive relief in the Complaint, Plaintiff cannot satisfy all or some of the prerequisites to a grant of equitable or injunctive relief in this matter and any request for injunctive relief is moot.

xix. Defendant is not liable for any punitive damages under state or federal law.

xx. Defendant reserves his right to assert other or additional defenses and affirmative defenses as may become known in the course of these proceedings.

4. UNDISPUTED FACTS

The following facts are undisputed:

- a. About 06:59 PM on October 20, 2016, Defendant heard a dispatch call respecting Plaintiff.
- b. Defendant heard on this dispatch call that a male who stated he was Plaintiff's brother complained of an alleged assault from Plaintiff.
- c. Defendant also heard on this dispatch call that Plaintiff was alleged to have headbutted the male in question.
- d. Defendant was dispatched approximately 06:59 PM as to this dispatch call.
- e. Defendant arrived at or near Plaintiff's location approximately 07:05 PM.

5. COMPUTATION OF DAMAGES

a. **Plaintiff**: Economic Damages -- Plaintiff has obtained medical bills from his primary care provider and his orthopedic surgeon totaling approximately \$6,000. Plaintiff is still waiting on hospital bills, which have been ordered but not yet received.

Noneconomic Damages/Physical Impairment -- Due to the pain and suffering and permanent mobility limitations caused by the fracture and the surgical procedure performed, Plaintiff values his noneconomic damages at no less than \$500,000.

b. **Defendant**: Defendant does not now seek damages, yet still reserves the right to pursue claims for his attorney fees and costs of litigation, as appropriate.

**6. REPORT OF PRECONFERENCE DISCOVERY
AND MEETING UNDER FED.R.CIV.P. 26(f)**

a. Date of Fed. R. Civ. P. 26(f) meeting: The Rule 26(f) meeting was held on August 15, 2017 via telephone.

b. Names of each participant and party he/she represented: Attorney Anthony Viorst of Viorst Law Offices, appeared on behalf of Plaintiff. Attorney Matthew J. Hegarty, of Hall & Evans, L.L.C., appeared on behalf of Defendant.

c. Statement as to when Rule 26(a)(1) disclosures were made or will be made: Plaintiff served his Fed. R. Civ. P. 26(a)(1) Initial Disclosures on July 10, 2017. Defendant anticipates serving his Fed. R. Civ. P. 26(a)(1) Initial Disclosures on or before August 29, 2017.

d. Proposed changes, if any, in timing or requirement of disclosures under Fed.R.Civ.P. 26(a)(1): None.

e. Statement concerning any agreements to conduct informal discovery: None at this time. However, the parties will notify the Court of any agreed-upon informal discovery, including joint interviews and SAMMS or Reuters meetings.

f. Statement concerning any other agreements or procedures to reduce discovery and other litigation costs, including the use of a unified exhibit numbering system: The parties have agreed to limit the number of Interrogatories, Requests for Production, Requests for Admission, Depositions, and Retained Experts as set forth in detail below, and have agreed to the use of a unified exhibit numbering system. Otherwise, there are no agreements or procedures to reduce discovery or litigation costs.

g. Statement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form: The parties do not anticipate that the claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form. While the medical records are in electronic form, the parties do not anticipate issues in the production or use of these records throughout the course of this case.

h. Statement summarizing the parties' discussions regarding the possibilities for promptly settling or resolving the case: The parties discussed the possibility of settlement, and have agreed such a discussion is premature at this time until further disclosures have been made and discovery have been conducted, as the parties have differing views as to the case's merits. The parties agree that they will continually reassess the prospects of settlement as this case progresses and that appropriate discussions may be entertained following adequate disclosures – including for experts – and discovery in the case in order to make such discussions or a settlement conference an economical use of time and expense. The parties do not believe this case is a good candidate for an Early Neutral Evaluation.

7. CONSENT

The parties have not unanimously consented to the exercise of jurisdiction of a magistrate judge.

8. DISCOVERY LIMITATIONS

a. **Modifications which any party proposes to the presumptive numbers of depositions or interrogatories contained in the Federal Rules:** ~~The parties agree to the presumptive limits on the number of depositions established in Fed. R. Civ. P. 30(a)(2)(A)(i), namely Each side may serve up to 10 depositions per side, including experts, and on the number of interrogatories established in Fed. R. Civ. P. 33(a)(1), namely each party may serve up to 25 interrogatories, including discrete subparts.~~ per side.

b. **Limitations which any party proposes on the length of depositions:** ~~The parties agree to the presumptive limitations on the length of depositions established in Fed. R. Civ. P. 30(d)(1), absent leave of court and for good cause shown. Each deposition may last up to one day of seven (7) hours.~~

c. **Limitations which any party proposes on the number of requests for production and/or requests for admission:** ~~The parties agree e~~Each side shall be limited to thirty (30) requests for production of documents and thirty (30) requests for admission that each party may serve, absent leave of court.

d. **Other Planning or Discovery Orders:** No opposed discovery motions are to be filed with the Court until the parties comply with D.C.COLO.LCivR 7.1(A) and participate in an informal discovery dispute conference before Magistrate Judge Wang.

9. CASE PLAN AND SCHEDULE

a. **Deadline for Joinder of Parties and Amendment of Pleadings:** The parties stipulate that the deadline to designate nonparties at fault shall be **October 20, 2017** and the deadline to join parties or amend pleadings will be **October 20, 2017**.

b. **Discovery Cut-off:** The parties agree to a discovery cutoff of **March 5, 2018**.

c. **Dispositive Motion Deadline:** All dispositive motions shall be filed no later than **April 6, 2018**.

d. **Expert Witness Disclosure:**

1. **The parties shall identify anticipated fields of expert testimony, if any.**

Plaintiff: Plaintiff may retain experts in the fields of liability and damages, including any rebuttal expert.

Defendant: Defendant may retain experts in the fields of liability and damages to counter Plaintiff's experts, if any.

2. **Limitations which the parties propose on the use or number of expert witnesses.** Each party may designate no more than two (2) specially retained expert witnesses.

3. **The parties shall designate all experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2):** The parties propose that Plaintiff shall designate all experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2) on or before **December 11, 2017**; and Defendant shall designate all experts and rebuttal experts and provide opposing counsel and any pro se parties with all information specified in Fed. R. Civ. P. 26(a)(2) on or before **January 8, 2018**. This includes disclosure of information applicable to "Witnesses Who Must Provide A Written Report"

under Rule 26(a)(2)(B) and information applicable to “Witnesses Who Do Not Provide a Written Report” under Rule 26(a)(2)(C).

4. The parties shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2): The parties propose that Plaintiff shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before **February 5, 2018**. This includes disclosure of information applicable to “Witnesses Who Must Provide A Written Report” under Rule 26(a)(2)(B) and information applicable to “Witnesses Who Do Not Provide a Written Report” under Rule 26(a)(2)(C).

Notwithstanding the provisions of Fed. R. Civ. P. 26(a)(2)(B), no exception to the requirements of the Rule will be allowed by stipulation unless the stipulation is in writing and approved by the court. In addition to the requirements set forth in Rule 26(a)(2)(B)(I)-(vi), the expert’s written report also must identify the principles and methods on which the expert relied in support of his/her opinions and describe how the expert applied those principles and methods reliably to the facts of the case relevant to the opinions set forth in the written report.

e. Identification of Persons to Be Deposed:

Name of Deponent	Date of Deposition	Time of Deposition	Expected Length of Deposition
<u>Plaintiff will depose:</u>			
Defendant Nick Rodgers	To be determined	To be determined	Up to 7 hours
Any and all defense expert witnesses	To be determined	To be determined	Up to 7 hours
Any and all medical	To be determined	To be determined	2-3 hours apiece

treatment providers of Plaintiff			
Defendant will depose:			
Plaintiff Dakota McGrath	To be determined	To be determined	Up to 7 hours
Any and all defense expert witnesses	To be determined	To be determined	Up to 7 hours
Any and all medical treatment providers of Plaintiff ¹	To be determined	To be determined	2-3 hours apiece

f. **Deadline for Service of Written Discovery Requests:** The parties agree that all Interrogatories, Requests for Production of Documents, or Requests for Admissions shall be served on or before **January 29, 2018**.

10. DATES FOR FURTHER CONFERENCES

a. Status conferences will be held in this case at the following dates and times: _____.

b. A final pretrial conference will be held in this case on May 18, 2018 at 9:30 o'clock a.m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than seven (7) days before the final pretrial conference.

11. OTHER SCHEDULING MATTERS

a. **Identify those discovery or scheduling issues, if any, on which counsel after a good faith effort, were unable to reach an agreement:** There are no discovery or scheduling issues on which counsel, after a good faith effort, were unable to reach an agreement.

¹ Currently, the complete nature and extent of Plaintiff's alleged injuries are unknown. As discovery progresses, Defendant will gain a better understanding of the physicians to be deposed. Defendant does not anticipate he will require depositions in excess of the presumptive limitations established by Fed. R. Civ. P. 30(a)(2)(A)(i).

b. Anticipated length of trial and whether trial is to the court or jury: The parties have requested a jury trial and anticipate that it will take five (5) days to complete.

A five-day jury trial is set to commence before the Honorable Lewis T. Babcock on 12-10-2018 at 9:00 a.m.

A Final Trial Preparation Conference is scheduled before Judge Babcock on 11-2-2018 at 9:00 a.m.

c. There are no pretrial proceedings that the parties believe may be more efficiently or economically conducted in any District Court facilities other than those located in the City and County of Denver, Colorado.

12. NOTICE TO COUNSEL AND PRO SE PARTIES

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1(c) by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all pro se parties.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures or Practice Standards established by the judicial officer presiding over the trial of this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1(a).

Counsel and unrepresented parties are reminded that any change of contact information must be reported and filed with the Court pursuant to the applicable local rule.

13. AMENDMENTS TO SCHEDULING ORDER

The scheduling order may be altered or amended only upon a showing of good cause.

DATED at Denver, Colorado, this 5th day of September, 2017.

BY THE COURT:

s/ Nina Y. Wang

Nina Y. Wang
United States Magistrate Judge

APPROVED:

VIORST LAW OFFICES, PC

HALL & EVANS, L.L.C.

/s/ Anthony Viorst, Esq.

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