

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-CV-01177-LTB-NYW

**DAKOTA TYLER MCGRATH,**

Plaintiff,

v.

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

Defendant.

---

**PLAINTIFF DAKOTA McGRATH'S MOTION PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE 36(b) TO PERMIT  
ADMISSIONS TO BE WITHDRAWN OR AMENDED**

---

Plaintiff Dakota McGrath, by and through counsel, Anthony Viorst of the Viorst Law Offices, P.C., hereby moves for permission to withdraw or amend his admissions, as follows:

**Certification**

Undersigned counsel certifies that he has contacted opposing counsel, Mr. Matthew Hegarty, about this motion, and that Mr. Hegarty opposes this motion.

**Factual Background**

1. This case concerns a baton strike inflicted by Fort Collins Police Officer Nick Rogers, the Defendant, which broke the leg of Dakota McGrath, the Plaintiff.

2. On November 17, 2017, defense counsel's office e-mailed discovery requests, including requests for admissions, to undersigned counsel (Attachment 1). The requests for admissions, which went directly to the merits of the instant case, consisted of the following:

1. Admit that, on the night of the Incident, you ignored Defendant's commands to step away from your vehicle and sit down on a curb.

2. Admit that, on the night of the Incident, you walked away from Defendant after he commanded you to approach him and sit down on a curb.

3. Admit that, on the night of the Incident, when Defendant informed you that you were under arrest and that force would be used against you if you did not comply with Defendant's commands, you responded, "Do what you have to do."

4. Admit that, on the night of the Incident, Defendant delivered a single blow to your left scapula consisting of a two-handed straight strike with Defendant's wooden baton, which caused you to fall to the ground.

5. Admit that, on the night of the Incident, you reached for your backpack after Defendant commanded you to roll over on to your stomach.

6. Admit that, on the night of the Incident, you resisted officers' attempts to place you in handcuffs.

7. Admit that, on the night of the Incident, you head-butted Lalo Rodriguez.

8. Admit that, on the night of the Incident, you drank alcoholic beverages.

9. Admit that, on the night of the Incident, you refused to comply with hospital personnel's requests to let them examine you.

3. Pursuant to Federal Rule of Civil Procedure 36, the responses to the requests for admissions were due 30 days thereafter, or no later than December 17, 2017.

4. On December 15, 2017, undersigned counsel's office sent an e-mail to defense counsel's office requesting a 12-day extension of time, or until December 29, 2017, to submit discovery responses (Attachment 2).

5. On December 18, 2017, defense counsel agreed to the requested extension (Attachment 3).

6. However, based upon a variety of complications--including the Christmas and New Year's holidays, difficulty communicating with Mr. McGrath (who does not have a computer and has trouble communicating by e-mail), as well as Mr. McGrath's physical and mental health problems--the responses to the requests for admission were not served until January 9, 2018, eleven days after the date of the agreed-upon extension (Attachment 4).

7. In his responses to the requests for admissions, Mr. McGrath denied each request for admission, with the exception of request for admission No. 8, regarding the consumption of alcoholic beverages prior to Officer Rogers' baton strike (Attachment 4).

8. Defense counsel has not yet taken the deposition of Mr. McGrath, which is set to be held within the next few weeks, and which will provide have ample opportunity for defense counsel to question Mr. McGrath regarding the matters referenced in the requests for admissions.

9. Although the discovery phase of this case was previously set to expire on March 5, 2018, Plaintiff has filed an unopposed motion to extend the discovery deadline for 60 days, until May 4, 2018.

### **Legal Argument**

Federal Rule of Civil Procedure 36(b) provides that a request of admission is deemed conclusively established if not answered within 30 days, "unless the court, on motion, permits the admission to be withdrawn or amended." A court may permit withdrawal or amendment "if it

would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.” *Id.*<sup>1</sup>

Regarding the first Rule 36(b) factor, the requests for admissions in the instant case concern the merits of the Plaintiff’s claim, such that “upholding the admission would practically eliminate any presentation of the merits of the case.” *Raiser v. Utah County*, 409 F.3d 1243, 1246 (10th Cir. 2005); *accord*, *Pittman v. Wakefield & Associates, Inc.*, 2017 WL 5593287, 16-cv-02695-RBJ-KMT (D. Colo. Nov. 21, 2017). In contrast, withdrawal or amendment of the admissions would enable Plaintiff to present the merits of his claim, and would thereby promote the just resolution of this case. *See Raiser v. Utah County, supra*, 409 F.3d at 1246 (the first 36(b) factor “emphasizes the importance of having the action resolved on the merits”); *accord*, *Pittman v. Wakefield & Associates, Inc.*, 2017 WL 5593287, 16-cv-02695-RBJ-KMT (D. Colo. Nov. 21, 2017).

Regarding the second Rule 36(b) factor, “[t]he prejudice contemplated by Rule 36(b) is more than simply inconvenience to the party.” *Dedmon v. Continental Airlines, Inc.*, 2015 WL 4639737 (D. Colo. Aug. 5, 2015) (citing *Raiser v. Utah County*, 409 F.3d at 1246). Instead, “the prejudice relates to the difficulty a party may have in proving its case.” *Id.*

Because the requests for admissions in the instant case bear upon the merits of the case, because the responses were filed only 11 days late, and because the discovery deadline is likely

---

<sup>1</sup> As described above, due to unforeseen complications, the responses to the requests for admissions were not timely filed. Though untimely, the responses were filed only eleven days after the agreed-upon extension date. Although the unforeseen complications and the minimal lateness of the responses could constitute “good cause” for the untimely responses, “good cause is not the standard under Rule 36(b).” *Lee Browning Belize Trust v. Aspen Mountain Condominium Association, Inc.*, 2017 WL 622712, Civil Action No 15-cv-00945-NYW (D. Colo. Feb. 15, 2017).

to be extended for an additional 60 days, Plaintiff asks this Court to grant his motion to withdraw or amend his admissions. *See Lee Browning Belize Trust v. Aspen Mountain Condominium Association, Inc.*, 2017 WL 622712, Civil Action No 15-cv-00945-NYW (D. Colo. Feb. 15, 2017) (allowing admissions to be withdrawn where responses were filed one month late, but issues raised in requests for admissions were addressed during deposition, and discovery deadline was extended for several months) (Attachment 5); *Jesusdaughter v. Scoleri*, 2007 WL 707464, 02-cv-00084-REB-BNB (D. Colo. Mar. 5, 2007); (allowing admissions to be withdrawn where responses served two days late, discovery deadline was extended for two months, and adverse party “did not forego any additional discovery or investigation based on the admissions”); *see also Raiser v. Utah County*, 409 F.3d 1243 (10th Cir. 2005) (district court abused its discretion in denying motion to amend admissions, “the admissions at issue conceded the core elements of [plaintiff’s] case,” the responses to requests for admissions were filed only two weeks late, and “[n]othing in the record before us shows that Utah County suffered prejudice sufficient to bar amendment of Mr. Raiser’s admissions”).

WHEREFORE, for the foregoing reasons, Plaintiff Dakota McGrath moves for permission to withdraw or amend his admissions.

Dated this 5<sup>th</sup> day of February, 2018.

THE VIORST LAW OFFICES, P.C.

*[Original signature on file at Viorst Law Offices, P.C.]*

*s/ Anthony Viorst*

---

Anthony Viorst, #18508  
Viorst Law Offices, PC  
950 South Cherry Street, Suite 300  
Denver, CO 80246  
Telephone: (303) 759-3808  
Facsimile: (303) 333-7127  
E-mail: [tony@hssspc.com](mailto:tony@hssspc.com)  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of February, 2018, I sent a true and correct copy of the foregoing **PLAINTIFF DAKOTA McGRATH'S MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 36(b) TO PERMIT ADMISSIONS TO BE WITHDRAWN OR AMENDED** to the following via e-mail:

Matthew J. Hegarty, Esq.  
Thomas J. Lyons, Esq.  
Hall & Evans, LLC  
1001 Seventeenth Street, Suite 300  
Denver, CO 80202

*[Original signature on file at Viorst Law Offices, P.C.]*

*s/ Michelle Spadavecchia*

---

Legal Assistant