

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 REPLY IN SUPPORT OF BRIEF
REGARDING INVOCATION OF PSYCHOTHERAPIST-PATIENT PRIVILEGE**

Plaintiff Dakota McGrath, by and through counsel, Anthony Viorst of the Viorst Law Offices, P.C., hereby submits the following reply in support of his brief regarding his invocation of the psychotherapist-patient privilege in the above-referenced case:

1. Plaintiff has previously agreed to waive any damages associated with emotional distress, in order to preserve his psychotherapist-patient privilege. To further clarify his position, Plaintiff agrees to limit his noneconomic damages to the pain and suffering stemming directly from the broken leg, and necessary medical treatment, caused by the Defendant's misconduct.
2. In his reply brief, Defendant maintains that "plaintiff's alleged pain and suffering [is] so inseparable from alleged emotional distress" that a waiver of the privilege must still be found.

3. However, under well-settled law, pain and suffering has a very narrow definition, which has been clearly delineated by the U.S. Supreme Court, as follows:

Although pain and suffering technically are mental harms, these terms traditionally “have been used to describe sensations stemming directly from a physical injury or condition.”

Consolidated Rail Corp. v. Gotshall, 512 U.S. 532, 550 (1994).

4. Pain and suffering is a natural consequence of all serious physical injuries, such that its presence may be inferred. *See C.J.S. Damages*, §383 Generally (“To justify a recovery for pain and suffering, the evidence must show either the actual existence thereof or else such injuries that pain and suffering would presumably follow . . . Physical pain and suffering may often be inferred from the plaintiff’s condition or from the nature of the injury without direct evidence.”).

5. None of the cases cited by Defendant have held that a Plaintiff who has voluntarily limited his noneconomic damages to pain and suffering, and who has withdrawn any claim for emotional distress, should be required to waive his psychotherapist-patient privilege. Indeed, such a requirement would be inconsistent with the important public policies served by that privilege, which include safeguarding the “mental health of our citizenry.” *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

6. In light of the societal importance of the psychotherapist-patient privilege, as well as Mr. McGrath’s affirmative waiver of any emotional-distress damages claim, Mr. McGrath hereby asks this Court to find that his psychotherapist-patient privilege remains intact, and that he is not obligated to disclose his psychotherapy records.

Dated this 23rd day of March, 2018.

THE VIORST LAW OFFICES, P.C.

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

s/ Anthony Viorst

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2018, I sent a true and correct copy of the foregoing **PLAINTIFF DAKOTA McGRATH'S REPLY BRIEF REGARDING INVOCATION OF PSYCHOTHERAPIST-PATIENT PRIVILEGE** was transmitted to the following via e-mail:

Matthew J. Hegarty, Esq.
Thomas J. Lyons, Esq.
Hall & Evans, LLC
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[Original signature on file at Viorst Law Offices, P.C.]

s/ Michelle Spadavecchia

Legal Assistant