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 ROGERS, in his individual capacity,

Defendant.

ORDER GRANTING MOTION TO WITHDRAW

Magistrate Judge Nina Y. Wang

This matter comes before the court on Plaintiff Dakota Tyler McGrath's ("Plaintiff" or "Mr. McGrath") Motion Pursuant to Federal Rule of Civil Procedure 36(b) to Permit Admissions to be Withdrawn or Amended ("Motion" or "Motion to Withdraw") [#22, filed February 5, 2018], and the Parties' supplemental briefing on the applicability of the psychotherapist-patient privilege to discovery sought by Defendant Nick Rogers[1] ("Defendant" or "Officer Rogers") [#25; #28; #31]. These matters were referred to the undersigned pursuant to 28 U.S.C. § 636(b), Rule 72(a) of the Federal Rules of Civil Procedure, the Memorandum dated February 6, 2018 [#23], and the Minute Order dated February 16, 2018 [#27]. Having reviewed the Motion to Withdraw and associated briefing, the Parties' supplemental briefing on the applicability of the psychotherapist-patient privilege, the comments offered during the Discovery Hearings on January 17 and February 6, 2018, the Motion to Withdraw is **GRANTED** and this court finds that Plaintiff's mental health records are not discoverable at this time.

[1] The Complaint mistakenly refers to Defendant as Nick "Rodgers." Pursuant to this Order, the Clerk of the Court shall amend the caption on the docket to reflect the proper spelling of Defendant's last name as "Rogers."

BACKGROUND

These allegations are drawn from the operative Complaint and are taken as true for the purposes of this motion. This civil rights action stems from an encounter between Plaintiff and Officer Rogers on the evening of approximately October 20, 2016. *See* [#1 at ¶¶ 1, 9]. Earlier that evening Mr. McGrath had an argument with his brother, which allegedly became physical, causing his brother to report the incident to police. *See* [*id.* at ¶¶ 9–10]. Officer Rogers responded to the 911-call and observed Plaintiff removing items from his vehicle. *See* [*id.* at ¶ 11]. Officer Rogers "called out to Mr. McGrath, but Mr. McGrath was wearing ear-buds and did not hear him," and walked away from Officer Rogers. [*Id.* at ¶ 12].

Officer Rogers pursued Mr. McGrath down an alleyway as another officer arrived on the scene. *See* [*id.* at ¶¶ 13–14]. Upon approaching Plaintiff from behind, Officer Rogers struck Plaintiff with his baton in the head/neck area, causing Plaintiff to fall to the ground momentarily unconscious. [*Id.* at ¶ 15]. While laying face-down on ground, Officer Rogers struck Plaintiff's right leg several times with the baton, causing significant injuries to Plaintiff's leg, including an "open facture of the proximal end of his right tibia." [*Id.* at ¶¶ 16–17]. Mr. McGrath was transported by ambulance to the hospital where his right tibia fracture was diagnosed; however, Plaintiff alleges that despite his need for medical attention, he was arrested and detained at the Larimer County Detention Center and did not receive adequate medical treatment despite his "multiple pleas for assistance." [*Id.* at ¶¶ 18]. Plaintiff ultimately received "extensive medical care, including surgery" for his right tibia fracture. [*Id.* at ¶ 19].

Plaintiff initiated this action on May 11, 2017, asserting one claim against Officer Rogers for excessive force in violation of Mr. McGrath's Fourth Amendment rights. [#1]. Plaintiff seeks damages for his economic and non-economic losses, any permanent impairment and

disfigurement of his right leg, emotional distress, pain and suffering, as well as attorney fees and costs. *See generally* [*id.*]. Plaintiff has since withdrawn his request for lost wages [#17], and has waived "any and all claims of emotional distress," including "any and all claims for compensation related to emotional distress" [#25 at 2].

The undersigned conducted a Scheduling Conference and entered a Scheduling Order setting, among others, a discovery deadline of March 5, 2018 [#12], later extended to May 4, 2018 [#21]. Following certain impasses with discovery, this court conducted three informal Discovery Hearings on January 17 and 24, and February 6, 2018, respectively. [#15; #16; #24]. Relevant here, at the January 17 Discovery Hearing the undersigned considered, *inter alia*, the issue of Plaintiff's untimely responses to Defendant's First Set of Requests for Admissions ("RFAs"), and directed Plaintiff to file his Motion to Withdraw on or before February 5, 2018 [#15]; at the February 6 Discovery Hearing the court considered the Parties' positions regarding the invocation of the psychotherapist-patient privilege as to Plaintiff's mental health records, and directed the Parties to file supplemental briefing on the issue [#24]. Because the Motion to Withdraw and the Parties' supplemental briefing on the psychotherapist privilege is complete, these issues are ripe for disposition, and this court considers each in turn.

ANALYSIS

I. Motion to Withdraw Deemed Admissions

Under Rule 36 of the Federal Rules of Civil Procedure, a party may serve on any other party a written request to admit the truth of any matters within the scope of Rule 26(b)(1) relating to facts, the application of law to fact, or opinions about either. Fed. R. Civ. P. 36(a)(1). A matter is admitted, unless within 30 days after being served, the party to whom the request is

directed serves on the requesting party a written answer or objection, which is signed by the party or her attorney. Fed. R. Civ. P. 36(a)(3).

Once a matter is admitted the court may permit the admission to be withdrawn or amended. Fed. R. Civ. P. 36(b). Subject to Rule 16(e), the court may permit withdrawal or amendment if (1) it would promote the presentation of the merits and if (2) the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action. *Id.* The prejudice contemplated by Rule 36(b) is more than simply inconvenience to the party. *See Raiser v. Utah County*, 409 F.3d 1243, 1246 (10th Cir. 2005). Instead, "the prejudice relates to the difficulty a party may have in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted." *Id.*

Defendant propounded 9 RFAs on Plaintiff on November 17, 2017 [#22-1], rendering Plaintiff's response due on or before December 17, 2017 [#22 at 2]. The 9 RFA at issue include:

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.

[#22-1 at 2–3]. Amongst themselves, the Parties' stipulated to a 12-day extension of time for Plaintiff to respond to the RFAs. *See* [#22 at 2–3; #22-2; #22-3]. Plaintiff, however, did not respond to the RFAs until January 9, 2018, 11 days after the stipulated deadline. [#22 at 3; #22-4].

Plaintiff now seeks leave to withdraw or amend his deemed admissions, arguing that the 9 RFAs concern the merits of Plaintiff's excessive force claim and that Defendant will not be prejudiced by amendment.[2] [#22; #30]. Defendant opposes withdrawal, asserting that only 1 RFA can be considered as going to the merits of Plaintiff's claim and that Defendant would be prejudiced by amendment because Defendant has yet to depose Mr. McGrath or serve any subsequent discovery based on that deposition. [#29].

To start, the court concludes that the first factor under Rule 36(b) weighs in favor of withdrawing Plaintiff's deemed admissions. The sole claim before the court is Plaintiff's excessive force claim, a claim courts evaluate under the Fourth Amendment's "relatively exacting 'objective reasonableness' standard." *Porro v. Barnes*, 624 F.3d 1322, 1325 (10th Cir. 2010). In determining whether the use of force is constitutionally impermissible, courts consider factors such as "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1249 (10th Cir. 2013) (citation and internal quotation marks omitted). Defendant concedes that RFA

[2] In his Response to Defendant's RFAs Plaintiff admits RFA No. 8 [#22-4] and, thus, this court does not consider this admission for purposes of the Motion to Withdraw.

No. 6 "could be construed to admit a core element" of Plaintiff's excessive force claim. The court further finds that the remaining RFAs also go toward the substance of the single claim. [#29 at 5]. For instance, RFA Nos. 1–3 seek concessions that Mr. McGrath ignored Officer Rogers's commands and assertions that force may be necessary; RFA No. 4 seeks a concession that the initial blow that knocked Plaintiff to the ground was to his left leg rather than his head/neck area as alleged in the Complaint; RFA Nos. 5–6 again seek concessions suggesting that Plaintiff was actively resisting arrest and/or Officer Rogers's commands, or that Plaintiff posed a threat to Officer Rogers; RFA No. 7 seeks a concession as to the severity of the underlying offense and potentially whether Plaintiff posed a threat to Officer Rogers; and RFA No. 9 seeks a concession suggesting that Plaintiff's alleged injuries may have been compounded by his own behavior. Concessions on these points concern the "core elements" of Plaintiff's excessive force claim, *i.e.*, whether Officer Rogers's use of force was objectively reasonable under the circumstances. *Cf. Jesusdaughter v. Scoleri*, No. 02-cv-00084-REB-BNB, 2007 WL 707464, at *2 (D. Colo. Mar. 5, 2007) (finding that enforcing the defendant's deemed admissions that he used some force on plaintiff and was not justified in doing so or using a stun gun "would essentially concede" the plaintiff's excessive force claim).

Second, the court also concludes that Officer Rogers fails to demonstrate that he will suffer prejudice should the admissions be withdrawn. He argues that the court is "well aware of [his] attempts to secure Plaintiff's deposition and, thus far, his being denied opportunity to question Plaintiff at deposition due entirely to circumstances outside Defendant's control." [#29 at 5]. Defendant further argues that he has also been prejudiced by the delay in his ability to serve "any follow-up discovery requests" following Plaintiff's deposition. [*Id.*]. As an initial matter, it appears that information regarding RFA Nos. 1–9, is also within Defendant's control.

Therefore, while this court understands that Defendant seeks admissions from Plaintiff, Defendant is not entirely without recourse as to discovery into those issues. In addition, as Plaintiff notes, the discovery deadline has since been extended to May 4, 2018, providing additional time for Defendant to conduct Plaintiff's deposition. This court fully expects Plaintiff to make the necessary accommodations to ensure that his deposition occurs before the discovery cut-off. *See Rapp v. Hoffman*, No. 13-cv-00908-RM-BNB, 2014 WL 5073353, at *2 (D. Colo. Oct. 8, 2014) (finding no prejudice to the plaintiff resulting from the withdrawal of the defendant's admissions where the court had extended discovery and intimating that further extensions would be granted). To the extent that Plaintiff fails to make himself available for a properly noticed deposition, Defendant may seek relief under Rule 37(d) of the Federal Rules of Civil Procedure. Further, Plaintiff's Response to the RFAs was only 11 days late, *see Raiser*, 409 F.3d at 1247 (finding no prejudice where response was 14 days late), well before the original discovery deadline of March 5, 2018. While acknowledging Defendant's frustrations with the delay in deposing Plaintiff, this court is not convinced that this is a sufficient reason for finding prejudice if the admissions are withdrawn, given the opportunity to properly notice the deposition now.

Based on the foregoing, the Motion to Withdraw is **GRANTED**. Plaintiff's deemed admissions are **WITHDRAWN** and Defendant shall **ACCEPT** Plaintiff's Responses filed January 9, 2018 [#22-4].

II. Discoverability of Plaintiff's Mental Health Records

The court now turns to whether Plaintiff should be compelled to produce his mental health records. Originally, Plaintiff sought non-economic damages for emotional distress, but has since withdrawn them. However, Defendant continues to insist that he is entitled to

discovery of Plaintiff's mental health records, as any psychotherapist-patient privilege has been waived.

The psychotherapist-patient privilege serves to protect "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment . . . from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). Like others, the privilege is not absolute and is subject to waiver. *See id.* at 15 n.14; *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (collecting cases holding the privilege waived where a plaintiff places her mental condition at issue). In this district, the psychotherapist-patient privilege is deemed waived if the plaintiff places her mental condition at issue by seeking damages for emotional distress. *See, e.g.*, *Fisher v. Sw. Bell Tel. Co*, 361 F. App'x 974, 978 (10th Cir. 2010) (affirming district court's conclusion that the plaintiff waived the psychotherapist-patient privilege by requesting emotional distress damages); *Fox v. Gates Corp.*, 179 F.R.D. 303, 306 (D. Colo. 1998) (concluding the plaintiff waived her psychotherapist-patient privilege by asserting claim for emotional distress damages); *Carbajal v. Warner*, No. 10-cv-02862-REB-KLM, 2013 WL 1129429, at *5 (D. Colo. Mar. 18, 2013) ("Plaintiff seeks damages for emotional distress. He has placed his psychological condition at issue. Thus, the psychotherapist-patient privilege has been waived.").[3]

Here, Plaintiff originally sought damages for emotional distress in addition to humiliation, loss of enjoyment of life, and "other pain and suffering." [#1 at 6]. Defendant then sought information regarding Mr. McGrath's mental health records—an issue brought before this

[3] Other courts, however, have found that a "garden variety" claim for emotion distress damages does not act as a waiver of the psychotherapist-patient privilege, unless the plaintiff "affirmatively plac[es] the substance of the advice or communication directly in issue." *St. John v. Napolitano*, 274 F.R.D. 12, 18 (D.D.C. 2011) (citations omitted); *see also Hucko v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D. Ill. 1999) ("[T]he plaintiff in this case has not waived the psychotherapist-patient privilege merely by asserting that the defendants' alleged misconduct caused him to suffer emotional harm.").

court at the February 6, 2018 Discovery Hearing. *See* [#24]. Plaintiff objected to the production of this information on grounds of the psychotherapist-patient privilege, while Defendant argued that Plaintiff had waived the privilege by placing his mental condition at issue. Plaintiff, however, now indicates to the court that he "**hereby waives any and all claims of emotional distress, and likewise waives any and all claims for compensation related to emotional distress, and agrees not to present any medical records, testimony, or other evidence which touches on the issue of emotional distress in any way**." [#25 at 2 (emphasis in original)]. Based on this waiver, Plaintiff argues that his mental health records retain the protections of the psychotherapist-patient privilege and are not relevant to his excessive force claim. [*Id.* at 4–5].

In light of this waiver, the undersigned ordered Officer Rogers to respond with any specific authority that permitted him to continue to seek Plaintiff's mental health records. *See* [#27]. Defendant now argues that "[o]nly if Plaintiff broadly waives claims for mental pain and suffering and claims for loss of enjoyment of life in addition to, in conjunction with, and to the same degree as the waiver set forth in [Plaintiff's brief [#25]] will Defendant consider Plaintiff's mental health records" protected from disclosure or discovery. [#28 at 2]. Defendant maintains that, because Plaintiff purportedly seeks an entitlement to damages for "mental pain and suffering, shame, embarrassment, zero self-confidence, and loss of enjoyment of life," but has not waived claims for these damages, the psychotherapist-patient privilege does not protect his mental health records. [#28 at 6 (brackets and internal quotation marks omitted)]; *see also* [#29-1]. Defendant suggests that Plaintiff's damages for pain and suffering "are so inseparable from alleged emotional distress" that Plaintiff's mental condition is still at issue, thereby waiving the psychotherapist-patient privilege. [*Id.* at 5].

While in certain instances a court may find the plaintiff's mental health records relevant, given the plaintiff's alleged emotional distress, "suffering of reputation, humiliation, mental anguish, and loss of enjoyment of life," *Carbajal v. Warner*, No. 10-cv-02862-REB-KLM, 2013 WL 1129429, at *3 (D. Colo. Mar. 18, 2013), this court interprets Plaintiff's waiver of any and all claims associated with or relating to emotional distress to include these additional categories of damages, *cf. In re Sims*, 534 F.3d 117, 134 (2d Cir. 2008) (concluding that a plaintiff may forfeit all claims for emotional distress to avoid waiving the psychotherapist-patient privilege). Plaintiff even clarifies in his Reply Brief that "he 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 [actions]." [#31 art 1]. "[M]edical expenses are not the only measure of compensatory damages, which [may] also account for factors such as the nature and extent of injury, physical impairment, and pain and suffering." *Therrien v. Target Corp.*, 617 F.3d 1242, 1258–59 (10th Cir. 2010); *accord Artery v. Allstate Ins. Co.*, 984 P.2d 1187, 1191–92 (Colo. App. 1999) (defining damages to include pecuniary compensation for an injury suffered, and explicating that medical expenses and pain and suffering "are damages that may be sought for a claim of personal injury."). And, based on Plaintiff's representations to the court, it does not appear that Plaintiff seeks damages for *mental* pain and suffering; indeed, his Complaint refers only to "other pain and suffering." [#1 at 6].

Based on the foregoing, this court concludes that the psychotherapist-patient privilege precludes discovery or disclosure of Mr. McGrath's mental health records. And, given his forfeiture of all damages associated with emotional distress, those records are no longer relevant to the claim at issue and Mr. McGrath has not otherwise waived the psychotherapist-patient privilege. Should Mr. McGrath try to seek compensation for emotional distress or

emotional/mental pain and suffering damages at a later date, Defendant is free to seek to compel such mental health records at that time.

CONCLUSION

For the reasons stated herein, **IT IS ORDERED** that:

(1) Plaintiff Dakota Tyler McGrath's Motion Pursuant to Federal Rule of Civil Procedure 36(b) to Permit Admissions to be Withdrawn or Amended [#22] is **GRANTED**. Plaintiff's deemed admissions are **WITHDRAWN** and Defendant shall **ACCEPT** Plaintiff's Responses filed January 9, 2018 [#22-4]; and

(2) Plaintiff's objections to production of his mental health records based on the psychotherapist-patient privilege [#25; #31] are **SUSTAINED** and Defendant's request for production of such documents is **OVERRULED**.

DATED: March 30, 2018

BY THE COURT:

Nina Y. Wang
United States Magistrate Judge