

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-~~WJM~~-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER, in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

~~PROPOSED~~ SCHEDULING ORDER

**1. DATE OF CONFERENCE
AND APPEARANCES OF COUNSEL**

The Scheduling/Planning Conference pursuant to Fed. R. Civ. P. 16(b) is scheduled for **June 5, 2019** at 1:30 p.m., in Courtroom C-205, Byron G. Rogers United States Courthouse, before Magistrate Judge N. Reid Neureiter. Appearing for the parties are:

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Counsel for Defendants

2. STATEMENT OF JURISDICTION

Plaintiff:

This case is brought pursuant to 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331. Jurisdiction supporting Plaintiff's claim for attorney fees and costs is conferred by 42 U.S.C. § 1988.

Venue is proper in the District of Colorado pursuant to 28 U.S.C. §1391(b), as all the events described occurred in Colorado.

Defendant:

The Defendants admit jurisdiction exists in respect to the claims brought by Plaintiff, but deny jurisdiction in all other respects including, but not limited to, the notion Plaintiff is somehow entitled to attorneys' fees and costs.

3. STATEMENT OF CLAIMS AND DEFENSES

Plaintiff:

On April 6, 2017, Ms. Surat and her then-boyfriend, Mitchell Waltz, went to Bondi Beach Bar in Fort Collins with some friends to celebrate her twenty-second birthday. While inside Bondi Beach Bar, Waltz became involved in an altercation and was asked to leave the bar by Bondi's staff; staff also called the police regarding the incident. Fort Collins Police Services (FCPS) responded; Officers Randall Klamser and Garrett Pastor arrived at Bondi Beach Bar shortly before 11:23 p.m.; Defendant Klamser stood several feet in front of the bar doors and questioned a Bondi Beach Bar bouncer, Cory Esslinger, about what happened. Officer Pastor stood further outside the bar on the sidewalk talking to Mr. Waltz as Ms. Surat stood on the outside bar patio.

Ms. Surat then left the patio, walked past Defendant Klamser, towards Mr. Waltz; she grabbed his arm, and tried to walk away with Waltz. She took only a few steps before Officer Pastor stopped Waltz and Defendant Klamser stopped Ms. Surat. Defendant Klamser told Ms. Surat that Mr. Waltz was not free to go, “but you can keep walking.” Concerned for the situation and her boyfriend, Ms. Surat stayed outside of the bar on the sidewalk and was several feet away from Waltz when Defendant Klamser again stopped her, stood in front of her and told her to “back off” while pushing her right shoulder backwards with his hand. Reasonably frustrated by Defendant Klamser’s aggressive confrontation and push to her shoulder, Ms. Surat told him, “you don’t need to touch me.” In response, Defendant Klamser grabbed Ms. Surat’s wrist. Frustrated by Defendant Klamser’s painful and unnecessary restraint of her wrist and arm, Ms. Surat told Defendant Klamser, “you don’t need to fucking touch me,” as she attempted to free herself from his grasp. Defendant Klamser, still holding onto Ms. Surat’s wrist, pulled her arm behind her and placed her in a rear wristlock hold. Still grabbing Ms. Surat’s wrist, Defendant Klamser demanded that Ms. Surat put her free hand up on her head. Simultaneously, Ms. Surat repeatedly asked Defendant Klamser why he was touching her. He responded that she was under arrest without giving her any other explanation. Speaking over each other, Ms. Surat again asked Defendant Klamser what she did and why he was touching her, and he again told her that she was under arrest. She asked Defendant Klamser, “can you explain to me why you’re arresting me? What did I do?” This exchange continued for several seconds. Defendant Klamser did not respond. Defendant Klamser then said to Ms. Surat, “I don’t want to throw you on the ground.” Defendant Klamser continued to force Ms. Surat’s wrist in a rear wrist control hold and Ms. Surat, again, distressed and confused by the situation, asked Defendant Klamser what she did

wrong. Defendant Klamser, still holding Ms. Surat's wrist, violently pulled Ms. Surat's arm and forcefully threw her face-down onto the sidewalk pavement. Ms. Surat's chin slammed into the sidewalk, causing a concussion, cervical spine strain, and a large and painful contusion that later turned black and purple. Ms. Surat sustained other painful bruising on both of her arms, wrists, knees, and legs. The entire encounter between Ms. Surat and Defendant Klamser happened in thirty-two seconds.

Defendant Klamser intended to harm Ms. Surat when he violently threw her to the ground to arrest her. Ms. Surat was five-feet, nine inches tall and approximately 115 pounds at the time. Defendant Klamser was about six-feet tall and 203 pounds. A reasonable person in Ms. Surat's place would have believed that she was not free to leave from the moment that Defendant Klamser grabbed her wrist and refused to let go. Defendant Klamser did not have a reason to believe that Ms. Surat had any weapon or that she posed a threat to the officers.

Ms. Surat was humiliated during this experience. During Defendant Klamser's violent take-down of Ms. Surat, her dress rose above her hips; her undergarments and buttocks were exposed. She remained face-down in this position while she was handcuffed by Officer Pastor. Defendant Klamser was aware that Ms. Surat's lower buttocks were exposed, as they were uncovered and entirely visible in his body cam footage during Ms. Surat's handcuffing. Ms. Surat was forcefully lifted to her feet by Defendant Klamser and Officer Pastor. One of the officers partially attempted to fix her dress, but it was not pulled down enough and she was paraded through Old Town Square with part of her lower buttocks still exposed. While Defendant walked with Ms. Surat towards a backup patrol vehicle, Ms. Surat was sobbing and asked a passerby for help. Ms. Surat then collapsed to the ground, and while still sobbing in

extreme distress, she told Defendant Klamser that he was hurting her. She soon mustered the strength to get back on her feet, she pleaded with individuals walking down the street to help her and pull her dress down because it was again at her hips. Several seconds later, a young woman helped Ms. Surat by pulling the skirt of her dress down.

Additional FCPS officers arrived at the scene, and Ms. Surat spoke with them about the incident while handcuffed in the patrol car. Ms. Surat was extremely distressed as she spoke with the officers. Ms. Surat requested paramedic help for her injuries. Ms. Surat proceeded through a misdemeanor jury trial in Fort Collins on August 20-24, 2018. Ms. Surat was convicted of C.R.S. § 18-8-103 (Resisting Arrest) and C.R.S. § 18-8-104(a)(a) (Obstructing a Peace Officer) and sentenced to 12 months of supervised probation, 48 hours of community service, alcohol evaluation and treatment, monitored sobriety, and a Making Better Choices class.

On the night of April 6, 2017, and into the morning of April 7, 2017, Ms. Surat was examined by Ken Philbeck, M.D. in the Poudre Valley Hospital (PVH) Emergency Department. Dr. Philbeck diagnosed Ms. Surat with “contusion of head, unspecified part of head.” Ms. Surat was then examined by Nicole Niemann, M.D. and Mollie Wolf, Physician Assistant, Certified (PAC) in the PVH Emergency Department. Dr. Niemann’s diagnoses were contusion to other part of head, contusion of left forearm, contusion of right forearm, and contusion of left wrist. Dr. Wolf’s physician exam showed a two centimeter in diameter ecchymotic area to her chin. Ms. Surat reported that she was in continual pain. Later that day, Ms. Surat was examined by doctors Thomas Fralich, M.D., Keasha Kuhnen, D.O., and Mollie Wolf, PAC in the Emergency Department for her chin contusion. She was given recommendation on how to care for her

contusion and instructed to return for a follow-up appointment in several days. By April 8, 2017, Ms. Surat's chin contusion had grown and become purple and black.

On April 11, 2017, Ms. Surat was evaluated by Dr. Julie Devita-Bailey, D.O. at UCHealth. Dr. Devita-Bailey noted that Ms. Surat presented with "injury" and "concussion." Ms. Surat was suffering from left hand pain and numbness, trouble focusing and thinking, headaches, and jaw, neck, and back pain. Dr. Devita-Bailey's physical exam showed that she had decreased cervical spine lordosis and tenderness with palpation of her left lateral neck. She also had mild to moderate spasms of her neck and trapezius muscles (back of neck to top of back) bilaterally. Dr. Devita-Bailey referred Ms. Surat to the Emergency Room for an evaluation for her neck pain and headaches. Ms. Surat was then seen by Dr. Travis Brown, D.O. at the UCHealth Emergency Room. She was diagnosed with "acute cervical strain" and "chin contusion." She was given pain relief medication during her visit and prescribed Flexeril to alleviate muscle spasms. Ms. Surat had trouble chewing and opening her mouth all of the way for approximately five to six months after the incident. The bruises on her arms and legs continued to hurt for several weeks, and her neck was sore and difficult to move for several days and was confused and dizzy at times due to the head injury. Ms. Surat also suffered mental and emotional harm from the incident. She received so many death threats and nasty comments online that she deactivated her social media accounts and avoided leaving her house. To this day, people on the street still recognize her from the video, which went viral.

Defendant Fort Collins has a custom, policy, and practice of unlawful seizure and use of excessive force. As the FCPS internal affairs investigation concluded that the Defendant Officers acted lawfully and in accordance with FCPS policy, the reasonable inference is that the

city's policy and training lead officers to act unconstitutionally. Additionally, in response to the incident involving Ms. Surat, FCPS spokesperson, Kate Kimble, told the media that Defendant Klamser used "standard arrest control," which indicates a custom and practice of unconstitutional use of force. Furthermore, Defendant Fort Collins has a responsibility to properly train and supervise its law enforcement officers in complying with constitutional requirements during encounters with citizens, and to discipline officers that violate such constitutional requirements. FCPS has been involved in several high-profile excessive force cases.

Despite having notice that their customs, policies, practices, procedures, and insufficient training and supervision has led to unconstitutional police conduct, Defendant Fort Collins continued to not provide adequate training to FCPS Officers on complying with the requirements of the Fourth Amendment, including lawful seizure and how to conduct a lawful seizure without the use of excessive force. Had Defendant Fort Collins implemented different training policies on seizures and the use of force after the first incident of use of force against Defendant Fort Collins, Officers would not have subjected Ms. Surat to the constitutional violations described herein. Thus, the Defendant Officer's illegal conduction was caused by Defendant Fort Collins' failure in its discretion to and training of FCPS officers.

Ms. Surat brings two claims against the Defendants: (1) Excessive Force pursuant to the Fourth and Fourteenth Amendments, and (2) a municipal liability claim based on the same.

Defendants:

The Defendants deny each and every substantive allegation set forth in Plaintiff's Complaint, and intends on filing a response consistent with this position, including but not

limited to a motion to dismiss. Should an answer, defenses, and affirmative defenses be filed, the Defendants intend to set forth the following affirmative defenses:

1. Some or all of the claims of the Plaintiff fail to state a claim upon which relief may be granted against the Defendant.
2. Plaintiff is not entitled to any relief being sought or claimed in the Complaint under any of the legal theories asserted therein.
3. To any extent, the Court concludes Officer Klamser acted under color of state law with respect to Plaintiff, this Defendant is entitled to absolute immunity, qualified immunity, or both such immunities, as well as common law and statutory immunities, with respect to some or all of Plaintiff's claim against him.
4. Plaintiff failed to mitigate her damages, if any.
5. Some or all of Plaintiff's injuries and damages, if any, were either pre-existing or not aggravated by any action or omission of or by these Defendants, nor proximately caused by or related to any act or omission of Defendants.
6. All or part of Plaintiff's claim never achieved the level of any constitutional violation sufficient to state a claim under 42 U.S.C. § 1983.
7. At all times pertinent herein, Defendants acted in accordance with all common law, statutory and constitutional obligations, and without any intent to cause Plaintiff harm.
8. Defendants also lacked the requisite intent to establish any claim against Plaintiff in this matter.

9. The claim of the Plaintiff also fails to establish any basis for concluding that Defendants acted or failed to act in a willful and wanton manner.
10. Defendants also possess or possessed a reasonable good faith belief in the lawfulness of all his conduct.
11. Plaintiff's injuries and damages, if any, in whole or in part, were proximately caused by her own acts or omissions, either in combination with one another or independent of one another.
12. Plaintiff's injuries and damages, if any, were proximately caused by the acts or omissions of third parties over whom Defendants possessed no ability to control or right of control.
13. To any extent, any action or inaction on the part of Defendants was in any way involved in any detention of the Plaintiff by anyone, any action or inaction by Defendants was privileged under applicable law, including the privilege of police officers to use reasonable physical force to affect an arrest, keep a subject in custody, and defend themselves and others.
14. In all respects, Defendants behaved in accordance with applicable legal authority in all actions or inactions associated with Plaintiff, negating any claim of liability asserted by Plaintiff against them.
15. Plaintiff's claim is barred in whole or in part by the doctrines of consent, estoppel and waiver.
16. Defendants never breached any obligation or responsibility to anyone associated with any property or liberty interest of any party in relation to this matter.

17. Plaintiff cannot satisfy all or some of the prerequisites to a grant of injunctive relief in this matter. Any request for injunctive relief is moot.
18. Defendants are not liable for any punitive damages pursuant to state or federal law and no Defendant could become liable for any such damages.
19. Plaintiff's claims are barred pursuant to the Colorado Governmental Immunity Act.
20. Any claim for punitive or exemplary damages against any individual Defendant in any individual capacity is barred, limited, reduced, or in the alternative, unconstitutional and in violation of the rights of such individual Defendant under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

4. UNDISPUTED FACTS

None.

5. COMPUTATION OF DAMAGES

Plaintiff:

Plaintiff claims all appropriate declaratory and equitable relief; compensatory and consequential damages including damages for physical injury, emotional distress, loss of reputation, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount determined at trial; all economic losses on all claims allowed by law; punitive damages on all claims allowed by law and in an amount to be determined at trial; attorneys' fees and costs associated with this action; pre-judgment and post-judgment interest at the highest lawful rate; and any further relief that this Court deems just and proper and as allowed by law.

A more precise computation of Plaintiffs' damages, to the extent Plaintiffs' damages are subject to such computation, will be provided during the normal course of discovery and will be determined by a jury in its sound discretion following a presentation of the evidence at trial in this matter.

Damages for emotional distress are not susceptible to the type of calculation contemplated by Rule 26(a)(1). "[C]ompensatory damages for emotional distress are necessarily vague and are generally considered a fact issue for the jury." *Williams v. Trader Pub. Co.*, 218 F.3d 481, 487 n.3 (5th Cir. 2000).

Punitive damages are sought based upon the egregious nature of the conduct of the Defendants as set forth in the Complaint and the need to restrain such conduct in the future. Calculation of these damages and entitlements is premature and not susceptible to the type of calculation contemplated by Rule 26(a)(1). *See Smith v. Wade*, 461 U.S. 30 (1983); *Burrell v. Crown Cent. Petroleum*, 177 F.R.D. 376, 386 (D. Tex. 1997).

Defendants:

The Defendant does not seek damages, attorneys' fees, or costs at this time, but reserves the right to do pursuant to applicable authority.

6. REPORT OF PRE-CONFERENCE DISCOVERY & MEETING UNDER FED. R. CIV. P. 26(f)

- a. Date of Rule 26(f) meeting: May 16, 2019
- b. Names of each participant and party he/she represented:
 - (1) Tania Valdez of KILLMER, LANE & NEWMAN, LLP, counsel for the Plaintiff;

(2) Mark S. Ratner of HALL & EVANS for Defendants;

c. The parties will exchange initial disclosures pursuant to Fed. R. Civ. P 26(a) on: June 5, 2019.

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

e. The parties agree to continue to explore options for informal discovery.

f. The parties agree to take all reasonable steps to reduce discovery

g. The parties anticipate that their claims or defenses will involve the discovery of some electronically stored information. To the extent that discovery or disclosures involve information or records in electronic form, the Parties will take steps to preserve that information. The Parties agree that, to the extent feasible, the Parties will exchange information (whether in paper or electronic form) in PDF format.

h. The parties intend to file a motion for a stipulated protective order.

i. The parties have not discussed the possibilities for a prompt settlement or resolution of the case by alternate dispute resolution. The Parties agree to attend ADR after completion of a reasonable amount of discovery has been conducted. The Parties agree to notify to the magistrate judge within fourteen (14) days of the ADR.

7. CONSENT

One or more parties do not consent 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:

~~Depositions: Each party shall be limited to ten (10) depositions exclusive of parties and experts. Each side shall be limited to 10 fact depositions, excluding experts.~~

~~i.~~

~~ii.i.~~ Interrogatories: Plaintiff may serve a total of thirty (30) interrogatories to Defendants, collectively; Defendants, collectively may serve a total of thirty (30) interrogatories to Plaintiff.

Limitations which any party proposes on the length of depositions: The Parties do not propose any modifications to the limitations on the length of depositions. ~~A deposition is limited to one day of seven hours as provided in Fed. R. Civ. P. 30(d)(1). Depositions shall not exceed 7 hours for three deponents, exclusive of experts, all others limited to 4 hours, for each side, without prior agreement or absent leave of court.~~

~~iii.ii.~~

~~iv.iii.~~ Limits on Number of Requests for Production of Documents and/or Requests for Admission: Plaintiff may serve a total of thirty (30) requests for production and thirty (30) requests for admission to Defendants, collectively; Defendants, collectively, may serve a total of thirty (30) requests for production of documents and thirty (30) requests for admission to Plaintiff.

~~v.iv.~~ Other Planning or Discovery Orders: It is the policy of Killmer Lane & Newman, LLP that no weapons are allowed on the premises during the taking of a deposition. ~~The Court is available for taking depositions.~~

9. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment to Pleadings: The filing of amended and supplemental pleadings will be made pursuant to Fed. R. Civ. P. 15.

b. Discovery cut-off: ~~February 3, 2020.~~ April 3, 2020

c. Dispositive Motions Deadline: ~~March 6, 2020~~ April 24, 2020

d. Expert Witness Disclosure:

Plaintiff proposes:

~~Both Parties' affirmative witnesses: November 25, 2019~~

~~Both Parties' rebuttal witnesses: January 6, 2020~~

Defendants propose:

Plaintiff's affirmative witnesses: ~~October 14, 2019~~ November 25, 2019

Defendants affirmative and rebuttal witnesses: November 25, 2019

January 6, 2020

Plaintiff's rebuttal witnesses: November ~~January 6, 2020~~ February 6,

2020

(1) Anticipated fields of expert testimony:

Plaintiff anticipates retaining experts in the following areas: Police and Arrest Practices; Medical and/or Mental Health.

Defendants anticipates retaining experts to rebut those experts listed by Plaintiff.

(2) The Parties propose a limit of ~~five (5)~~ four (4) experts per side.

~~(3) Plaintiff proposes the parties shall designate all affirmative 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: November 25, 2019.~~

~~Defendant proposes the expert scheduled set forth in (d) above.~~

~~(4) Plaintiff proposes 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) on or before: January 6, 2020.~~

~~Defendant proposes the expert scheduled set forth in (d) above.~~

e. Identification of Persons to Be Deposed*: PLEASE SEE ABOVE

<i>Name of Deponent</i>	<i>Date of Deposition</i>	<i>Time of Deposition</i>	<i>Expected Length of Deposition</i>
Michaela Surat	TBA	TBA	7 hours
Randall Klamsner	TBA	TBA	7 hours
30(b)(6) of Fort Collins	TBA	TBA	7 hours
Michael Waltz	TBA	TBA	7 hours
Other responding officers from the City of Fort Collins Police Department	TBA	TBA	2 hours each
Employees from Bondi Beach Bar	TBA	TBA	1 hour each
Witnesses to incident	TBA	TBA	1 hour each

* The Parties reserve the right to take additional depositions of persons identified in the Parties' disclosures and through the course of discovery.

f. Deadline for Interrogatories: All interrogatories must be served no later than: **49 days prior to the discovery cut-off (~~December 16, 2019~~)**.

g. Deadline for Requests for Production of Documents and/or Admissions: All Requests for Production of Documents and/or Requests for Admission must be served no later than: **49 days prior to the discovery cut-off (~~December 16, 2019~~)**.

10. DATES FOR FURTHER CONFERENCES

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

JOINT STATUS REPORT shall be filed no later than February 21, 2020.

~~b.a.~~ A final pretrial conference will be held in this case on July 7, 2020 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 five (5) days before the final pretrial conference.

11. OTHER SCHEDULING ISSUES

Discovery or scheduling issues, if any, on which counsel after a good faith effort, were unable to reach an agreement:

- a. Other than as stated herein, counsel for the parties have no disagreement concerning discovery or scheduling issues.
- b. The parties estimate that the jury trial will take seven (7) days.
- c. The parties agree that designations of any non-party at fault, if any, shall be thirty (30) days after the plaintiff's deposition.

12. NOTICE TO COUNSEL AND PRO SE PARTIES

On filing motions for extension of time or continuances, the parties must comply with D.C.COLO.LCivR 6.1D by submitting certifying 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 the D.C.COLO.LCivR 7.1(a).

In addition to filing an appropriate notice with the clerk's office, a *pro se* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any motion for withdrawal, motion for substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

13. AMENDMENTS TO SCHEDULING ORDER

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

DATED this 26th day of July 2019.

BY THE COURT:



U.S. Magistrate N. Reid Neureiter

SCHEDULING ORDER REVIEWED:

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