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United States District Court,
D. Colorado.

Rebecca Trujillo, Plaintiff,
v.
City and County of Denver, Colorado, Denver Health and Hospital Authority, d/b/a Denver Health Medical Center; Deputy [First Name Unknown] Allen, Denver Sheriff Department, in his individual and official capacities; Deputy [First Name Unknown] Rodriguez, Denver Sheriff Department, in his or her individual and official capacities; Anthony Perez, RN, in his individual and official capacities; Victoria Toliver, RN, in her individual and official capacities; Dana Wimberly, RN, in her individual and official capacities; Jennifer Firebaugh, RN, in her individual and official capacities; Brenda Sue Hagman, LPN, in her individual and official capacities; Paul Michael Umbriaco, RN, in his individual and official capacities; Marvin Korell, RN, in his individual and official capacities; Pauline Marie McGann, MD, in his individual and official capacities; Donna Marie Blatt, RN, in her individual and official capacities; and John and Jane Does 1 Through 20, Denver City and County Sheriff's Deputies and Medical Personnel, in their official and individual capacities, Defendants.

Civil Action No 14-cv-02798-RBJ-MEH
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Signed 09/07/2016

Attorneys and Law Firms

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ORDER

R. Brooke Jackson, United States District Judge

***1** This matter is before the Court on two motions to dismiss [ECF Nos. 114, 123]; plaintiff's motion to strike a reply brief, or in the alternative, to file a surreply [ECF No. 150]; and the recommendations of Magistrate Judge Michael Hegarty regarding all three motions [ECF Nos. 143, 167, 168]. The recommendations are incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Judge Hegarty recommended that the Court grant both motions to dismiss, deny the motion to strike, but permit plaintiff leave to file a surreply. ECF Nos. 143, 167, 168. Following its review, the Court adopts in part and rejects in part the recommendations.

FACTS

The allegations of facts were minimally summarized in the original Complaint but were set forth in detail in the First Amended Complaint, ECF No. 99. In May 2012 Ms. Trujillo was incarcerated in the Denver Jail (the jail). *Id.* at ¶ 36. On July 4, 2012, while working as a member of the cleaning staff, Ms. Trujillo was operating a large, rotating floor buffer. *Id.* at ¶ 38. The cord of the buffer got stuck under the machine, which twisted Ms. Trujillo's body, injuring her spine and causing her to fall. *Id.* at ¶ 39. Ms. Trujillo had received minimal training on how to use the buffer. *Id.* at ¶ 37. Her injury happened in front of a number of on-duty deputies. *Id.* at ¶ 39. She alleges that none of the deputies offered to help her. *Id.*

Ms. Trujillo immediately began to exhibit signs of a serious spinal injury, including chronic pain, loss of control of bowel movements, slowed speech, altered gait, and reduced ability to use her hands and legs. *Id.* at ¶ 40. She alleges that she sought help multiple times from the jail infirmary, sent several kites requesting medical treatment, and filed formal grievances for the jail's failure to provide treatment. *Id.* However, no one responded to her requests for help. *Id.*

The following timeline describes Ms. Trujillo's allegations concerning her attempts to receive medical treatment from

the time of her injury until her release from jail in May 2013:

- July 6, 2012: Ms. Trujillo visited the jail infirmary. The nurse on duty was defendant Jennifer Firebaugh. Nurse Firebaugh noted that Ms. Trujillo had an altered gait and difficulty walking. Nurse Firebaugh had also been notified by jail officials of these same impairments. She did not evaluate Ms. Trujillo for an injury, but rather noted that Ms. Trujillo had a history of rheumatoid arthritis (RA). Nurse Firebaugh provided Ms. Trujillo with a walker. On or about the same day, defendant Nurse Paul Michael Umbriaco also evaluated Ms. Trujillo, noting that she needed help with "activities of daily living" (ADLs), could not walk or use the restroom, and was talking slowly. Nurse Umbriaco recommended that a doctor evaluate Ms. Trujillo the next day, but he did not follow up to confirm that Ms. Trujillo did receive a medical evaluation. *Id.* at ¶¶ 41, 42.

- On or about July 9, 2012: Defendant Brenda Hagman, a nurse practitioner (NP), saw Ms. Trujillo in the infirmary and noted that she had fallen "earlier," had been seen for previous falls, had an unsteady gait, and had a history of RA. NP Hagman recorded that Ms. Trujillo would be housed in the infirmary, but did not ensure that Ms. Trujillo received any further evaluation. *Id.* at ¶ 43.

***2** - July 11, 2012: Jail deputies notified defendant Nurse Marvin Korell that Ms. Trujillo was struggling with ADLs, was covered in feces, and was unable to clean herself. The deputies also reported that Ms. Trujillo was unsteady even with a walker and was at a risk of falling. Nurse Korell noted that the jail should decide whether Ms. Trujillo should continue being housed at the jail or whether she should be transferred to the department of corrections. Nurse Korell did not assess Ms. Trujillo for a spinal injury or take further action. *Id.* at ¶ 44.

- July 17, 2012: NP Hagman saw Ms. Trujillo again and noted that she was in chronic pain and remained at a risk to fall. NP Hagman recommended that Ms. Trujillo be transferred to rheumatology but did not evaluate her for a spinal injury or provide her with any treatment other than "minimal pain medication akin to Advil." *Id.* at ¶ 45.

- July 23, 2012: Defendant Dr. Paulene McGann evaluated Ms. Trujillo. Plaintiff explained that she had fallen recently, was in chronic pain, and was experiencing tingling in her arm from her shoulder to her hand. Dr. McGann noted the possibility of an impinged nerve and recommended that plaintiff be evaluated for RA. Dr. McGann did not evaluate Ms. Trujillo for a spinal injury and did not perform any follow-up examination. *Id.* at ¶ 46.

- July 25, 2012: Ms. Trujillo told Nurse Korell that she thought she was having a stroke because she was experiencing weakness, tingling in her extremities, and an unsteady gait. Nurse Korell concluded that Ms. Trujillo's new medication caused the symptoms but did not perform any additional evaluation. Nurse Korell recommended continued monitoring. *Id.* at ¶ 47.

- That same day (July 25): NP Kina Mosley answered the medical call line in the jail. Officer Jones told NP Mosley that Ms. Trujillo had fallen a few times and was unstable even with the assistance of a walker. NP Mosley recommended a wheelchair for Ms. Trujillo but did not provide plaintiff with any medical care. *Id.* at ¶ 48.

- July 26, 2012: Nurse Jacqueline Annette Christman noted that Sergeant Marshal Gutierrez and other staff requested a transfer for Ms. Trujillo to the Denver Department of Corrections Infirmary. Nurse Christman did not recommend any treatment or testing. *Id.* at ¶ 49.

- July 27, 2012: Ms. Trujillo went back to the infirmary and reported that she was having trouble walking, and that she had less strength and more weakness. Nurse Umbriaco encouraged Ms. Trujillo to ambulate with assistance and recommended daily supervision, but he did not order or offer any other medical care. *Id.* at ¶ 50.

- July 28 and 29, 2012: On two consecutive days Ms. Trujillo fell when transferring from her wheelchair. The first happened when she was trying to get from the toilet back to her wheelchair, and the second time she was found on the floor by her bed. Defendant Nurse Anthony Perez recommended that Ms. Trujillo use the "call light" to request assistance when transferring. *Id.* at ¶ 51.

- July 31, 2012: Dr. McGann saw Ms. Trujillo again and noted that she was complaining of weakness and tingling all over her body and that plaintiff's legs would occasionally lock up and give out. Dr. McGann suggested an x-ray of Ms. Trujillo's hands to evaluate her RA but did not examine her for a spinal injury or take any other action. *Id.* at ¶ 52.

- On or about August 1, 2012: Defendant Nurse Donna Blatt noted that Ms. Trujillo made numerous but "vague" complaints of weakness and tingling. Nurse Blatt also indicated that plaintiff's charts reflected recent slips but no falls. Nurse Blatt noted that she thought Ms. Trujillo was malingering. She recommended further evaluation but did not recommend any other treatment. *Id.* at ¶ 53.

***3** • August 5, 2012: Nurse Perez noted that plaintiff had "chronic charting," but he did not recommend any other treatment or care. *Id.* at ¶ 54.

- August 10, 2012: Dr. Dennis Boyle examined Ms. Trujillo at Denver Health Medical Center. The purpose of the assessment, according to the jail's referral, was to evaluate Ms. Trujillo for RA. Dr. Boyle noted that plaintiff complained of weakness, numbness, and tingling that had persisted for weeks, especially on her left side, which she indicated felt "dead" to her. Dr. Boyle's notes indicate less-severe symptoms on Ms. Trujillo's right side, and that plaintiff needed to use a walker. Dr. Boyle's examination revealed a moderate left-sided hemiparesis (paralysis affecting one side of the body), as well as abnormalities on plaintiff's right side. Dr. Boyle concluded that Ms. Trujillo likely had a significant neurologic illness. He did not detect any evidence of RA. Dr. Boyle recommended an urgent neurologic evaluation for a CT scan, MRI, and neurologic consult. He also recommended against any continued treatment or assessment for RA. Dr. Boyle called the jail regarding Ms. Trujillo's status, and the jail told him officials would return his call. The jail never called Dr. Boyle, and Dr. Boyle never followed up regarding Ms. Trujillo's treatment. *Id.* at ¶¶ 55–60.

- August 10, 2012: Ms. Trujillo returned to the jail following her visit to Dr. Boyle. Despite defendant Nurse Victoria Toliver's note that Ms. Trujillo was to receive an urgent neurologic follow-up, Ms. Trujillo did not undergo a neurologic evaluation. Nurse Toliver did not take any action to ensure that Ms. Trujillo received the follow-up. *Id.* at ¶ 61.

- August 13, 2012: Nurse Umbriaco noted that Ms. Trujillo needed to be referred to neurology but no referral was made. *Id.*

- August 10–September 12, 2012: Nurse Perez updated Ms. Trujillo's chart each week during this period, noting that there was "chronic charting," plaintiff had bilateral knee and ankle pain from RA, and that she was a fall risk. No care or treatment was recorded, and Nurse Perez did not take any action regarding Dr. Boyle's finding of neurologic illness. *Id.* at ¶ 62.

- September 12, 2012: Ms. Trujillo returned to Denver Health Medical Center where Dr. Richard Hughes examined her. He made similar findings to those of Dr. Boyle, noting that Ms. Trujillo's symptoms indicated a stroke. He ordered an urgent MRI to determine whether Ms. Trujillo had multiple sclerosis or whether she had had a stroke. Ms. Trujillo returned to jail that day where defendant Nurse Dana Wimberly noted that plaintiff needed an urgent MRI. However, neither Nurse Wimberly nor Dr. Hughes followed up to see if Ms. Trujillo received the MRI. *Id.* at ¶¶ 63, 64.

- October 10, 2012: Ms. Trujillo had an MRI at the hospital. The results showed a significant spinal injury. Upon Ms. Trujillo's return to jail that same day, Nurse Wimberly did not outline a treatment plan for Ms. Trujillo. *Id.* at ¶¶ 65, 66.

- October 10, 2012–January 13, 2013: Ms. Trujillo received only minimal pain medication for her spinal injury and did not receive any other treatment. *Id.* at ¶ 67.

***4** • On or about January 13, 2013: Ms. Trujillo filed a request for medical assistance, stating that she had pain in her legs and hands. She requested a follow-up with Dr. Hughes. Dr. John Gehred spoke with plaintiff and suggested that her prescription medications were causing her symptoms. He recommended Ms. Trujillo continue taking her medication. Dr. Gehred disregarded the other doctors' findings and the MRI results. He has since been disciplined and voluntarily surrendered his medical license. After Ms. Trujillo's request

for assistance, Nurse Perez continued to chart Ms. Trujillo's condition, noting only "chronic" charting and a risk of falling. Nurse Perez did not provide any medical treatment despite being aware of the MRI results showing a severe spinal injury. *Id.* at ¶¶ 68, 69.

- February 13, 2013: Dr. Edward Maa at Denver Health Medical Center assessed Ms. Trujillo. Dr. Maa noted that, after the July 2012 accident, Ms. Trujillo had pain in both hands and feet with numbness and pins and needles; a sensation of "electrical shock" whenever she moved that worsened with activity; incontinence; a very slow gait with a need for a walker; dizziness when standing up; and falling almost daily because of imbalance. Dr. Maa reviewed the MRI and noted spinal stenosis at C5-6, C6-7 and T2 signal at C4-5 and C6-7, which he attributed to edema. He found the MRI to be consistent with a history of trauma in addition to chronic stenosis. Dr. Maa recommended that the jail schedule a neurosurgical evaluation. That same day, Nurse Umbriaco ignored the recommendation and indicated that plaintiff did not need a follow-up appointment. During the remainder of her incarceration, Ms. Trujillo never saw a neurosurgeon, and the records do not indicate any ongoing treatment other than minimal pain medication. *Id.* at ¶¶ 70, 71.

- May 16, 2013: Immediately after Ms. Trujillo's release from jail, she returned to the Denver Health Medical Center. Dr. Vanderheiden and Dr. Fleisher diagnosed plaintiff with: (1) Cervical myelopathy (pathology of the spinal cord); (2) C5-6-7 spondylosis (spinal degeneration) and degenerative disk changes; (3) C3-4 Klippel-Feil failure of segmentation (abnormal joining or fusion of two or more spinal bones in the neck); (4) C4-5 spondylolisthesis (one bone in the back slides forward over the bone below); (5) Multilevel cervical spinal cord injury; and (6) Multilevel cervical stenosis. The doctors recommended that Ms. Trujillo be admitted to the hospital immediately for emergency surgery. They were worried that Ms. Trujillo's condition had deteriorated since the MRI, and that her balance issues could cause her to fall, further injuring her spinal cord. *Id.* at ¶ 72.

- On or about May 21 or May 22, 2013: Ms. Trujillo underwent surgery. She continues to rely on a walker or cane. Her gait remains weak, and she still has considerable pain. *Id.* at ¶¶ 73, 74.

Based on the foregoing allegations Ms. Trujillo brings two claims for relief pursuant to 42 U.S.C. § 1983: (1) deliberate indifference to serious medical needs against all defendants in violation of the Eighth Amendment, and (2) municipal liability for failure to train and supervise against Denver and Denver Health. *Id.* at ¶¶80-100. [1] Ms. Trujillo seeks declaratory relief; economic, compensatory, and punitive damages; costs; and attorney's fees. *Id.* at 23–24.

CASE HISTORY

Ms. Trujillo, represented by counsel, filed her original Complaint pursuant to 42 U.S.C. § 1983 on October 10, 2014. ECF No. 1. She alleged that she had been injured while she was an inmate in the Denver Jail, but that the defendants had been deliberately indifferent to her medical needs in violation of the Eighth Amendment. Plaintiff named the City and County of Denver (sometimes referred to herein simply as "the City") and six individuals (two deputies and four nurses) as defendants. *Id.*

***5** In 2015 a number of issues arose regarding plaintiff's counsel and the appointment of pro bono counsel. *See* ECF No. 98. Among other things, for several months after the Complaint was filed none of the defendants had been served with the summons and complaint. Eventually one individual defendant, Victoria Toliver, a nurse, was served. Because the return of service was never filed, the exact date of service is unknown to me. However, I presume that it probably was in early March, 2015, because she answered the Complaint on March 31, 2015. ECF No. 17. The City and County of Denver presumably was served in the same timeframe, because counsel entered an appearance on the City's behalf on April 1, 2015. ECF No. 18.

On April 10, 2015 plaintiff's counsel moved to withdraw, claiming difficulty in contacting Ms. Trujillo and an irreconcilable conflict. ECF No. 21. The motion was granted by Magistrate Judge Hegarty, ECF No. 23, although the circumstances of the withdrawal were the subject of several subsequent orders. ECF Nos. 27, 28, 32, 43, 47. Meanwhile the City had filed a motion to dismiss,

to which Ms. Trujillo's pro se response was essentially a request that counsel be appointed to represent her. ECF Nos. 20, 57.

On July 28, 2015 Judge Hegarty granted Ms. Trujillo's motion for the appointment of counsel to the extent that he directed the Clerk of Court to attempt to find a member of the court's Civil Pro Bono Panel who would be willing to represent Ms. Trujillo on a pro bono basis. *See* ECF No. 63. On September 9, 2015 Diego G. Hunt of the law firm of Holland & Hart LLP, having informed the Court of his availability, was appointed. ECF No. 78. This Court notes its gratitude to Mr. Hunt, who has since withdrawn due to his appointment to the District Court for the First Judicial District, and to his colleagues who have taken over for him.

On October 14, 2015 Ms. Trujillo, through her new counsel, filed a motion for leave to file the First Amended Complaint. ECF No. 86. The motion was opposed by Nurse Toliver, who still was the only individual defendant to have been served. However, on November 6, 2015 I granted the motion to amend, which mooted Nurse Toliver's motion to dismiss. ECF No. 98.

The First Amended Complaint, filed the same day, is now the operative pleading. ECF No. 99. It added substantial detail, as discussed above, and it named numerous additional law enforcement and medical defendants. ECF No. 99. On December 1, 2015 waivers of service were signed by the original defendants other than Nurse Toliver and by most of the newly named defendants. ECF No. 105. New defendant Marvin Korell was served by waiver two days later. ECF No. 109. [2]

Defendants Denver Health and Hospital Authority (Denver Health), Jennifer Firebaugh, Brenda Sue Hagman, Paul Michael Umbriaco, Marvin Korell, Pauline Marie McGann, and Donna Marie Blatt (collectively referred to by Judge Hegarty as the "Health Care Defendants" and in this order as the "added defendants") filed the pending motion to dismiss on January 5, 2016. ECF No. 114. The City and County of Denver filed a separate motion to dismiss on January 29, 2016. ECF No. 123. On April 13, 2016 Ms. Trujillo filed a motion to strike the City and County of Denver's reply brief, or in the alternative, for leave to file a surreply. ECF No. 150.

ANALYSIS

I. Standard of Review.

***6** Following the issuance of a magistrate judge's recommendation on a dispositive matter, the district court judge must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3).

To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), purely conclusory allegations are not entitled to be presumed true. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). Importantly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted); *accord Robbins v. Okla. ex. rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal citation omitted).

II. Added Defendants' Motion to Dismiss.

On January 5, 2016 the added defendants filed a motion to dismiss, arguing that plaintiff's claims against them are time-barred, and that the "relation-back" provision in Fed. R. Civ. P. 15 does not apply. ECF No. 114 at 12–16. On March 28, 2016 Judge Hegarty recommended that this Court grant the motion to dismiss. ECF No. 143. The recommendation advised the parties that specific written objections were due within fourteen (14) days after

being served with a copy of the recommendation. *Id.* at 2 n.3. Plaintiff filed objections on April 14, 2016. ECF No. 152. The Court has reviewed all of the relevant pleadings and Judge Hegarty's recommendation. After its de novo review, the Court concludes that Judge Hegarty's analysis is thorough and correct. Therefore, the Court adopts the recommendation and grants the added defendants' motion to dismiss.

"Although a statute of limitations bar is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss when the dates given in the complaint make clear that the right sued upon has been extinguished." *Torrez v. Eley*, 378 Fed.Appx. 770, 772 (10th Cir. 2010) (unpublished) (internal citation omitted). "Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations[.]" *Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006) (internal citation omitted). Pursuant to Colorado law, the statute of limitations for § 1983 claims is two years "from the time the cause of action accrued." *Id.* (internal citation omitted); *see* C.R.S. § 13–80–102. The cause of action accrues when "the plaintiff knows or should have known that his or her constitutional rights have been violated." *Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1154 (10th Cir. 1998) (internal citation omitted).

***7** It is undisputed that plaintiff's cause of action accrued no later than May 22, 2013 when she underwent surgery at the Denver Health Medical Center. Accordingly, the claims against the added defendants, filed on November 6, 2015, were untimely. Ms. Trujillo does not dispute that the statute of limitations purports to bar her claims against the added defendants. However, under certain circumstances, even though the statute of limitations has run, an amended pleading may relate back to the date of the original complaint. Plaintiff argues that this relation-back rule, and specifically Fed. R. Civ. P. § 15(c)(1)(C), saves her claims against the added defendants. This Rule permits the addition of new parties after the expiration of the period of limitations if three requirements are met.

First, the amendment must address the same facts set out in the original pleading. Fed. R. Civ. P. 15(c)(1)(C). There is no dispute that this requirement is satisfied here.

Second, within the service period provided by Fed. R. Civ. P. 4(m), the new parties must have "received such notice of the action that [they] will not be prejudiced in defending on the merits." Fed. R. Civ. P. 15(c)(1)(C)(i). Judge Hegarty did not address this second requirement because he concluded that even if plaintiff could demonstrate that the added defendants had sufficient notice of the claims, she failed demonstrate that she could meet the third requirement. ECF No. 143 at 14. [3].

Third, plaintiff must show that defendants "knew or should have known that the action would have been brought against [them], but for a mistake concerning the proper [parties'] identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). Judge Hegarty concluded that plaintiff failed to get by this final hurdle. ECF No. 143 at 14–15. I agree.

"Rule 15(c)(1)(C)(ii) asks what the prospective defendant knew or should have known during the Rule 4(m) period, not what the plaintiff knew or should have known at the time of filing her original complaint." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 548 (2010). [4] In applying this test I emphasize that it has two component parts: (1) the added defendants knew or should have known (2) that they would have been named but for plaintiff's mistake concerning the proper parties' identities.

***8** First, it is not at all clear that the added defendants knew or should have known during the limitations period, let alone during the Rule 4(m) service period, that Ms. Trujillo had filed a lawsuit. The original Complaint was filed on October 10, 2014, but only two of the original defendants, Nurse Toliver and the City and County of Denver, were served by the expiration of the limitations period on May 22, 2015. The new defendants were added more than five months later, on November 6, 2015, when the First Amended Complaint was accepted for filing. The added defendants (and the original defendants not previously served) were served by waiver on December 1, 2015. Perhaps there was talk around the jail about the suit, and some of the added defendants learned something about it that way. But that is speculation. I am unaware of anything in the record that shows that the added defendants knew of the lawsuit by May 22, 2015.

But, second, even if one were to assume (as Judge Hegarty essentially did) that the added defendants were aware of the suit during the service and limitations periods, the Court has no reason to find or assume that they knew or should have known that they would have been included but for a mistake by the plaintiff. To be sure, *Krupski* described "mistake" broadly. It provided two scenarios

that could constitute a misunderstanding about the proper party's identity: (1) where "a plaintiff may know that [party A] exists, while erroneously believing him to have the status of party B;" and (2) where "a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the 'conduct, transaction, or occurrence' giving rise to her claim." 560 U.S. at 549. And it added that "[t]he reasonableness of the mistake is not itself an issue." *Id.* But the Court also established an outer limit to what constitutes a mistake in identity.

Specifically, the Court agreed with the defendant that a plaintiff's "making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity." *Id.* Accordingly, *Krupski* has been interpreted to provide that "[c]laims against any newly added defendants will not 'relate back' to the date of the original complaint where the plaintiff's failure to name the prospective defendant was 'the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity.' " *Schoolcraft v. City of New York*, 81 F.Supp.3d 295, 301 (S.D.N.Y. 2015) (quoting *Krupski,* 560 U.S. at 552). Ms. Trujillo asserts several arguments as to why her claims against the added defendants should relate back under the *Krupski* standard. I am not persuaded.

First, Ms. Trujillo asserts that she mistakenly attempted to assert claims against all medical providers in the medical provider's in the Jail's infirmary in the original Complaint through the case caption. ECF No. 152 at 3-4; ECF No. 124 at 8. The caption read,

> REBECCA TRUJILLO,
>
> Plaintiff,
>
> v.
>
> CITY AND COUNTY OF DENVER, COLORADO,
>
> DEPUTY ROMERO, Denver Sheriff Department,
>
> DEPUTY J. ALLEN, Denver Sheriff Department,
>
> J. ALLEN, RN[,]
>
> A. PEREZ, RN,
>
> V. TOLIVER, RN,
>
> DANA WIMERLY, RN, all medical providers in the Denver City Jail Infirmary,
>
> Defendants.

ECF No. 1 at 1.

However, a plain reading of the caption indicates that plaintiff capitalized all of the named parties, and that the lower-case phrases following an individual's name are descriptors, explaining where that individual is employed. For example, Ms. Trujillo does not contend that she intended to name the "Denver Sheriff Department" as a defendant. Rather, "Denver Sheriff Department" indicates where Deputies Romero and Allen are employed. Similarly, the Court reads the phrase "all medical providers in the Denver City Jail Infirmary" to indicate where Nurses Allen, Perez, Toliver, and Wimberly work.

***9** Second, Ms. Trujillo indicates that when the original Complaint was filed she had access to her medical records which identified all the medical providers in the infirmary. This, she suggests, confirms that it was a mistake to rely on the caption and not to name the providers individually in the Complaint. ECF No. 152 at 3-4. However, I do not find the admission that she had access to her medical records to be helpful to her. Rather, it suggests to me that she and her lawyer made a deliberate choice of whom to sue and not to sue, fully aware of the role that each provider played in her medical care and, presumably, also aware of the pertinent legal standards. It defies credibility to believe that Ms. Trujillo and her lawyer knew who the medical providers were but nevertheless chose to name only four of them and to rely instead on the ambiguous (at best) wording of the caption to include the others as additional defendants.

Similarly, Ms. Trujillo argues that she made a mistake because, while she knew she had suffered a violation of her constitutional rights, it took her some time to "understand how the individuals' roles played into the conduct, transaction, or occurrence giving rise to her claims." ECF No. 152 at 4; ECF No. 124 at 8. However, Ms. Trujillo fails to explain how she misunderstood "the factual and legal differences" between the original defendants and the added defendants. She does not, for

example, allege that she mistakenly thought Nurse A refused to provide medical care only to later realize that Nurse B was the individual who did not order treatment. Again, she admits to having the medical records when she filed her original Complaint. She could and presumably did rely on her lawyer to analyze the applicable law.

I note as well that, although predating *Krupski*, the Tenth Circuit held in *Garrett v. Fleming* that "[a] plaintiff's designation of an unknown defendant as 'John Doe' in the original complaint is not a formal defect of the type [Rule 15(c)(1)(C)] was meant to address." 362 F.3d 692, 697 (10th Cir. 2004); *see also Hughes v. Colo. Dep't of Corrs.*, 594 F. Supp. 1226, 1237 (D. Colo. 2009) ("replacing an unknown defendant on the basis of new information is not a 'mistake concerning the proper party's identity.' "). *Krupski* does not appear to have rendered *Garrett* obsolete. *See Martinez v. Gabriel* No. 10–cv–02079–CMA–MJW, 2012 WL 1719767, at *2 (D. Colo. May 15, 2012). Rather, "[f]iling a complaint against nameless defendants is not a mechanism by which the plaintiff receives extra time to discover the John Doe identities. Even after *Krupski*, Plaintiff's amended complaint does not relate back to her original complaint because her original complaint did not contain a 'mistake.' " *Id.* (citing *Smith v. City of Akron,* 476 Fed.Appx. 67, 69, 2012 WL 1139003, at *2 (6th Cir. 2012) (unpublished) (holding that *Krupski* does not affect the rule that relation back does not apply when the plaintiff seeks to substitute named defendants for John Doe defendants)).

Plaintiff relies on *Santistevan v. City of Colo. Springs*, No. 11–cv–01649–MEH, 2012 WL 280370 (D. Colo. Jan. 31, 2012) to support her argument that relation back applies because she misunderstood the roles of the various individuals involved in her health care. However, in *Santistevan* (which was also decided by Magistrate Judge Hegarty), the court permitted relation back where the plaintiff learned through discovery that the named defendant did not have decision making authority regarding the alleged constitutional violation, and that the decision maker was someone else. 2012 WL 280370, at *6. The court explained that this type of mistake tracked the first hypothetical from *Krupski*. *Id.* That is not the case here. Rather, the present matter is more analogous to *Asten v. City of Boulder,* No. 08–cv–00845–PAB–MEH, 2010 WL 5464298, at *5 (D. Colo. Sept. 28, 2010) *report and recommendation adopted*, No. 08–cv–00845–PAB–MEH, 2010 WL 5464297 (D. Colo. Dec. 29, 2010). In *Asten* the plaintiff sought to add two parties, rather than to change a party. The *Asten* court reasoned that "it is this addition [of parties] that belies Plaintiff's assertion of a mistake. This matter is not a case of mistaken identity, as in *Krupski*, but concerns a deliberate choice to sue one set of defendants without including certain others also involved in the [ ] incident." No. 08–cv–00845–PAB–MEH, 2010 WL 5464298, at *6.

***10** Ms. Trujillo also cites *Laratta v. Raemisch*, 12–cv–02079–MSK–KMT, 2014 WL 1237880 (D. Colo. March 26, 2014) for the notion that a "mistake" can be made when a plaintiff has a misunderstanding regarding when and how to name certain defendants. In *Laratta*, the pro se plaintiff filed an amended complaint, where, among other additions, he added a claim against two Colorado Department of Corrections employees in their official capacities. 2014 WL 1237880, at *6. The plaintiff argued that the statute of limitations did not bar his claims because they related back to the newly-added defendants. *Id.* at *14. He contended that because he "requested declaratory and injunctive relief [in his original complaint], it is clear that he intended to bring official capacity claims against the named Defendants, i.e. against CDOC itself." *Id.* at *16 (brackets in original). In her recommendation Magistrate Judge Kathleen Tafoya found that the claim did relate back because the plaintiff had made a mistake by "misunderstanding that he had to name specific defendants in their official capacities in order to obtain declaratory and injunctive relief." [5] *Id.*

Judge Hegarty reasoned that *Laratta* did not apply because the *Laratta* plaintiff was pro se while Ms. Trujillo was represented by counsel when she filed her original complaint. ECF No. 152 at 4; *see* ECF No. 143 at 17. Plaintiff objects, arguing that the "*Laratta* court does not limit its analysis to pro se plaintiffs." ECF No. 152 at 4. Maybe not, but even if the Court were to consider Judge Tafoya's discussion in *Laratta* to apply to represented parties, it is distinguishable. Judge Tafoya found that the plaintiff had committed the legal error of not knowing when to name defendants in their official capacities in order to obtain certain types of relief. In contrast, Ms. Trujillo maintains that her error was that she did not know she needed to identify the new defendants individually. However, plaintiff's original complaint belies this assertion because that pleading demonstrates that she knew to sue *some* defendants by name.

The Court surmises that Ms. Trujillo likely realized—after the expiration of the statute of limitations and with the guidance of new counsel—that she had failed to bring suit against all of the health care providers who might be liable for a violation of her constitutional rights. The Court is sympathetic to the issues Ms. Trujillo had with her original attorney. However, while it might have been an ill-advised legal strategy to not name all of the health care providers and Denver Health, there is no indication that Ms. Trujillo failed to do so because of a mistake regarding the proper parties' *identities.* It would be an unreasonable extension of the relation back doctrine to permit a plaintiff to expand the scope of her claim simply by arguing, in a general and conclusory fashion, that she misunderstood the roles of those involved in the events.

In sum, the Court finds that plaintiff has failed to demonstrate that her claims against the added defendants relate back to her original pleading.

III. Plaintiff's Motion to Strike.

On April 13, 2016 plaintiff filed a motion to strike sections of Denver's reply brief in support of its motion to dismiss, arguing that Denver improperly sought to dismiss her first claim for relief for the first time in its reply brief. ECF No. 150 at 2. In the alternative, plaintiff sought leave to file a surreply. *Id.* at 4. Judge Hegarty recommended that this Court deny the motion to strike but grant the request for leave to file a surreply. ECF No. 167 at 3.

Neither party filed an objection to Judge Hegarty's recommendation. "In the absence of timely objection, the district court may review a magistrate ... [judge's] report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985)) (stating that "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings"). This Court concludes that "there is no clear error on the face of the record." Fed. R. Civ. P. 72 advisory committee's note. Therefore, the Court denies plaintiff's motion to strike. However, it has considered plaintiff's surreply, ECF No. 150-1, in deciding the City and County of Denver's motion to dismiss.

IV. City and County of Denver's Motion to Dismiss.

***11** On January 29, 2016 the City filed a motion to dismiss. ECF No. 123. On June 8, 2016 Judge Hegarty recommended that this Court grant the motion to dismiss. ECF No. 168. Plaintiff filed timely objections to which the City responded. ECF Nos. 173, 176. After its de novo review, the Court partially adopts and partially rejects the recommendation.

The City moves to dismiss Ms. Trujillo's second claim, arguing that Ms. Trujillo fails to allege plausibly that any of the allegedly unconstitutional actions resulted from a municipal policy.[6] ECF No. 123 at 3–10. In response Ms. Trujillo contends that that her allegations do state a claim for municipal liability based on the City's failure to train and supervise, and that her first claim for relief for deliberate indifference survives the City's motion to dismiss. Additionally, she argues that the City can be held indirectly liable through the non-delegable duty doctrine for policies, practices, or customs of Denver Health. ECF No. 133 at 2.

"[I]t is axiomatic that there is no vicarious liability under section 1983, and thus a municipality may not be held liable merely because one of its employees has inflicted an injury." *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010), *cert. denied*, 564 U.S. 1019 (2011). In order to establish municipal liability, a plaintiff must show the existence of (1) a municipal policy or custom; (2) a direct causal link between the policy or custom and the injury alleged; and (3) deliberate indifference on the part of the municipality. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) (a plaintiff must "show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury"). The "official policy or custom" requirement "was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in original).

A. Direct Liability.

The Court will consider first whether the City is directly liable for the alleged violations of Ms. Trujillo's Eighth Amendment rights. Judge Hegarty reasoned that the First Amended Complaint fails to state a plausible claim for relief under any of plaintiff's theories because Ms. Trujillo

does not allege an underlying constitutional violation by any of Denver's officers. ECF No. 168 at 16. I agree.

It is well established that "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). Plaintiff fails to allege any unconstitutional conduct by the two remaining Denver Sheriff's Deputies Allen and Rodriguez. Ms. Trujillo does not allege that either individual engaged in any of the conduct at issue; in fact, neither deputy's name appears in the allegations. In her objections, Ms. Trujillo lists the allegations in her First Amended Complaint regarding how the "jail repeatedly delayed providing her with necessary treatment and recommended diagnostic tests." ECF No. 173 at 14. However, the only places where Denver employees appear in the First Amended Complaint are general references to conduct by "on-duty jail deputies," "guards," "officers," and "employees of Denver Sheriff's Department." *See* ECF No. 99 at ¶¶ 1, 58–59, 60, 63, 67, 70–71. As Judge Hegarty determined, such general allegations are insufficient pursuant to Fed. R. Civ. P. 8(a). ECF No. 168 at 17 n.7 (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570).

***12** Moreover, as Judge Hegarty noted, there is no suggestion that plaintiff has served either of the two remaining defendants within the time required by the federal rules. *See* Fed. R. Civ. P. 4(m) ("If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice or order that service be made within a specified time."). Accordingly, the Court construes Judge Hegarty's recommendation as notice to Ms. Trujillo and dismisses Deputies Allen and Rodriguez without prejudice.

In sum, because Ms. Trujillo does not allege any unconstitutional conduct by an employee of Denver, the Court finds that Denver cannot be held directly liable on any of plaintiff's theories.

B. Indirect Liability.

The next issue is whether Denver is indirectly liable for any constitutional violations by Denver Health or its nurses or doctors.[7] The government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). The government's duty to provide adequate medical care is non-delegable. The "non-delegable duty doctrine" grew out of the Supreme Court's decision in *West v. Atkins*, where the Court reasoned that "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." 487 U.S. 42, 56 (1988) (holding that a private physician who was under contract with a state prison "acted under the color of state law" pursuant to § 1983). "[T]he State cannot, by choosing to delegate its constitutional duties to the professional judgment of others, thereby avoid all liability flowing from the attempted fulfillment of those duties under Section 1983." *Anglin v. City of Aspen, Colo.*, 552 F.Supp.2d 1229, 1244 (D. Colo. 2008) (citing *West*, 487 U.S. at 56 n.14).

The City argues that the non-delegable duty doctrine does not apply because Denver Health is a public entity, and the doctrine only extends to a government entity's contracting with a private company for the provision of health care. ECF No. 139 at 5–9. Denver Health used to be part of the City and County of Denver. *Bradley v. Denver Health and Hosp. Authority*, 734 F.Supp.2d 1186, 1189 (D. Colo. 2010). However, in 1997 Denver Health separated from Denver and "became a political subdivision of the State of Colorado." *Id.* (citing C.R.S. § 25–29–103(1) (2010)).

Plaintiff contends that there is significant confusion in state and federal courts regarding whether Denver Health is a public or private entity. ECF No. 173 at 7 n.7. Plaintiff nevertheless proceeds on the theory that the non-delegable duty doctrine *does* extend to contracts for medical services between two public entities. *See id.* at 7. The Court does not discern any genuine dispute over Denver Health's status, and for the purposes of this motion, it will consider Denver Health to be a public entity. *See Villalpando v. Denver Health & Hosp. Auth.*, 65 Fed.Appx. 683, 686–87, 2003 WL 1870993, at **2–3 (10th Cir. 2003) (unpublished) (treating Denver Health as a public entity subject to liability under § 1983); *Ware v. Denver Health*, 2009 WL 4506409, at *2 (D. Colo. 2009) (Denver Health is considered a "political subdivision of the state," it "may

be sued for alleged civil rights violations only pursuant to 42 U.S.C. § 1983").

***13** As Judge Hegarty recognized, the Supreme Court in cases following *West* has described the doctrine as involving the delegation of state authority to a private actor. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 48 U.S. 179, 192 (1988) ("In the typical case raising a state-action issue, a *private* party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved [by delegation or otherwise] to treat that decisive conduct as state action.") (emphasis added); *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 51 U.S. 288, 296 (2001) ("We have treated a nominally *private* entity as a state actor when ... it has been delegated a public function by the State") (emphasis added). Additionally, where the Tenth Circuit has considered this issue, it has done so in the context of a private contractor's alleged constitutional violation. In fact, this Court considered such a fact pattern, holding that a county sheriff could be indirectly liable for a private healthcare provider's constitutionally inadequate training of its nurses. *McGill v. Correctional Healthcare Cos., Inc.*, No. 13–cv–01080–RBJ, 2014 WL 5423271, at **6–7 (D. Colo. Oct. 24, 2014).

In his recommendation, Judge Hegarty determined that the non-delegable duty doctrine does not apply to the present facts. ECF No. 168 at 14–15. Ms. Trujillo objects, arguing that Judge Hegarty's interpretation of the doctrine is "contrary to established legal principles and public policy concerns for the care of inmates and deprives Ms. Trujillo of her ability to adequately vindicate her Eighth Amendment rights." ECF No. 173 at 6. I respectfully disagree with Judge Hegarty and agree with plaintiff. Neither the Supreme Court nor the Tenth Circuit has explicitly limited the doctrine to a public entity's contracting with private medical providers. Additionally, I find that the policy behind the doctrine supports its application to the facts here.

Plaintiff relies on *Ford v. Boston*, 154 F.Supp.2d 131 (D. Mass. 2001). *Id.* at 7. In *Ford*, the city and county had an agreement under which the county took custody of and housed the city's female arrestees. 154 F. Supp. 2d at 133–34. The county subjected all jail admittees "to strip and visual body cavity searches." *Id.* at 133. A certified plaintiff class challenged the constitutionality of the searches. *Id.* at 133–34. The *Ford* court held that the city would be liable for the county's unconstitutional policies or customs. *Id.* at 149.

The *Ford* court clarified that it was not relying on a theory of *respondeat superior*, stating that "the question is City liability for promulgation and implementation of an express County policy, not City liability" for negligence of "County employees acting as agents of the City." *Id.* at 148 n. 36 (citing *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403 (1997)). The court analyzed the case through the lens of the non-delegable duty doctrine where, pursuant to a subcontract, the county housed and "cared for City arrestees." *Id.* at 148. The court reasoned that a city's contracting with a private entity would not insulate it from liability for constitutional violations caused by policies or customs of the county. *Id.* at 149. The *Ford* court saw no reason to reach a different result when the contract was between two governmental entities, stating that the county's status as "a public entity does not alter this analysis." *Id.* at 149 n.37. The court explained that the city had "an affirmative obligation ... to ensure that the policy of the [county] officials did not lead to a widespread violation" of the arrestee's rights. *Id.* at 149 (citing *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 n.9 (11th Cir. 1984)) ("[W]here a governmental entity delegates the final authority to make decisions then those decisions necessarily represent official policy.").

The *Ford* court cited a case from the Eighth Circuit with similar facts. *Id.* at 149 n.38. In *Young v. City of Little Rock*, the city had delegated the housing of prisoners to the county. The Eighth Circuit upheld a jury verdict for the plaintiff who had been subjected to an unconstitutional strip search at the county jail. 249 F.3d 730, 736 (8th Cir. 2001). The appellate court reasoned that "the jury could reasonably infer that the City knew that a person entering the [County] jail ... would be strip-searched. In these circumstances, it is far from unfair to attribute to the City the policies routinely used by the County jail in the housing and processing of City prisoners." *Id.*

***14** While *Ford* and *Young* are not binding on this Court, I find them persuasive. As Judge Hegarty correctly discussed, one central aim of non-delegable duty doctrine is to ensure that an individual is not deprived "of the means to vindicate [her] Eighth Amendment rights[.]" *West*, 487 U.S. at 56. Here, as Judge Hegarty recognized and as defendant argues, Ms. Trujillo attempts to

vindicate her Eighth Amendment claims by suing Denver Health and its employees directly for constitutionally inadequate medical care. *See* ECF Nos. 168 at 15; 176 at 6. However, there is more to this picture.

The non-delegable duty doctrine presents a second, equally-important aim: a governmental entity has a "constitutional duty to provide adequate medical treatment to those in its custody[.]" *West*, 487 U.S. at 56. The *Ford* court interpreted *West* to mean that "any entity, public or private, that takes on the city's obligations may be held liable as a state actor under § 1983, but the city, too, retains its oversight obligations." 154 F. Supp. 2d at 138 n.37. I agree. Even though Ms. Trujillo brings a § 1983 claim against Denver Health directly, the policy forces at play suggest that the city cannot dodge its obligation to provide medical care. In sum defendant's argument must fail because it does not account for the important aim of preventing a public entity from avoiding liability by strategically choosing to contract with another public entity.

The City argues that a Sixth Circuit case supports its position that Denver cannot be held liable for Denver Health's policies or practices. ECF No. 139 at 6. In *Deaton v. Montgomery Cnty., Ohio*, the court addressed the issue of "whether a county, which contracts with a municipality to manage and operate its jail facilities ... may be held liable under 42 U.S.C. § 1983 for constitutional deprivations resulting from a custom, policy or practice of the municipality." 989 F.2d 885, 885–90 (6th Cir. 1993). The Sixth Circuit found that

> [t]he duty to manage and operate the facility belongs to the City and the custom or policy it chooses to implement does not become that of the County because the City has separate statutory authority to house prisoners. Therefore, any constitutional violations of the plaintiffs' rights were the result of City, not County, policy.

Id. at 888.

The *Deaton* court did not foreclose the possibility that one public entity could be liable for another public entity's policy. Rather, the court reasoned that "because each entity is required to be in compliance with Ohio law, we do not believe the County adopts the City's policy by default *absent a showing of deliberate indifference.*" 989 F.2d at 889 (emphasis added). The court concluded that the county was not deliberately indifferent because, prior to filing of the suit, there was no evidence that "the [county] sheriff knew or should have known that [the municipality's] strip searches were conducted in violation of state law." *Id.* at 889–90 (noting that the filing of the suit arguably placed the county on notice and "any inaction by the County after this point might make a case for deliberate indifference" to subsequent prisoners' rights).

Here, unlike in *Deaton*, the Court finds that plaintiff has alleged plausibly that the City was deliberately indifferent. Plaintiff alleges that Denver knew or should have known that inadequate health care was being provided at the jail because "Denver has a long history of failing to train its personnel properly for medical issues relating to inmates and has not remedied its failures." ECF No. 99 at ¶ 40. Specifically, Ms. Trujillo claims that

> ***15** [i]n 2006, the Denver jail failed to provide medical assistance to a prisoner named Emily Rice, who had sustained injuries during a drunk driving accident prior to be housed at the jail, and later died from her untreated internal injuries. Emily Rice's family sued the city of Denver and Denver Health for her death. Both the city and Denver Health settled with Ms. Rice's family, and as part of the settlement, agreed to provide enhanced training to its personnel regarding medical care for inmates.

Id. at ¶ 76.

Additionally, Ms. Trujillo alleges that the City made a training video, "which was supposed to tell the story of what happened to Emily Rice and to train deputies to prevent another inmate from suffering her fate. The video, however, did not train deputies and there was a public outcry as a result of this video." *Id.* at ¶ 77. It is unclear if this video was created before or during Ms. Trujillo's time in jail. Plaintiff states that "[i]n August 2014, it came to light that Denver Jail was still not providing proper training to its employees." *Id.* At this stage, the Court must construe any inferences in plaintiff's favor.

For the purposes of this motion, it is plausible that the "public outcry" in response to the video's inadequacies occurred before or during Ms. Trujillo's time in the jail and therefore would have put the City on notice.

Moreover, plaintiff claims that she "sent several kites for medical treatment and also filed formal grievances against the jail for its failure to provide medical treatment." *Id.* at ¶ 40. Ms. Trujillo also alleges that Dr. Boyle called the jail regarding Ms. Trujillo's status, and the jail told him officials would return his call. The jail never called Dr. Boyle, and Dr. Boyle did not follow up regarding Ms. Trujillo's treatment. *Id.* at ¶¶ 55–60. The Court finds that these allegations make it plausible that the City knew or should have known of the inadequate medical treatment being provided to Ms. Trujillo. *See Young*, 249 F.3d at 736 ("City employees were aware of the custom of chaining prisoners, and they knew that [plaintiff] was being taken back to the jail.").

In sum, the Court concludes that Denver can be held liable for an unconstitutional policy or custom of Denver Health.

1. Municipal Liability.

The Court must next decide whether Ms. Trujillo has stated a claim for municipal liability. I find that she has.

A plaintiff may demonstrate the existence of a municipal policy or custom in the form of (1) an officially promulgated policy; (2) an informal custom amounting to a widespread practice; (3) the decisions of employees with final policymaking authority; (4) the ratification by final policymakers of the decisions of their subordinates; or (5) the failure to adequately train or supervise employees. *Bryson*, 627 F.3d at 788. Ms. Trujillo argues that she has "adequately alleged facts to support that the moving force behind this [constitutional] violation was a Denver Health policy or custom for nurses to ignore treating physicians' medical directives if the nurse can justify this conduct due to some suspected malingering or 'chronic charting.' " ECF No. 173 at 13. Alternatively, plaintiff argues that the constitutional violation was caused by a "failure to adequately train its employees regarding inmate medical issues, including the detection and treatment of spinal injuries." *Id.*

First, regarding whether Denver Health had a policy or custom that caused the violation of plaintiff's Eighth Amendment rights, plaintiff does not allege the existence of an officially-promulgated policy. Therefore, her first theory necessarily proceeds on the notion that an informal custom existed that amounted to a widespread practice. *Bryson*, 627 F.3d at 788. Ms. Trujillo alleges that Nurse Perez "noted that Ms. Trujillo had chronic charting" on August 5, 2012. ECF No. 99 at ¶ 54. Second, during the month following Dr. Boyle's assessment that plaintiff had a "very significant neurologic illness," *id.* at ¶ 58, Nurse Perez "updated Ms. Trujillo's chart on a weekly basis, stating simply that there was 'chronic charting,' " and noting knee and ankle pain and a risk of falling. *Id.* at ¶ 62. Nurse Perez did not provide any treatment or care during this time. *Id.* Finally, from the date of the MRI on October 10, 2012 until February 2013, Nurse Perez made weekly notes that repeated that plaintiff had "chronic charting, bilateral knee and ankle pain, and fall risk." *Id.* at ¶ 67. Ms. Trujillo claims that Nurse Perez "deliberately never noted Ms. Trujillo's continuing and worsening neurologic symptoms" and never provided treatment. *Id.* Ms. Trujillo concludes that "[t]hese facts, when taken as true, adequately allege that a Denver Health policy or custom was the moving force behind the violation of her constitutional rights." *Id.* I agree.

***16** Defendant argues that "[P]laintiff only attacks the medical judgment and medical treatment of specific Denver Health personnel who she alleges violated her constitutional rights[,]" and such allegations are insufficient because "allegedly inadequate medical judgment does not rise to the level of deliberate indifference." ECF No. 176 at 7. I disagree. This is not a case where a plaintiff simply has a different opinion about her medical treatment. *See Mata v. Saiz*, 427 F.3d 745, 761 (10th Cir 2005). Rather, Ms. Trujillo's allegations, when taken as true, depict a troubling picture of the jail's health care providers' ignoring her obvious symptoms and doctors' diagnoses of a spinal injury and failing to provide the doctors' recommended treatment.

Second, regarding plaintiff's theory about the failure to train, plaintiff cites to the same allegations that she relied on for her informal custom theory. Ms. Trujillo summarizes her allegations as follows:

> on at least four separate occasions during her incarceration, a treating physician identified

> specific, significant spinal injuries and ordered necessary treatment for Ms. Trujillo. And in the month or months following each evaluation, the nurses deliberately disregarded those medical directives and were deliberately indifferent to Ms. Trujillo's sudden onset of obvious indications of a spinal injury, attributing the symptoms to rheumatoid arthritis even after a doctor definitively stated that Ms. Trujillo's symptoms were likely caused by a neurologic issue.

ECF No. 173 at 13 (citing ECF No. 99 at ¶¶ 53, 58–59, 63, 67, 70–71). Plaintiff alleges that the failure to train caused the violation of her constitutional rights, arguing that that "[h]ad the nursing staff been trained on implementing medical directives, [she] would have received the care prescribed." ECF No. 133 at 12. Ms. Trujillo further contends that "[t]he number of incidents alleged in the Complaint and the egregious nature of those failures 'warrant an inference that it was attributable to inadequate training or supervision[.]' " *Id.* at 12–13 (quoting *Martini v. Russell*, 582 F. Supp. 136, 142 (C.D. Cal. 1984)). The Court agrees. Plaintiff's allegations are "sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need." *Allen v. Muskogee*, 119 F.3d 837, 842, 844 (10th Cir. 1997).

In sum, I find that Ms. Trujillo has alleged enough to make it plausible that Denver Health had a custom of treating nurses' ignoring medical directives based on a justification that the patient was "malingering" or had "chronic charting." Additionally, I conclude that plaintiff's alternative theory—a failure to train—also survives dismissal. Furthermore, plaintiff alleges plausibly that this custom and the purported deficiency in Denver Health's training program directly caused the violations of her right to adequate medical care. Finally, regarding deliberate indifference, the Court finds that plaintiff's allegations are sufficient to establish that a violation of plaintiff's rights is "a highly predictable or plainly obvious consequence of [Denver Health's] action or inaction[.]" *Schnieder*, 717 F.3d at 769 (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)).

Therefore, these policies can be imputed to the City and County of Denver because of its delegation of health care services to Denver Health. Denver's motion to dismiss is denied on these grounds.

ORDER

For the foregoing reasons, it is ORDERED that

1. The Recommendations of United States Magistrate Judge Michael E. Hegarty [ECF Nos. 143, 167, 168] are ADOPTED IN PART AND REJECTED IN PART.

***17** 2. The added defendants' motion to dismiss [ECF No. 114] is GRANTED. The claims against Denver Health and Hospital Authority; Jennifer Firebaugh, RN; Brenda Sue Hagman, LPN; Paul Michael Umbriaco, RN; Marvin Korell, RN; Pauline Marie McGann, MD; and Donna Marie Blatt, RN are dismissed with prejudice. The claims against John Allen, RN; Dennis Boyle, MD; Edward Maa, MD; and Richard Hughes, MD are dismissed without prejudice.

3. Plaintiff's motion to strike [ECF No. 150] is GRANTED IN PART AND DENIED IN PART. It is denied as to striking the reply brief but granted as to leave to file a surreply.

4. Defendant City and County of Denver's motion to dismiss [ECF No. 123] is GRANTED IN PART AND DENIED IN PART. It is granted as to direct liability and denied as to indirect liability.

5. The claims against Deputies Allen and Rodriguez are dismissed without prejudice pursuant to Fed. R. Civ. P. 4(m); and

6. Therefore, plaintiff's claims will proceed against defendant City and County of Denver on a theory of indirect liability; Anthony Perez, RN; Victoria Toliver, RN; and Dana Wimberly, RN.

DATED this 7th day of September, 2016.

All Citations

Slip Copy, 2016 WL 5791208

Footnotes

1 The First Amended Complaint included a third claim for relief based on supervisory liability for failure to train and supervise. *Id.* at ¶¶101-08. Plaintiff voluntarily dismissed this claim on February 22, 2016. ECF No. 132.

2 Original defendants Victoria Toliver, RN; Anthony Perez, RN; and Dana Wimberly, RN filed answers on December 11, 2015 [ECF No. 113] and January 9, 2016 [ECF No. 116]. There is no indication that Deputies Allen and Rodriguez have been served, and they have not entered their appearances. *See* ECF No. 123 at 2 n.1. Plaintiff voluntarily dismissed original defendants Deputy James A. Romero and John Allen, RN. ECF Nos. 121, 157. Plaintiff voluntarily dismissed newly-added defendants Sergeant Marshal Gutierrez; Deputy Sylvia Luna; Deputy Maria Kaipat-Jones; Dennis Boyle, MD; Edward Maa, MD; Richard Hughes, MD; and John Gehred, MD. ECF Nos. 118, 121, 180.

3 Rule 4(m) in the form applicable here provided that if a defendant was not served within 120 days after the complaint was filed the court must either dismiss the action without prejudice against that defendant, order that service be made within a specified time, or extend the time for service for good cause shown. For some of the same reasons I discuss below with respect to the third requirement, I question whether plaintiff could demonstrate compliance with the second requirement.

4 The *Krupski* plaintiff tripped on a cruise ship and sued Costa Cruise Lines for negligence. Costa Cruise Lines was identified on the plaintiff's ticket. The ticket also listed Costa Crociere as the carrier. *Id.* at 542–43. After the statute of limitations expired, Costa Cruise asserted that it was the wrong defendant, moving for summary judgment on the basis that Costa Crociere was the proper defendant. *Id.* at 543–44. The district court granted plaintiff leave to amend, and the plaintiff filed an amended complaint against Costa Crociere. Costa Crociere moved to dismiss, arguing that the amended complaint did not relate back. *Id.* at 544. The district court granted the motion to dismiss. *Id.* at 545. The Eleventh Circuit affirmed, holding that because the plaintiff knew or should have known that Costa Crociere was the correct party, she had made no mistake, and the statute of limitations barred plaintiff's claim against Costa Crociere. *Id.* at 546. The Supreme Court reversed, reasoning that relation back hinged on "whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error." *Id.* at 548.

5 In adopting the magistrate judge's recommendation, Chief Judge Marcia Krieger did not reach the issue of whether the added claim related back because she found that the plaintiff's claim was timely. *Id.* at *6.

6 Denver also moved to dismiss plaintiff's third claim, but as noted above, Ms. Trujillo voluntarily dismissed it. *See* ECF Nos. 123 at 3; 132.

7 As Judge Hegarty recognized, the parties do not explicitly state whether Denver or Denver Health employs the medical providers at the jail. ECF No. 168 at 13. However, I agree with Judge Hegarty that it can be inferred from the briefings that Denver Health employs these individuals.