

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-02184-EWN-BNB

DEL L. CREASON,

Plaintiff,

v.

D.C. 1980, INC., f/k/a CONNECTICUT VALLEY ARMS, INC.; and DIKAR, S. COOP. LTDA,

Defendants.

PLAINTIFF'S SUPPLEMENT TO SCHEDULING ORDER RE ECONOMIC DAMAGES

1. Pursuant to the Court's February 21, 2008 Order, Plaintiff, Del Creason, through his attorney, Michael O'B. Keating, of the law firm of Fogel Keating Wagner Poldiori and Shafner, P.C., hereby supplements the February 21, 2008 Scheduling Order with his good faith estimate of economic damages claimed as follows:
2. On April 7, 2008, Plaintiff's counsel provided defense counsel with an updated settlement demand letter, including a good faith estimate of Plaintiff's past and future economic damages. *See*, Exhibit 1.
3. As stated in Plaintiff's counsel's letter, Plaintiff has past and future economic losses of between \$760,000 and \$840,000.

Respectfully submitted this 11th day of April, 2008.

s/ Michael O'Brien Keating

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2008, I electronically filed the foregoing **PLAINTIFF'S SUPPLEMENT TO SCHEDULING ORDER RE ECONOMIC DAMAGES** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses, or if e-mail addresses are not available, I sent notification by U.S. Mail this date to the following:

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s/Shari L. Wall
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EXHIBIT 1

Fogel Keating Wagner Polidori Shafner

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April 7, 2008

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Re: Del L. Creason
Case Number 1:07-cv-02184-EWN-BNB

Dear Counsel:

This letter is sent to you in anticipation of the Settlement Conference which is currently set for April 24, 2008 with retired Denver District Court Judge William Meyer at the Judicial Arbiter Group. Although much of the substance of this letter was echoed in previous demand packages, it will provide you and your adjuster with a background of the settlement negotiations to date. It will also provide you with the plaintiff's position on damages.

Prior to your formal entry of appearances in this matter, settlement discussions had occurred between Plaintiff's counsel, Mr. Creason, Robert Hickey, Neil Stevens and representatives from Zurich.

On August 8, 2006, Plaintiff's counsel provided Messrs. Hickey and Stevens with a settlement demand package and settlement video. I have taken the liberty of enclosing duplicate copies of the settlement demands. At that time, both Mr. Hickey and Mr. Stevens accepted the primary role in pre-litigation negotiations. Based on representations by Mr. Stevens, an additional copy of the settlement packet was forwarded to representatives of Zurich Madrid.

The substance of that demand package focused on two areas: liability, and Mr. Creason's injuries. A review of the DVD will confirm that our position is that this is a case of clear liability.

There are several deposition excerpts from other similar cases which demonstrate that even when the firearms were used as directed by the manufacturer, there were catastrophic and severe in-the-field failures. Otolaryngologist, Michael Lepore, M.D., provided a diagnosis and explanation of Mr. Creason's injuries.

Following the explosion, Mr. Creason suffered immediate, serious, cranio-facial injuries including:

1. Fracture of the anterior maxillary sinus wall;
2. Fracture of the lateral maxillary sinus wall;
3. Fracture of medial maxillary sinus wall;
4. Orbital rim fracture;
5. Inferior orbital fracture.

Officer Creason suffered a right thumb injury which was repaired at Fort Morgan Community Hospital.

Because of the "significant destruction" of the orbital rim and sinuses, Dr. Lepore was required to use metal plating to reconstruct Officer Creason's orbital bones. Dr. Lepore explained radiographic findings, as well as the surgery that was done to repair Officer Creason's cheek bone.

The long term prognosis for Officer Creason is guarded. Dr. Lepore believes there is a risk of infection to the sinuses and a risk of the infection spreading into the orbit. He indicated that there is the possibility of ongoing surgical treatment to treat the chronic sinus problems which may develop in the future. Finally, he noted that because of the facial scarring to Officer Creason, plastic surgery should be considered in the future as a way of trying to repair the scar tissue.

In the settlement demand of August 2006, Officer Creason explained the frequency and the severity of the pain he endures. Because of the extensive reconstruction of his orbital floor and orbital rim, Officer Creason suffers from daily pain. He describes it as akin to an abscessed tooth: an ever present aching pain. Along with the pain he has facial numbness and has visual disturbances.

At that time, Plaintiff made an opening demand of \$925,000 with the representation that, in an effort to resolve the pending matter, the Plaintiff was making a reasonable and "realistic demand".

Following that demand, on August 22, 2006, Mr. Hickey and Mr. Stevens met with myself and Mr. Creason at my office. At that time, both Mr. Hickey and Mr. Stevens had an opportunity to discuss the circumstances of the accident with Mr. Creason. They inspected the firearm. Based on their representations, they were satisfied with Mr. Creason's explanation and description of his loading procedures and the fact that he had used the proper propellant prior to the catastrophic failure of the CVA weapon.

Following the meeting, Mr. Stevens made a collective offer on behalf of CVA and Dikar in the amount of \$300,000. The first \$100,000 of that amount accounted for CVA's self-insured retention policy and the remaining monies were to be tendered by Zurich.

In response to the \$300,000 offer, I provided Zurich with additional settlement information regarding Mr. Creason's ongoing treatment and future prognosis. On February 22, 2007, I sent two additional copies of a videotape interview with ophthalmologist, Richard Stiverson, M.D.

The force of the impact and the damage to the sinuses caused the eyeball to hemorrhage in the anterior chamber of the eye and in the vitreous body of the eye. The force caused tears of muscles located in the iris and caused the iris to "disinsert" from the trabeculae.

It was noted on Mr. Creason's initial visit that there was blood in the aqueous humor. In the words of Dr. Stiverson, the existence of an aqueous humor hemorrhage suggests that "where there is smoke there is fire. An impact sufficient to break blood vessels is sufficient to cause damage to vision." This was confirmed with his diagnosis of commotio retinae.

Throughout his interview, Dr. Stiverson addresses his long-term concerns for Mr. Creason. The type of trauma to his eye certainly predisposes Mr. Creason to a wide variety of adverse medical conditions affecting the eye. He is concerned about:

1. Retinal detachment and retinal tears;
2. Retinal dialysis;
3. Damage to the trabecular meshwork;
4. Damage to pupil muscles;
5. Damage to the iris;
6. Future cataracts; and,
7. Glaucoma.

All these injuries and long-term conditions interact with each other and make treating his eye very difficult.

As an example, Dr. Stiverson addresses treating Mr. Creason's different sized pupils pharmacologically. As a result of the increase in pupil size, Mr. Creason has visual aberrations. The abnormal pupil size can be corrected with medication. However, the medication can cause retinal detachment. Because Mr. Creason is at increased risk for retinal injuries because of the trauma, use of pilocarpene as a medication is contraindicated because of his risk factors. Thus, treating one area of the trauma – his pupils – places him at a greater risk for having other injuries because of the trauma – retinal detachment.

Another example, is performing cataract surgery. Because of the trauma, Mr. Creason is at increased risk for a traumatically induced cataract. Performing surgery on a patient such as Mr. Creason is treacherous because there is a likelihood for complications. In patients who have high risk factors, it is possible to place the lens in front of the eye in order to perform a successful cataract surgery. Doing so necessarily blocks part of the trabecular meshwork. Unfortunately, because Mr. Creason already has damage to his trabecular meshwork, further occluding that meshwork would increase his intraocular pressure and thus place him at a greater risk for glaucoma. In fact, it would probably *cause* glaucoma. Again, treating one area of the trauma – his lens – places him at a greater risk for having other injuries because of the trauma – glaucoma.

As was seen in the interview, it is not an understatement to say that Plaintiff's right eye is a Pandora's Box. He has suffered a significant injury and is at significant risk for the remainder of his life. What is shocking is Dr. Stiverson's observations that Mr. Creason's eye is "moth-eaten" at the edges. He states that over the course of a year Mr. Creason's iris has deteriorated. What he is saying is that light is entering his eye in a location other than the pupil and his eye is forced to try and process the incoming light. It is analogous to having light enter through the side

of the camera as well as through the aperture.

Besides the extraneous light entering his eyeball, Del's right eye is working less efficiently than it did when Dr. Stiverson saw him on September 13, 2005. You will see that Dr. Stiverson explains that Del's right pupil is larger than the left, but is constricting less quickly than it did a year before.

Dr. Stiverson's diagnosis; Dr. Lepore's diagnoses, and Mr. Creason's statements from the prior settlement video give a bleak picture as to his employability as a police officer. His pain can be so severe he becomes nauseated and he has visual deficits which are not improving with time. Based upon this information, Plaintiff made a modest reduction in his demand to \$900,000. To date, there has not been a response to the demand of \$900,000.

Presently, Mr. Creason is being evaluated by vocational and rehabilitation expert, James Gracey, Ph.D., at Colorado Institute for Injury Rehabilitation. Although Dr. Gracey has not finalized his findings, let me provide you with some of his initial observations and impressions. These findings will also serve to comply with the Court's order to provide you with a range of anticipated economic damages so you may adjust your reserves.

Dr. Gracey is a rehabilitation consultant and therapist and has specialized in vocational analysis for 25 years. He has reviewed Mr. Creason's medical records, educational and employment backgrounds and will conduct vocational testing.

In Dr. Gracey's opinion, Mr. Creason has permanent and severe injuries. These injuries include permanent visual deficits and permanent ongoing pain issues. Because of his permanent injuries, Mr. Creason will have a shortened work life expectancy as a police officer. Dr. Gracey believes that Mr. Creason will be employable as a police officer for the next two to five years before his medical condition precludes him from pursuing his law enforcement career any further. At that time, Mr. Creason will have to seek other employment. Because of Mr. Creason's injuries and his limited college and trade education, he is placed at a competitive disadvantage in the job market. It is likely that when Mr. Creason is forced to seek new employment, he will be between the ages of 43 and 46 years old. Conservatively, he will make 25% less than he did as a police officer and will have a shortened work-life expectancy in his new career field. It is not likely that he will work to full retirement age and will likely only work to the age of 60. Thus, Mr. Creason will have between 14-17 years of making 25% less than he otherwise would, and that he has between five and eight years where he will not have any meaningful income. Mr. Creason earns approximately \$74,000 per year inclusive of overtime and secondary employment as a police officer.

These conservative calculations place Mr. Creason's future economic losses between \$629,000 and \$684,000.00. He has past medical expenses of approximately \$117,000, with the likelihood of the future medical treatments suggested by Dr. Lepore and Dr. Stiverson. His future medicals expenses are between \$25,000 to \$50,000. Thus, Mr. Creason has past and future economic losses of between \$760,000 and \$840,000

I look forward to our upcoming settlement conference, but I am still awaiting responses to our discovery requests. I will file the Protective Order soon. However, meaningful settlement discussions can only occur with the requested materials.

Should you have any additional questions or concerns do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mike Keating", followed by a horizontal line.

Mike Keating

MK/af

cc: Del L. Creason