

**NONPRECEDENTIAL DISPOSITION**

To be cited only in accordance with FED. R. APP. P. 32.1

**United States Court of Appeals**

**For the Seventh Circuit**

**Chicago, Illinois 60604**

Submitted April 28, 2023\*

Decided May 4, 2023

**Before**

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-2132

LAWRENCE GREGORY BURNS,  
*Plaintiff-Appellant,*

*v.*

AUSTIN SUMMERS,  
*Defendant-Appellee.*

Appeal from the United States District  
Court for the Western District of Wisconsin.

No. 21-cv-302-jdp

James D. Peterson,  
*Chief Judge.*

**ORDER**

Lawrence Burns alleges he was beaten by at least five officers, shot in the back of his neck with a taser, and then held half-naked in a holding cell for hours while he was detained in the Eau Claire County Jail in Wisconsin. He sued Austin Summers—the City of Eau Claire police officer who arrested and delivered him to the jail—under 42 U.S.C.

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\* We have agreed to decide the case without oral argument because the briefs and the record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

§ 1983, alleging that Summers, as well as other individuals, subjected him to excessive force in violation of his Fourteenth Amendment rights. Through discovery requests of Summers and motion practice before the district court, Burns attempted to find out the names of those involved in his arrest and detention. He did not learn the names of the corrections officers at the jail until after the deadline for amending his complaint had passed, and even that was as a result of an open-records request by Summers, who had included the names in his summary judgment filings.

Burns then sought leave to file an amended complaint naming the officers at the jail, which the district court denied. The court also entered summary judgment for Summers, concluding that he was not personally involved in the use of force. We affirm the district court's decision as to Summers. But the events here persuade us that good cause was shown to modify the scheduling order so parties could be added. So, we vacate and remand on Burns's remaining claims for him to amend his complaint to include the Eau Claire County corrections officers at the jail.

## **I. Background**

We take the following account from the summary judgment record and construe all facts and reasonable inferences in favor of Burns. *Gaddis v. DeMattei*, 30 F.4th 625, 628 (7th Cir. 2022). Discovery in the district court included a video and audio recording from a dashcam in Summers's squad car, which we have reviewed. The video is inconclusive, as the windshield of the officer's squad car was obstructed by rainwater, but portions of the recording's audio are audible.

In the early morning of September 16, 2019, Summers heard Burns yelling at two elderly women at a nearby gas station. Summers began to respond and then received an emergency dispatch about a possible fight at the same gas station. When Summers arrived, Burns was intoxicated and defiant. Burns yelled at Summers in an abusive manner using racial epithets. Summers arrested Burns for disorderly conduct.

Summers then drove Burns to the Eau Claire County Jail, which is operated by the Eau Claire County Sheriff's Office. On the way, Summers radioed ahead and told jail personnel that he was bringing in an unruly subject. At the jail, Summers pulled into a secured garage, where corrections officers met him and retrieved Burns. Those officers brought Burns to a holding cell, searched him, and then instructed him to lie down and remove his pants (apparently because the waistband had a drawstring). Burns did not comply, so the officers removed his pants and forced him to lie face down with his hands cuffed behind his back. According to the officers' reports, Burns "repeatedly tens[ed] up" and "verbally assault[ed]" them as they held him. They responded by

punching and kicking him and then tasing him in the back of his neck. In audio captured by Summers's dashcam, Burns is heard screaming in pain. Apparently, Burns resisted no further. The episode lasted about seven minutes.

About a year and a half later, in February 2021, Burns sued Summers under § 1983, asserting that Summers had subjected him to excessive force in violation of his Fourteenth Amendment rights. In his complaint, Burns wrote that "multiple other ... officers" were involved but "I do not know their names." The district court therefore inserted a "John Doe" placeholder defendant and gave Burns until August 6, 2021, to name the unknown officers. The court also instructed Summers to "endeavor to provide" their identities to Burns "as soon as possible" and to "use good faith best efforts promptly to identify the Doe defendants in this case."

In an interrogatory dated June 16, 2021, Burns asserted he "was assaulted and battered in the Eau Claire County Jail by police officers" while he was "face-down [and] handcuffed." So, he "request[ed] the officers names." He separately asked for "the names of the officers/individuals involved in [the] arrest." Summers provided the arrest report and the footage taken by his vehicle's dashcam, but no additional names. Unsatisfied, Burns asked the district court to extend the deadline to complete discovery and to compel Summers to provide responsive answers. The court agreed and instructed Summers to "supplement his interrogatory response with the names of any of the officers he knows or can obtain with reasonable effort." The court also extended the deadline to name the Doe defendants through September 10, 2021.

Summers then provided the names of two City of Eau Claire police officers who were involved in arresting Burns at the gas station but did not identify the corrections officers at the jail. The court ultimately dismissed the Doe defendants because the deadline to name them had passed.

Shortly thereafter, Burns filed another set of interrogatories in which he asked, "Who tazed Burns ultimately in the holding cell," and "How many officers/jailers were there?" And he requested "copies of all witnesses/jailers and police officers: names, addresses, and phone numbers present during this time." Summers responded he did not beat or tase Burns and he did not know who did.

Summers then moved for summary judgment, arguing he was not involved in beating or tasing Burns. In support, Summers submitted jail incident reports from the Eau Claire County Sheriff's Office, which included the names and narratives of the corrections officers who used force against Burns. Summers obtained the reports from

the Sheriff's Office through an open-records request, *see* Wis. Stats. §§ 19.31–19.39, which he made about a week before moving for summary judgment.

Burns then submitted a proposed amended complaint that named the corrections officers and asked for leave to file it. This occurred within Wisconsin's three-year statute of limitations for an action for injury to the person, *see* Wis. Stat. § 893.54 (2018), but several months after the September 2021 scheduling-order deadline. Burns argued that when he filed his complaint, he did not know the names of the corrections officers, that he had requested their names in discovery, and that Summers had provided only the names of the officers who were involved in his arrest at the gas station. Burns contended that Summers knew who the corrections officers were because Summers's summary judgment brief mentions them, and he had the incident reports. To Burns, justice required that he be permitted to amend. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); FED. R. CIV. P. 15(a). Burns also opposed the summary judgment motion, arguing there was a material fact dispute over whether the use of force was objectively reasonable. *See Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

The district court entered summary judgment for Summers, concluding that there was no evidence that he was personally involved in using force against Burns. The court also denied Burns's motion to amend his complaint, giving two reasons.

First, the court observed that because Burns filed this lawsuit, he knew that individuals other than Summers were involved. Burns was given extra time to pursue discovery and file an amended complaint, as well as an extension, yet that deadline passed without Burns filing anything with the court. Burns could have asked for more time, the court noted, but he failed to do so; instead, he waited until after Summers had moved for summary judgment.

Second, the district court concluded that Burns did not substantiate his assertion that Summers provided false information in response to Burns's written discovery requests. Burns's discovery request to Summers sought the identities of officers involved in Burns's arrest, but Burns did not ask Summers to identify jail staff. Further, Summers said he did not witness the use of force, so he would not know which corrections officers were involved. Burns could have filed his own open-records request or subpoena under Federal Rule of Civil Procedure 45, the court noted, and Burns could not blame Summers for failing to do that for him.

## II. Discussion

### A. Amendment of Complaint

On appeal, Burns argues that the district court erred by denying his motion for leave to amend his complaint. He recognizes that he sought leave to amend after the deadline but argues he had diligently pursued the corrections officers' names in discovery. He also says justice requires permitting him to amend because he is trying to hold accountable the officers who allegedly used excessive force.

We review a district court's denial of leave to amend for an abuse of discretion. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005). After a court-imposed deadline expires, a plaintiff must show "good cause" to amend the complaint. *Id.*; FED. R. CIV. P. 16(b). Whether good cause exists is primarily about the diligence of the party seeking amendment. *Trustmark Ins. Co.*, 424 F.3d at 553. This standard is higher than the instruction in Rule 15(a)(2) to "freely give leave when justice so requires." *Cage v. Harper*, 42 F.4th 734, 743 (7th Cir. 2022); FED. R. CIV. P. 15(a)(2), 16(b)(4). No party contends that Burns does not satisfy the standard of Rule 15(a)(2).

We see the parties' decisions and actions here somewhat differently than the district court. To us, the parties talked past each other, not fully engaging in the discovery—of parties and non-parties—required "to secure the just ... determination of every action and proceeding." FED. R. CIV. P. 1.

We read Burns's attempts at discovery and motion practice as consistently trying to identify correctly the individuals who used force against him at the jail. He tried repeatedly to get their names in discovery, including by moving to compel. When their names were identified in Summers's summary judgment filings, Burns quickly moved to amend his complaint. The district court is correct that Burns could have filed an open-records request or used a non-party subpoena under Rule 45 to get the officers' names. But there is no indication that Burns was dilatory or strategic in waiting to amend his complaint. *See Trustmark Ins. Co.*, 424 F.3d at 553.

Just so, we see Summers as precise in his responses, relaying the names of the other City of Eau Claire police officers involved in Burns's arrest. Some months after the district court granted Burns's motion to compel, Summers filed an open-records request and found out which Eau Claire County Jail corrections officers were present that night. Yet, the gap in discovery remained unaddressed—the corrections officers who Burns wanted to sue worked for the Eau Claire County Sheriff's Office, and are not City of Eau Claire police officers, like Summers.

“In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment.” *Cage*, 42 F.4th at 743 (internal quotes omitted). From the outset, Burns wanted to sue those individuals who used force against him, and when he learned their names, he asked the court for permission to amend his complaint and tendered a proposed amended complaint that named them—all before the applicable statute of limitations expired.

Burns would have been advised to consider a “belt and suspenders” approach to finding out the other potential defendants by filing an open-records request and serving a subpoena. Still, Burns may not have pursued these routes because the court’s orders can be read, especially by a layperson, to say that party discovery was the way to get the information he needed. The court initially instructed that Burns could ask Summers for the Doe defendants’ identities and that Summers’s attorneys were “expected to use good faith best efforts promptly to identify the Doe defendants.” Then, in granting Burns’s motion to compel, the court commanded Summers to use “reasonable effort” to obtain the names. Burns followed the path laid out for him by the court.

All in, this sequence of events persuades us that good cause was shown for modification of the scheduling order. A district court “must have a wide berth to manage caseloads and dockets,” *Ruark v. Union Pac. R.R. Co.*, 916 F.3d 619, 630 (7th Cir. 2019), and its discretion in this area “is considerable: case management depends on enforceable deadlines.” *Flint v. City of Belvidere*, 791 F.3d 764, 768 (7th Cir. 2015). But under these circumstances—including the parties’ apparent mutual mistake about which municipality the corrections officers worked for—Burns should have been permitted to sue the corrections officers who used force against him. *See Foman*, 371 U.S. at 182; *Glover v. Carr*, 949 F.3d 364, 370 (7th Cir. 2020).

## **B. Summary Judgment for Summers**

Burns argues that summary judgment for Summers was inappropriate because the parties disagree about the degree of force used against him. But this dispute is irrelevant to his claim against Summers because there is no evidence of Summers’s personal involvement—a prerequisite to liability under § 1983. *Taylor v. Ways*, 999 F.3d 478, 493–94 (7th Cir. 2021). Burns also alludes to liability for Summers based on his failure to intervene in others’ use of force, but Burns waived this theory by failing to raise it at any point in the district court. *Mahran v. Advocate Christ Med. Ctr.*, 12 F.4th 708,

713 (7th Cir. 2021). Therefore, the district court properly entered summary judgment for Summers.<sup>1</sup>

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For these reasons, the district court's judgment is AFFIRMED in part, VACATED in part, and the case is REMANDED for further proceedings consistent with this order.

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<sup>1</sup> Burns's protest that he did not consent to having a magistrate judge preside is unfounded because a district judge decided this case. *See Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 475 (7th Cir. 2017); 28 U.S.C. § 636(b)(1)(A). The parties' consent was not needed for the magistrate judge to conduct the preliminary pretrial conference or for any other matter he handled in this case. § 636(b)–(c).