

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS L. SCHROEDER,

Plaintiff,

ORDER

v.

03-C-299-C

MARK THOMPSON,

Defendant.

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This case is scheduled for jury trial during the week beginning June 21, 2004.

This order describes how the court generally conducts a trial, and reminds the parties what written materials they are to submit before trial.

Jury Selection - Voir Dire Questions

The process begins with jury selection. The judge will ask all the potential jurors standard “voir dire” questions, which they must answer under oath. (“Voir dire” means roughly “to speak the truth.”) This is the parties’ chance to observe the potential jurors while they are being questioned so that they can decide which prospective jurors to strike from the panel when the time comes to exercise their strikes.

The standard questions appear in the attachment to the magistrate judge's preliminary pretrial conference order dated September 24, 2003. The parties may add to the standard questions by submitting their proposed questions to the court and the opposing party no later than seven days before trial.

A total of 13 possible jurors will be called forward. When the court has finished questioning the thirteen, each side will be allowed to strike the names of three potential jurors. The plaintiff will strike one name, the defendant one name, the plaintiff one name, the defendant one name, etc., leaving seven persons who will make up the jury panel.

### Opening Statements

After the parties select the jury, plaintiff will give an opening statement describing his claim. An opening statement should give the jury an idea of what the case is about and what the jurors will see and hear from the witnesses and from the exhibits that plaintiff will offer into evidence. The opening statement is not a time for plaintiff to give testimony. What is said during opening statements is not evidence. Therefore, if plaintiff begins to make comments in the nature of testimony, and if defense counsel objects, the court will interrupt plaintiff and instruct the jury not to consider the testimony-like statements.

Following plaintiff's opening statement, defense counsel is allowed to make a statement about defendant's case. If counsel wishes, he or she may choose to delay the

statement until the beginning of defendant's case.

### Avoiding Dismissal of the Case

After opening statements, the evidentiary stage of the trial begins. Plaintiff must put in his evidence first, because he has the burden of proving his claim by a preponderance of the evidence. He must prove each element of his claim. The elements of plaintiff's claim are set forth below in the section titled "Elements of Plaintiff's Claim." If plaintiff does not put in enough evidence to prove his claim, the defendant may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before the defendant is called upon to produce any opposing evidence.

### Elements of Plaintiff's Claim

In order to survive a motion for judgment as a matter of law, plaintiff must present enough evidence to allow a reasonable jury to find that

- 1) On November 15, 1999, defendant Mark Thompson used physical force in handling plaintiff;
- 2) the force resulted in an injury to plaintiff; and
- 3) the defendant applied the force in a malicious or sadistic way, for the purpose of causing plaintiff harm.

### Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award as compensatory damages an amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendant's acts. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendant's actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendant's actions. If the court permits it, the jury may award punitive damages as a deterrence to defendant.

### Evidence

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence. For example, if a party wishes to introduce evidence about the content of a document, he should get a copy of the document, submit it as an exhibit at the time of trial and produce a witness who can testify from his or her own knowledge that the document is what it appears to be. Or, a party can ask the opposing party to agree that the document is what it appears to be and is accurate. If the opposing party agrees, the first party still must produce the document as an exhibit, but he does not need to call a witness to testify about the document.

Both parties submitted and relied on documents at the summary judgment stage.

Unless the other side objects to the authenticity or accuracy of these documents, plaintiff or defendants may rely on them at trial without producing a witness who can testify that the document is what it appears to be and is accurate. However, a party may not rely on affidavits at trial because they are hearsay. The only exception to this rule is that a party may use a witness's affidavit to show that the witness made an earlier statement that is inconsistent with the witness's trial testimony.

The Federal Rules of Evidence limit the testimony of witnesses. Witnesses may give testimony on any relevant matter about which they have personal knowledge. However, witnesses generally cannot give hearsay testimony, that is, the witness cannot testify about what someone else said out of court, since the accuracy of a hearsay statement cannot be tested by the opposing party.

### Preparing for Trial

In the magistrate judge's preliminary pretrial conference order, the parties were given a deadline of May 24, 2004, to disclose to each other the names and addresses of their trial witnesses. A copy of this court's written Procedures for Calling Witnesses to Trial was attached to the order. According to those procedures, any party who wished to call an incarcerated witness to testify was to have served and filed a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial, together with the affidavits

the procedure requires. It appears from the record that plaintiff waited too long to attempt to discover the whereabouts of the inmate witnesses he believes would testify on his behalf. Nevertheless, I presume that plaintiff intends to take the stand himself at trial to testify on his own behalf. Therefore, I will direct the Clerk of Court to issue a writ of habeas corpus ad testificandum for his attendance at trial. Plaintiff should note that he cannot expect the defendant to be present at trial. If he wishes to call him as a witness at trial, he must subpoena him unless defendant's counsel agrees to make defendant available to be called by plaintiff as a witnesses at trial.

#### ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for plaintiff's attendance at trial, beginning on June 21, 2004.

The parties are reminded that NOT LATER THAN SEVEN CALENDAR DAYS BEFORE TRIAL, they are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; and (c) proposed jury instructions. The parties should not submit the standard voir dire questions and jury instructions attached to the magistrate judge's preliminary pretrial conference order. The court will consider any objections to the voir dire questions by either party in a conference to be held before jury selection begins.

2. The court retains the discretion to refuse to entertain special verdict forms or jury

instructions not submitted on time, unless the subject of the request is one arising in the course of trial that could not reasonably have been anticipated prior to trial.

3. If either party wants to submit a trial brief in advance of trial, he must serve a copy of the brief on the opposing party. He may file the brief with the court at any time before jury selection.

Entered this 28th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge