

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

JAY J. SCHINDLER

Plaintiff,

v.

THE MARSHFIELD CLINIC,

Defendant.

ORDER

05-C-0705-C

A final pretrial conference was held in this case on May 3, 2007, before United States District Judge Barbara B. Crabb. William Hinnant, Michael Brown and Michael Brohman appeared for plaintiff Jay J. Schindler. Don Schott and Matthew Duchemin appeared for defendant Marshfield Clinic, along with Randall Sandfort, counsel for the clinic.

It appears that the case will take 4-6 days to try. The first phase will concern liability only and it is possible that the parties can stipulate to damages. Counsel understand that trial days will begin at 9:00 a.m. and will run until 5:30 p.m, with at least an hour for lunch, a short break in the morning and another in the afternoon. There will be no trial on Tuesday, May 8.

Counsel agreed that the witnesses would be sequestered. Counsel are either familiar

with the court's visual presentation system or will make arrangements with the clerk for some instruction on the system.

No later than noon on the Friday before trial, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel are to give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility during the presentation of their case. Also, no later than noon on the Friday before trial, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court with copies of their documentary evidence before the start of the first day of trial.

Counsel agreed to the voir dire questions in the form distributed to them at the conference, with one exception, which was to include a listing of plaintiff's witnesses as well as defendant's. I have made the change.

The jury will consist of eight jurors to be selected from a qualified panel of fourteen.

Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, which are limited to 45 minutes each, the court will give the jury the introductory instructions on the way in which the trial will proceed and the jurors' responsibilities during the trial.

Counsel discussed the form of the verdict and the instructions on liability. Plaintiff takes issue with the court's proposed instruction on good cause, saying that the instruction should repeat the actual language of the employment contract. I am reserving a ruling on this issue until the instruction conference. Defendant argues that the special verdict form should have the immunity question before the good cause question. Final decisions on the instructions and form of verdict will be made at the instruction conference once all the evidence on liability has been introduced.

The following rulings were made on the parties' motions in limine.

1. Plaintiff's motion to exclude evidence relating to the decisions made by the Executive Committee and the Board of Directors is DENIED. This evidence is relevant to whether defendants terminated plaintiff's employment for good cause.

2. Plaintiff's motion to exclude allegations of infections is GRANTED because this information was not before the professional review committee or the executive committee. The jury is to decide whether the committees had good cause to believe that they were acting in compliance with the employment contract when the professional review committee

decided to recommend plaintiff's termination and when the executive committee found that the recommendation was not arbitrary. It is not the purpose of the trial to have the jury decide whether plaintiff should have been terminated or whether he should be reinstated; it is to decide the good faith of the committees that made the decision and whether the termination was a breach of plaintiff's employment contract. As the Wisconsin Court of Appeals said in Hale v. Stoughton Hospital Ass'n, Inc., 126 Wis. 2d 267, 276, 376 N.W.2d 89, 91 (Ct. App. 1985): "We will not inquire into the board's decision-making process to determine whether its decision is correct. Inquiry is limited to whether the board really believed Hale's termination was in the hospital's best interests."

Evidence of infections may be introduced only if plaintiff puts in testimony or other evidence to the effect that defendant would have found no questionable cases other than the ones it presented at the committee hearings had it chosen a random sample of plaintiff's cases.

3. Plaintiff's motion to exclude witnesses Barbara Kuhl and Deb Weiland and other evidence suggesting that plaintiff tried to avoid reporting T.S.'s complication is GRANTED unless defendant can show that the profession review committee considered such evidence.

4. Defendant's motion to exclude evidence of non-wage related damages is GRANTED.

5. Defendant's motion to limit the presentation of evidence to 18 hours for each side

is DENIED as unnecessary. With the exclusion of irrelevant witnesses and testimony, the case can be tried completely in 4 days.

At the hearing, defendant advised the court that it will not be calling the following witnesses:

- Barbara Kuhl
- Deb Weiland
- Terri Schultz
- Scott Nelson
- Tanya Guntley
- Megan Eick
- Robert MacMahon
- Marc Weissman
- Frederic Wesbrook
- Sanjay Rao
- Charles Mick
- Raj Rao
- Gregory Przyblski
- Michael Salcman
- Greg Geissinger (unless Dr. Neal testifies that he advised the committee of the contents of his conversation with Geissinger about plaintiff and then only so that Geissinger can be asked what he told Neal).

In a letter to the court dated May 4, 2007, defendant advised the court that it had rethought its position on Frederic Wesbrook and will be calling him to testify on the proceedings before the executive committee and the decision he prepared. It may do so.

Plaintiff will not be calling the following witnesses:

- Julian Bailes
- Regis Haid
- Efrain Cancel

- Michael Collins
- Patrick Sullivan
- Ade Dillon
- Peggy Murphy
- Nick Daskalas
- Jon Krause
- Randall Sandfort
- Cindy Schuster
- Julia Sinha
- Gaywood Ottosen
- Anne Bump
- Charles Hart
- Fred Landes

Entered this 4th day of May, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge