IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GERARD M. MOCNIK,

ORDER

Plaintiff,

06-C-191-C

v.

DR. WILLIAMS,

Defendant.

- -

In this civil action for monetary relief under 42 U.S.C. § 1983, plaintiff Gerard M. Mocnik, a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, contends that defendant Dr. Williams, a former prison doctor, sexually assaulted him in violation of his rights under the Eighth Amendment. Trial is scheduled for April 2, 2007. This order will describe how the court generally conducts a trial and explain to the parties what written materials they are to submit before trial.

A. Preparing for Trial

In the magistrate judge's preliminary pretrial conference order entered on July 13, 2006, dkt. #7, the parties were given a deadline to disclose 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. Because those procedures have been updated recently, with this order I am enclosing a copy of the revised procedures. The parties should take particular note that the procedures require that any party who wishes to call an incarcerated witness to testify to serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial, together with supporting affidavits revealing the witness's willingness to appear voluntarily. The parties should make all efforts to submit any motion as soon as possible so that the court will be able to issue any writs in time to insure the witness's presence at trial. In addition, to avoid having to resubmit a motion, the parties should carefully describe the nature of the testimony the witnesses will give, being sure to explain how each potential witness has personal knowledge of information relevant to a claim or defense.

I presume that plaintiff will 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 defendants to be present at trial. If he wishes to call defendants as witnesses at trial, he should promptly ask defendant's counsel whether defendants will agree to be called as witnesses by plaintiff, without requiring plaintiff to subpoena them. If defendant does not agree, plaintiff will have to follow the attached procedures for issuing subpoenas to defendant if he wishes to obtain testimony from him.

B. Other Documents Submitted Before Trial

The parties are reminded also that there is a March 26 deadline to file and serve any motions in limine, exhibit lists, proposed voir dire questions, proposed jury instructions, proposed verdict forms and any objections to the other party's designations under Fed. R. Civ. P. 26(a)(3). Voir dire questions are discussed below in Section D. A party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. For example, if a party's opponent submitted evidence in support of its summary judgment motion that the party believes would be irrelevant or unfairly prejudicial at trial, he may file a motion in limine asking the court to keep that information from being introduced. Motions in limine are not intended to resolve disputes regarding all pieces of evidence; most evidentiary objections about individual documents can be made during trial. However, in cases in which there are disputes regarding evidence having a potentially significant impact on the course of trial, it may be appropriate in some circumstances to seek a ruling in advance.

C. Elements of Plaintiff's Claim

Plaintiff's claim is that defendant Williams violated his Eighth Amendment rights by sexually assaulting him during a medical examination on September 10, 2004. At trial, it will be plaintiff's burden to prove that:

1) Defendant Williams placed his fingers into plaintiff's anus and

2) Defendant Williams had no legitimate medical reason for doing so.

D. Jury Selection - Voir Dire Questions

The trial will begin with jury selection. The judge will ask all the potential jurors standard "voir dire" questions, which they must answer under oath. ("Voir dire" means "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. 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 thirteen 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 defendants one name, the plaintiff one name, the defendants one name, etc., leaving seven persons who will make up the jury panel.

E. 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.

F. 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 claims by a preponderance of the evidence. He must prove each element of his claim. If plaintiff does not put in enough evidence to prove his claim, defendant may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before defendant is called upon to produce any opposing evidence. 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 each legal

element of his claim has been proven by a preponderance of the evidence.

G. 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. 42 U.S.C. § 1997e(e). A sexual assault is a physical injury, Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) ("[S]exual assaults qualify as physical injuries as a matter of common sense"); therefore, if plaintiff presents evidence that he was assaulted sexually, he may then present evidence of mental or emotional injuries suffered as a result of defendant's actions. If plaintiff satisfies the legal standard for punitive damages set out in the court's standard instructions, the jury may, but is not required to, award these damages as a deterrence to defendant.

H. Evidence

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence, which plaintiff should study carefully before trial. Although it is impossible to predict which rules may be important in a given trial, the most commonly cited rules are

those relating to hearsay (Rules 801-807), relevance (Rules 401 and 402), unfair prejudice (Rule 403), character evidence (Rules 404 and 608), use of criminal convictions to impeach (Rule 609) and prior statements of witnesses (Rule 613).

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, a 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. There are a number of exception to this general rule that are set out in Rule 803 and Rule 804.

If a party wishes to introduce documentary evidence, he has several options. First, he may ask opposing counsel to agree that the proposed exhibit may be admitted into evidence. (At the final pretrial conference, the parties will have the opportunity to discuss stipulating to the admissibility of each party's proposed exhibits.) If the parties cannot agree on the admissibility of a proposed document or other piece of evidence, at trial the party wishing to introduce the evidence must produce a copy of the document, mark it with an exhibit number and produce a witness who can testify from his or her own knowledge that the document is what it appears to be.

For example, if plaintiff wishes to introduce medical records as evidence, he should obtain an authenticated copy of the relevant medical records from the prison health service

unit staff responsible for maintaining custody of the records and ask the custodian to certify that the records were made at or near the time the events recorded in them, and were recorded and kept in the course of regularly conducted business. Fed. R. Evid. 806(6). He may then testify that he obtained the records from the health services office and that they reflect the treatment he recalls receiving.

Before introducing any evidence at trial, plaintiff should have a witness (who may be himself) identify the evidence he wishes to introduce and explain how the witness has knowledge of the document and its contents. Then, plaintiff should show the exhibit to opposing counsel and ask the court to allow the evidence to be accepted into the record.

Plaintiff should be aware that a party may not introduce affidavits into evidence or read from them at trial because they are hearsay statements, made outside the court. However, a person who has completed an affidavit may appear in person to testify as a witness if he or she can offer testimony that is relevant to the lawsuit. Also, if at trial a witness testifies to facts that are inconsistent with statements the witness made in an earlier affidavit, a party may use statements in the witness's affidavit to show that the witness's testimony is inconsistent with the witness's earlier sworn statements.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad

testificandum for the attendance of plaintiff Gerard Mocnik (Stanley Correctional Institution) at trial beginning on April 2, 2007.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN March 2, 2007, the parties are to file and serve any motions for the issuance of writs of habeas corpus ad testificandum, together with supporting affidavits revealing the witness's willingness to appear voluntarily.

2. NOT LATER THAN March 26, 2007, the parties are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; and (c) proposed jury instructions; (d) exhibit lists; (e) motions in limine; (f) objections to the other parties designations under Fed. R. Civ. P. 26(a)(3). 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.

3. 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.

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

Entered this 12th day of February, 2007.

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