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

MARK RENALDO LOWE,

Plaintiff,

v.

DR. KAPLAN,
NURSE DAN, and
MARY JO SCHMITT,

Defendants.

PRELIMINARY PRETRIAL CONFERENCE ORDER

06-C-680-C

This court held a recorded telephonic preliminary pretrial conference on June 13, 2007. Plaintiff is representing himself and appeared without an attorney. Defendants appeared by Elizabeth Sheehan. The court set the schedule and discussed with the parties how this case will go forward.

Important Information

So that there are no misunderstandings or mistakes, I am reminding the parties of some important points:

Read this whole order NOW

This federal civil lawsuit is a serious matter. As a party to a federal civil lawsuit, it is your duty to understand what you are supposed to do and when you are supposed to do it. To help you, this order explains what your duties are and what your deadlines are. This court has a number of rules that you must follow. It will not be easy to do everything that you are supposed

to do, and you will not have a lot of time. Therefore, it is important for you to read this order now so that you can do things the right way.

Review the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure are the rules that control much of what happens in this lawsuit. Not all of those rules will be important in your case, but some of them will be very important, particularly the rule about summary judgment and the rules about discovery. It is your duty to know the rules of procedure that apply to you in this case. This court cannot provide you with a copy of the rules of procedure. You will have to find your own copy of the rules to review.

The Federal Rules of Evidence could be important later in this lawsuit. The rules of evidence affect the parties' submissions for summary judgment motions. Also, if this case goes all the way to trial, the rules of evidence will affect how the evidence is presented at trial. It is your duty know the rules of evidence that apply to you in this case. This court cannot provide you with a copy of the rules of evidence. You will have to find your own copy of the rules to review.

Service of documents on your opponent is REQUIRED:

Every letter, motion, brief, exhibit, or other document that you file with the court in this lawsuit must be served on your opponent at the same time. This means that whenever you mail a document to the court, you also must mail a copy of that document to your opponent at the same time. To prove that you did this, you must **certify service** by including with each

submission to the court a sentence at the end of your document, or on a separate piece of paper, in which you swear or certify that you sent a copy through the mail with proper postage to your opponent's lawyer.

There is no acceptable excuse for not serving your documents on your opponent. If you do not serve your documents on your opponent and if you do not certify service, then this court will not look at your documents. There are no exceptions to this policy. If you think you will have trouble making copies, then you should think about this ahead of time and follow the directions in the next section about copying.

You are responsible for making or obtaining your own copies

This court will not make copies for you and it will not give you money to make copies. If you are in an institution, you must use your own money or money from your legal loan account to pay for copies. If you have reached your loan limit, or if you think you will reach it during this case, then you must plan accordingly. You have no legal right to require the prison to make free photocopies of documents that you write by hand. That means that you must write your own copies of these documents by hand to serve on your opponent and to keep a copy for yourself. This court will not order the institution to provide photocopies of large amounts of documents if those documents already have been submitted by you or by the defendants. This court will not order the institution to photocopy documents for you in this lawsuit if you already have a federal lawsuit in this court that has used up your legal loan account, unless there is some special reason to do so, such as your present physical safety.

Scheduling

1. Three Preliminary Matters:

A. Identifying the "Jane Doe" defendant

The defendant previously identified simply as "MJS" has identified herself as Mary Jo Schmitt and has filed an answer. Therefore, the parties and the court shall add defendant Schmitt to the case caption.

To simplify what I told the parties at the pretrial conference, there is no need for plaintiff to move to amend his complaint. Instead, the court and the defendants shall presume that all references to "MJS"in plaintiff's already-filed complaint are references to defendant Mary Jo Schmitt.

B. Plaintiff's request for a preliminary injunction

At the pretrial conference plaintiff asked if the court would be granting him injunctive relief while his case was pending. If plaintiff wants a preliminary injunction, he should file promptly a motion and all arguments and evidence he has in support of his request. To obtain a preliminary injunction, plaintiff must show that: (1) He is reasonably likely to succeed on the merits of his claim; (2) He is suffering irreparable harm; (3) This harm outweighs any harm the defendants or the institution will suffer if the injunction is granted; (4) There is no adequate remedy at law; and (5) An injunction would not harm the public interest. *See Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

If plaintiff files and serves a motion for injunctive relief, then the defendants shall have 14 calendar days after service of the motion within which to file and serve a response. Plaintiff

shall have five days after service of the response within which to file and serve any reply. The court will decide the motion on the written submissions unless it notifies the parties that it needs a hearing.

C. Plaintiff's request for appointed counsel

At the pretrial conference plaintiff asked if this court would appoint a lawyer to represent him in this lawsuit. Plaintiff will have to file a separate motion requesting appointment of counsel, along with all supporting evidence and arguments.

Before doing so, however, plaintiff should be aware that when determining whether counsel should be appointed, this court first must find that plaintiff made reasonable efforts to retain counsel and was unsuccessful or that he was precluded effectively from making such efforts. *See Gil v. Reed*, 381 F.3d 649, 656 (7th Cir. 2004); *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). Plaintiff must provide the court with the names and addresses of at least three lawyers that he has asked to represent him in this case and who have declined to take the case before this court can find that he has made reasonable efforts to secure counsel.

Plaintiff should be aware that if he attempts to obtain a lawyer and is unsuccessful, that does not mean that one will be appointed for him automatically. At that point, the court must determine whether he is competent to represent himself given the complexity of the case, and if he is not, whether the presence of counsel would make a difference in the outcome of his lawsuit. *See Johnson v. Doughty*, 433 F.3d 1001, 1006-07 (7th Cir. 2006), citations omitted.

Plaintiff should be aware that the court is not able to appoint attorneys for pro se plaintiffs in more than a few cases each year because there are not many attorneys willing to volunteer their services. As a result, most pro se plaintiffs do not receive lawyers and they end up handling their entire lawsuit by themselves. You should not wait until you learn if you will be getting an attorney to begin working on this case, because the deadlines set forth below will not change if you ask for an attorney and the court denies your request.

2. Decision on consent: June 29, 2007

Right now, District Judge Barbara B. Crabb is the trial judge and the summary judgment judge in this case. Magistrate Judge Crocker is the judge assigned to handle other matters, like scheduling and discovery. If the plaintiff wishes to change judges so that Magistrate Judge Crocker also becomes the trial judge and the summary judgment judge, then the plaintiff must send a consent letter to the clerk of court by the deadline, saying that this is what he wants to do. If the defendants wish to change judges, then they must do the same thing. If both sides send a letter to the clerk of court, then Magistrate Judge Crocker will become the trial judge and the summary judgment judge.

3. Disclosure of Expert Witnesses: Plaintiff: September 14, 2007

Defendants: October 12, 2007

Because expert witnesses are different from other witnesses, there is a special rule telling how plaintiffs and defendants must name their experts and explain what those experts are going

to say at trial. That rule is Rule 26(a)(2) of the Federal Rules of Civil Procedure. If a party does not follow the requirements of Rule 26(a)(2) by his (or her) deadline to disclose expert witnesses, then this court will not allow that expert witness to present evidence in this case.

Any state employee who will be an expert witness in this case must follow Rule 26(a)(2)'s disclosure requirements unless the court grants permission to do something else. Physicians, nurses and other similar care givers who will be offering evidence only about what they did, and who will not be offering new expert opinions, must be named as experts by the deadlines set forth above, but these types of witnesses do not have to prepare written reports for this lawsuit.

This court does not have any money to help plaintiff hire an expert witness. This court does not have any lists or other information that would help plaintiff or defendants locate or contact an expert witness. The parties are on their own and they should keep this in mind if they think they might want expert witnesses in this case. There is no extra time in the schedule to allow for extensions, so the parties should begin looking for expert witnesses right away if this type of witness might be important for summary judgment or for trial.

4. Deadline for Filing Dispositive Motions: October 26, 2007

There are two kinds of dispositive motions: (1) motions to dismiss, and (2) motions for summary judgment. No one may file a dispositive motion after the deadline unless the court grants permission. The court usually does not grant permission to file a late motion, so you must work hard on this case to meet the deadlines.

A) Motions To Dismiss

Motions to dismiss the complaint or to dismiss some of the claims in the complaint often are filed early in a prisoner law suit. Motions to dismiss usually do not require the parties to present evidence or to take discovery. If a defendant files a motion to dismiss, he (or she) must submit a supporting brief at the same time.

Plaintiff must file and serve his response to a motion to dismiss within 21 calendar days of service of the motion. The court starts counting these 21 days on the day the motion to dismiss is filed with the court. Any reply brief by the defendant must be filed and served within 10 calendar days of service of the response.

B) Motions for Summary Judgment

Summary judgment is a way for plaintiff or defendants to win this lawsuit (or parts of it) before the trial. Rule 56 of the Federal Rules of Civil Procedure explains how the parties must present their evidence and their legal arguments when they file or respond to a summary judgment motion. Rule 56 is important, so you should read it carefully, even before a summary judgment is filed, so that you can be ready for a summary judgment motion and then to do things correctly.

This court has a written set of rules that explains how to file a summary judgment motion and how to respond to your opponent's summary judgment motion. This "Procedure Governing Summary Judgment" is attached to this order and you should read it **now.** This will help you

to understand how much work will be involved, and understand the parts that give plaintiffs trouble, like writing good responses to the defendants' proposed findings of fact.

Because it is very hard for an imprisoned plaintiff to prepare everything needed to respond to a summary judgment motion, the court will give you 30 calendar days to file every part of your response and to serve it on the defendants' attorney. The court will start counting your 30 day response deadline on the day that it receives defendants' motion for summary judgment. Any reply must be filed and served not later than 10 calendar days after service of the response.

BE AWARE: you are not going to get an extension of this 30 day deadline. The only way to get more time would be if you can convince the court that something totally unfair happened that actually prevented you from meeting your deadline, and this was completely somebody else's fault. Some things that might seem unfair to you are **not** reasons to get more time. For example, you will not get more time just because you claim that you did not have enough time or money to make copies. You will not get more time if you waited too long to get all the information you think you need to respond to the motion. You will not get more time if you have been put in segregation for actually committing some infraction.

Also, if you do not follow the court's procedure for how to respond to summary judgment, then you will not get more time to do it over unless the court decides on its own that you should get a second chance.

The only way to make sure that the court will consider your documents is to start early, do them right the first time, and file them and serve them on time. If you do not

do things the way it says in Rule 56 and in the court's written summary judgment procedure, then the court will not consider your documents.

A party may not file more than one motion for summary judgment in this case without first getting permission from the court.

5. Discovery Cutoff: February 22, 2008

"Discovery" is the word used in federal courts to describe how plaintiffs and defendants can learn information and get documents that are useful to deciding this lawsuit. Rules 26 through 37 of the Federal Rules of Civil Procedure explain how you may get information and documents from the defendants and how the defendants may get information and documents from you. You should read Rules 26 through 37 **now** so that you understand how this works, and so that you can begin taking discovery in this case.

The court expects both sides to follow Rules 26 through 37. You have no right to get information or documents to use in this case except in the way these rules say. For example Rule 26(b) says that you may discover evidence that is relevant to the claims or defenses in this lawsuit. You may not discover evidence that is not relevant. Rule 26(c) protects all parties from discovery requests that are annoying, oppressive, or too expensive or too much time to be worth it in this case. Defendants often object that discovery demands violate Rules 26(b) or 26(c), so it is important to make careful discovery requests that are aimed at getting the information and documents you really need for this lawsuit, and not aimed at getting other information and documents that you don't really need.

Another reason that it is important to make careful discovery requests is because Rule 33(a) says that a party only may serve 25 interrogatories on his opponents. An interrogatory is a written question that you want the defendants to answer under oath. Even if you have lots of questions that you want the defendants to answer so that you can learn information about your claims, you cannot ask more than 25 questions unless the court gives you permission first. This court usually does not give either side permission to ask more than 25 interrogatories. That means you must use your 25 interrogatories to ask the most important questions.

Sometimes the defendants do not object to a few extra interrogatories, and this court expects that the defendants and their attorney in their case will be reasonable. But the plaintiff should not count on obtaining answers to more than 25 interrogatories during this lawsuit.

Rule 34 allows you to ask the defendants to show you documents that are relevant to this lawsuit, but it does not require the defendants to make free photocopies of these documents for you. The court expects the defendants and their attorney to be reasonable when responding to document production requests. The best way for a plaintiff to obtain quick and complete disclosures from defendants is for the plaintiff to limit his document requests to the documents that he really needs to prepare his claims for summary judgment and for trial.

If the parties disagree about discovery requests, then this court would like them to try to work it out if they can do so quickly, but the court does not require this if it would be a waste of time. If either side thinks that the other side is not doing what it is supposed to do for discovery and they cannot work it out, then either the plaintiff or the defendant quickly should file a motion with the court. If the parties do not bring discovery problems to the court's

attention quickly, then they cannot complain that they ran out of time to get information that they needed for summary judgment or for trial.

If a party files a motion to compel discovery, or to protect from discovery, or for some other discovery problem, that party also must submit at the same time his (or her) other documents that show why the court should grant the motion. If your opponent files a discovery motion, you only have five calendar days to file and to serve your written response. You must have your response in the mail stream at the prison within five calendar days. The court will not allow a reply brief on a discovery motion unless the court asks for one.

The court does not want the parties to file their discovery material with the court, except to support some other matter in this lawsuit, such as a summary judgment motion. Once a document or a copy of a document is in the court's file, no one has to file another copy, as long as the parties make it clear to the court where the court can find the document in the file.

The one kind of discovery material that the parties must file with the court are deposition transcripts, which are due promptly after they are prepared. Deposition transcripts must be in compressed format.

6. Disclosure of Trial Witnesses: February 25, 2008

Not later than 28 days before trial each party shall serve on all other parties all of the materials listed in Federal Rule of Civil Procedure 26(a)(3)(A), (B) and (C). Also, the parties must follow this court's written Procedures for Calling Witnesses to Trial, a copy of which is attached to this order. If you intend to call any other party (that is, a named plaintiff or a

named defendant) as a trial witness, then you must list that party as a trial witness and arrange for a subpoena or a writ, just like any other witness. If you do not do all of these things by the deadline, then the court might not allow you to present witnesses at trial.

7. Final Pretrial Conference: March 24, 2008 at 8:30 a.m.

Not later than seven calendar days before the final pretrial conference both sides shall submit to the court and serve all of these documents:

a) Exhibit lists

b) Motions *in limine* (and any necessary briefs or documents in support)

c) Proposed voir dire questions

d) Proposed jury instructions

e) Proposed verdict forms

f) Any objections to an opponent's designations under Rule 26(a)(3).

The way to prepare and to submit proposed voir dire questions, jury instructions and verdict forms is set forth in the written Order Governing Final Pretrial Conference, which is attached.

As noted earlier in this order, the parties must file deposition transcripts promptly with the Clerk of Court. Any deposition that has not been filed with the Clerk of Court seven calendar days before trial shall not be used by any party for any purpose at trial.

8. **Trial: March 24, 2008 at 9:00 a.m.**

The parties estimate that this case will take two to three days to try.

Trial shall be to a jury of seven and shall be bifurcated. This means that the parties will offer evidence and arguments only on the issue of liability, that is, whether plaintiff has proved his claims. If the jury find that the plaintiff has met his burden, then the parties will offer evidence and arguments on the issue of damages.

This case will be tried in an electronically equipped courtroom and the parties may present their evidence using this equipment. It is up to the parties and lawyers to check whether their personal electronic equipment works with the court's electronic equipment.

The parties must have all witnesses and other evidence ready and available to present at trial in order to prevent delay. If you are not ready with your witnesses or other evidence ready when it is your turn, then the court could end your presentation of evidence.

9. **E-Filing**

Parties in this lawsuit may file documents with the court electronically. If you choose to file electronically, then you must follow the court's procedures in order to ensure that the court properly receives and dockets each submission. The court's procedures, FAQ page, and related information may be found at:

www.wiwd.uscourts.gov.

10. Electronic Notification

Parties in this lawsuit may receive court notices, briefing schedules and orders electronically. If they choose to participate in this program, they must follow the court's procedures. The court's procedures and related information may be found at:

www.wiwd.uscourts.gov.

Entered this 13th day of June, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge