

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

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ARLING OLSON,

Plaintiff,

FINAL PRETRIAL CONFERENCE  
ORDER

10-cv-199-bbc

v.

TIMOTHY MOORE,  
in his individual capacity,

Defendant.  
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A final pretrial conference was held in this case on June 16, 2011, before United States District Judge Barbara B. Crabb. Plaintiff appeared by Jeff Scott Olson. Defendants appeared by Oyvind Wistrom.

Counsel predicted that the case would take 4-5 days to try liability. If so, the damages phase will have to be tried in mid-July. Counsel understand that trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning and another in the afternoon.

Counsel agreed to the voir dire questions in the form distributed to them at the conference. 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, the court will give the jury introductory instructions on the way in which the trial will proceed and their responsibilities as jurors.

Counsel agreed that with the exception of experts, all witnesses would be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for 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 should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's 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 copies of documentary evidence to the court before the start of the first day of trial.

Counsel discussed the form of the verdict and the instructions on liability. F i n a l decisions on the instructions and form of verdict will be made at the instruction conference once all the evidence on liability is in.

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

### Defendant's Motions

#### 1. Motion to exclude evidence concerning settlement discussions - #61

Plaintiff wants to put in evidence that in January 2009, counsel for Polk County told plaintiff that if he resigned from the sheriff's department and sign a release, "they" would drop the criminal charges that had been brought against plaintiff. This offer was not made in the context of this federal case, so it is doubtful that Rule 408 would be applicable, as defendant argues. However, the evidence is not admissible for another reason: plaintiff has not shown that defendant was the source of the offer. Instead he "wishes to explore at trial the extent to which Defendant Moore was behind the settlement offer." Plt.'s Resp., dkt. #90, at 2. It is too late for plaintiff to be pursuing matters he could have explored through discovery. Defendant's motion is GRANTED.

#### 2. Motion to exclude the transcript of a conversation held in the Justice Center in November 2008 - dkt. #63

Defendant seeks to preclude plaintiff from offering a transcript of a conversation supposedly recorded surreptitiously by Sgt. Timothy O'Hare during a meeting in the Sheriff's Department in the fall of 2008. According to defendant, no one knows who prepared the transcript and it is not certified as required under Fed. R. Civ. P. 80. In response, plaintiff argues that the transcript was prepared a medical transcriptionist and that he compared the transcript to O'Hare's audio recording and found it absolutely accurate.

Defendant's statements at the meeting are admissions and can be used against him at trial. Sgt. O'Hare can testify about what he heard defendant say at the meeting that O'Hare recorded. Also, plaintiff can ask defendant whether he made certain statements; if he says no, then plaintiff can play the tape.

Defendant's motion is GRANTED.

3. Motion to exclude evidence concerning Brady Tulgren - dkt. #65

Defendant seeks to exclude evidence of an investigation into defendant's alleged use of excessive force in connection with the arrest of Brady Tulgren in September 2003. In particular, he wants to keep out evidence that Tulgren accused defendant of beating him while he was in handcuffs. No criminal charges were brought as a result of that investigation (which also looked into the alleged illegal taping of the questioning of suspect Tryn Johnson in May 2002). This motion is DENIED. Plaintiff is arguing that his involvement in the investigation is at least one of the reasons why defendant retaliated against him; plaintiff

gave a written statement about the matter during the investigation; his participation is relevant.

As to the accusation about the beating, I reserved a ruling at the hearing. After giving the matter more thought, I believe that plaintiff should be allowed to mention the allegations of the beating. Again, this was the subject of one of his statements to investigators. To avoid undue prejudice to defendant, I will give a contemporaneous instruction, telling the jury that the accusation of the beating is not being offered for its truth, but only to show that Olson made it and that the investigation found no evidence to substantiate it.

4. Motion to exclude evidence that Polk County has an obligation to indemnify defendant -  
dkt. #67

GRANTED as unopposed.

5. Motion to exclude the theory that Moore's acts concerning the criminal charges were in  
retaliation for anything other than election speech - dkt. #69

This motion is DENIED because it merely repeats defendant's arguments in his motion for summary judgment and his motion for reconsideration.

6. Motion to exclude testimony of Timothy Patterson - dkt. #71

This motion is GRANTED as it relates to any opinions not provided by him in the course of his treatment of plaintiff, but DENIED as it relates to any opinions based on Patterson's reliance on plaintiff's reports of symptoms and DENIED as to Patterson's apportionment of causation. These issues go to the weight of his testimony rather than its admissibility.

7. Motion to exclude any testimony from Jared Cockcroft - dkt. #75

Defendant wants to bar plaintiff from calling Jared Cockcroft as a witness to testify about his treatment by defendant. The motion is DENIED in part; plaintiff can put in evidence matters that are admissible under Fed. R. Evid. 404(b), but these matters are limited to the meeting at which defendant reassigned plaintiff to a civil process server defendant's comments in the meeting taped by Sgt. O'Hare and any other comments by defendant blaming plaintiff for the investigations.

Plaintiff wants to introduce evidence from Cockcroft that he saw defendant in the room with access to the recording equipment when plaintiff was interviewing Johnson. I reserved a ruling on this request, pending more discussion on Monday, June 20, 2011 at 1:00 pm.

8. Motion to exclude evidence related to claims dismissed at summary judgment - dkt. #74

DENIED as to all allegedly retaliatory acts except (1) transferring plaintiff to a civil process server position and (2) giving plaintiff a bad schedule.

Entered this 17th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge