IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE CHERRY,

Plaintiff, ORDER

v. 03-C-129-C

THOMAS BELZ and
HENRY BRAY,

Defendants.

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This case is scheduled for jury trial during the week beginning January 12, 2004.

This order describes how the court generally conducts a trial, and explains to 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 court's scheduling order dated July 21, 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 defendants' case. If counsel wishes, he or she may choose to delay the

statement until the beginning of defendants' 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 Claims." If plaintiff does not put in enough evidence to prove his claim, the defendants may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before the defendants are called upon to produce any opposing evidence.

Elements of Plaintiff's Claims

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

l) Defendants Thomas Belz and Henry Bray maliciously and sadistically put sharp objects in plaintiff's food for the very purpose of causing him harm; AND

2) Plaintiff suffered more than a minimal injury as a result of defendants' conduct. Alternatively, plaintiff may prove that

1) Defendants acted with deliberate indifference to plaintiff's health or safety when

they placed sharp objects in his food; AND

2) Defendants subjected plaintiff to a substantial risk of serious harm.

Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award damages. In order to recover more than nominal damages, plaintiff must introduce evidence of a compensable injury. If plaintiff presents evidence of a physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendants' actions. If the court permits it, the jury may award punitive damages as a deterrence to defendants.

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..

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. 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

Preparing for Trial

In this court's scheduling order, the parties were given a deadline of November 14, 2003 (for plaintiff), and December 5, 2003 (for defendants), 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. Those procedures require that any party who wishes to call an incarcerated witness to testify must serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial, to make sure the incarcerated witness attends trial. Plaintiff should take special care to refer to those procedures before he submits such a motion. In particular, plaintiff is reminded that his motion must be accompanied by the affidavits the procedure requires. In addition,

he must tell the court where each incarcerated witness is housed, so that the court can address the writ to the proper warden.

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 defendants to be present at trial. If he wishes to call them as witnesses at trial, he must subpoena them unless defendants' counsel agrees to make defendants available to be called by plaintiff as 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 January 12, 2004.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN SEVEN CALENDAR DAYS BEFORE TRIAL, 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. 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 12th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge