IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOEL FLAKES,

Plaintiff, ORDER

v. 04-C-189-C

JANE SONDALLE,

Defendant.

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The parties in this case are presently considering whether they will consent to try this case to a jury with the magistrate judge presiding during the week beginning Monday, November 14, 2005, or whether they wish to proceed to trial during the week beginning Monday, November 21, 2005, with me as the judge. Regardless which option the parties choose, I am entering this order now to describe how the court generally conducts a trial, and explain 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 magistrate judge's preliminary pretrial conference order entered on December 13, 2004. 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 defendant's case. If counsel wishes, he or she may choose to delay the statement until the beginning of defendant's 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 Claim." If plaintiff does not put in enough evidence to prove his claim, the defendant may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before the defendant is called upon to produce any opposing evidence.

Elements of Plaintiff's Claim

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) He filed an inmate complaint on March 15, 2002, against defendant's friend, Carol Wetzel; and

2) That complaint was one of the reasons that defendant Sondalle refused him the assistance of an aide.

In order to show that defendant acted because of the complaint against Wetzel, plaintiff will have to show that defendant knew that plaintiff had filed a complaint and knew of its contents.

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 act. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendant's actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendant's action. If the court permits it, the jury may award punitive damages as a deterrent to defendant.

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. For example, plaintiff may wish to introduce as evidence the letter he wrote on March 19, 2002, to Oshkosh warden Judy Smith. If so, he should mark a copy of the letter as an exhibit, identify it during his testimony (plaintiff should have personal knowledge that the copy of the letter is a true and correct copy of the letter he wrote) and ask the court and opposing counsel to allow the letter to be admitted into evidence. Plaintiff should be aware, however, that 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 cross-examine a witness and show that the witness made an earlier statement that is inconsistent with the witness's trial testimony.

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 such a statement cannot be tested by the opposing party.

Preparing for Trial

In the magistrate judge's preliminary pretrial conference order, the parties were given a deadline 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 has not filed a witness list or made any motion seeking the attendance of any incarcerated individual. Nevertheless, 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 the defendant to be present at trial. If he wishes to call her as a witness at trial, he will have to subpoena her unless he obtains the agreement of defendant's counsel to make defendant available to be called by plaintiff as a witness at trial.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff, inmate Joel Flakes (Stanley Correctional Institution) at trial beginning either on Monday, November 14, 2005, or Monday, November 21, 2005.

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 include in their submissions 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 or she must serve a copy of the brief on the opposing party and file the brief with the court at any time before jury selection.

Entered this 28th day of October, 2005.

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