

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

GARY B. CAMPBELL,

Plaintiff,

v.

WOOD COUNTY SHERIFF DEPUTY
TODD JOHNSON,

Defendant.

ORDER

04-C-661-C

This case has been rescheduled for trial on January 9, 2006, because the court could not try it during the week of September 19 and defendant's counsel was unavailable for trial on November 7, 2005. Now plaintiff has written a letter to the clerk of court requesting subpoenas to secure the attendance at trial of Daniel M. Lucas, M.D., Allen L. Teter, M.D. and R.N. Nurse Lurline Getzloff, each of whom plaintiff believes works at the Riverview Hospital in Wisconsin Rapids, Wisconsin.

As an initial matter, I note that plaintiff did not identify Drs. Lucas and Teter or Nurse Getzloff as potential witnesses until at least August 31, 2005, when he signed his request for subpoenas and mailed them to the court with his Rule 26(a)(3) disclosures.

Giving plaintiff the benefit of the mail box rule set out in Houston v. Lack, 487 U.S. 266 (1988) (pro se prisoner's notice of appeal timely if delivered to prison authorities within applicable time limit), this is one week later than the August 22, 2005 deadline set by the magistrate judge for disclosing trial witnesses. However, given that the trial of this case has been moved back more than three months, defendants will not be prejudiced if I accept plaintiff's slightly tardy submission of his witness list, so long as plaintiff intends on calling these witnesses as fact witnesses only. It is far too late for him to name expert witnesses. As fact witnesses, the nurse and doctors may testify as to what care they rendered to plaintiff and any diagnosis they made but they cannot offer any opinion about how plaintiff may have sustained his injuries. On this understanding, I will accept the witness list and ask the clerk of court to send plaintiff the requested subpoena forms.

Plaintiff should be aware that each subpoena he completes and returns to the court for service on the witnesses must be accompanied by a check or money order made payable to the witness covering the fees for one day's attendance and the mileage allowed by law. Fed. R. Civ. P. 45(b)(1). The daily witness fee is \$40 and mileage to and from the court is 48.5 cents per mile. This payment requirement applies to plaintiff even though he is indigent. McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987); 28 U.S.C. § 1915(d) (witnesses shall attend as in other cases . . ."). A litigant's constitutional right of access to the courts does not include a waiver of witness fees so that an indigent plaintiff can present

his case fully to the court. McNeil, 831 F.2d at 1373. If plaintiff's subpoenas are not accompanied by a check or money order made payable to each witness in the necessary amount, I will not ask the United States Marshal to serve plaintiff's subpoenas on the witnesses.

ORDER

IT IS ORDERED that the clerk of court send plaintiff three blank subpoena forms. Pursuant to this court's Procedures for Calling Witnesses to Trial, a copy of which was sent to plaintiff with the magistrate judge's preliminary pretrial conference order, the completed forms must be submitted to the court together with a check or money order made payable to each witness no later than two weeks before trial.

Entered this 19th day of September, 2005.

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