IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREDERICK ROGERS,

ORDER

Plaintiff,

04-C-977-C

v.

C. O. HERWIG,

Defendant.

- -

This is a civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Frederick Rogers, a prisoner at the Fox Lake Correctional Institution in Fox Lake, Wisconsin, maintains that defendant corrections officer Herwig violated his rights under the Eighth Amendment when he denied plaintiff an inhaler for his asthma. This case has been scheduled for a jury trial on March 6, 2006. The final pretrial conference will be held at 8:30 a.m. on that same date. The purpose of this order is to clarify the issues for trial and explain pretrial procedures.

TRIAL PREPARATION

A. Jury Selection - Voir Dire Questions

The trial will begin 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 April 20, 2005. 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 thirteen 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.

B. 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.

C. 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. (These elements are set forth below in section D, below.) If plaintiff does not put in enough evidence to prove his claim, defendant may move the court for judgment as a matter of law against plaintiff and the judge may dismiss the case before defendant is called upon to produce any opposing evidence.

D. 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 each legal element of his claim has been proven by a preponderance of the evidence. With respect to plaintiff's claim that defendant denied him an inhaler for his asthma in violation of the Eighth Amendment, plaintiff must show that:

1) he suffers from asthma and had at the time of the incident at issue been prescribed an asthma inhaler;

2) on the evening of April 27, 2003, defendant knew that plaintiff had notified an officer in his unit that he could not breathe; and

3) when defendant learned that plaintiff could not breathe defendant had access to plaintiff's inhaler but deliberately refused to give it to plaintiff.

E. 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 acts. 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 deterrence to defendant.

F. 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, but he does not need to call a witness to testify about the document. For example, plaintiff may wish to introduce as evidence his offender complaint filed on April 27, 2003. If so, he should mark a copy of the complaint 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 complaint he wrote) and ask the court and opposing counsel to allow the complaint to be accepted into evidence.

Plaintiff should be aware 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 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 a hearsay statement cannot be tested by the opposing party.

The Federal Rules also allow only relevant evidence. Any evidence that is offered must pertain to the claim in this lawsuit.

Plaintiff submitted and relied on the following documents at the summary judgment stage. Unless defendant objects to their authenticity or accuracy, plaintiff or defendant may rely on these documents at trial without producing a witness who can testify that each document is what it appears to be and is accurate.

1. Racine Correctional Institution Medical Information Sheet for plaintiff dated April 28, 2003;

2. Two pages of medical notes entitled "Physician's Orders" spanning the period from April 16, 2003 through May 2, 2003;

3. Adult Conduct Report for plaintiff dated April 28, 2003.

(These documents were attached as exhibits to "Plaintiff's Response to Defendant's Proposed Findings of Fact," dkt. #26.)

G. Preparing for Trial

In the magistrate judge's preliminary pretrial conference order dated April 20, 2005, 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 (I am attaching another copy to this 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 note that he cannot expect defendant to be present at trial. If he wishes to call the defendant as a witnesses at trial, he will have to subpoena him unless defendant's counsel agrees to make him available to be called by plaintiff as witnesses at trial.

ORDER

IT IS ORDERED that

1. The parties are to follow the attached Procedures for Calling Witnesses to Trial with respect to incarcerated and unincarcerated witnesses they wish to call at trial.

2. 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.

3. 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.

4. If either party wants to submit a trial brief in advance of trial, it must serve a copy of the brief on the opposing party. The party may file the brief with the court at any time before jury selection.

Entered this 2nd day of February, 2006.

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