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

CHRISTOPHER SANDERS,

Plaintiff,

v.

DR. SEARS,

Defendant.

ORDER

11-cv-202-slc

This case is scheduled for trial on August 13, 2012 on plaintiff's claims that defendant Dr. John Sears:

> (1) acted with deliberate indifference by failing to examine Sanders until June 4, 2010 and by failing to prescribe pain medication for Sanders between May 24 and August 2, 2010;
>
> (2) retaliated against and acted with deliberate indifference toward Sanders by acting rudely, leaving Sanders bleeding and in pain and packing Sanders's open sockets with horse hair on August 2, 2010; and
>
> (3) retaliated against and acted with deliberate indifference toward Sanders by failing to respond to Sanders's requests for pain medication and medical attention between August 7 and 10, 2010 and after August 13, 2010.

All claims against defendant Jeff Pugh were dismissed by the court on summary judgment. Plaintiff is representing himself at trial. This order will describe how the court conducts a trial and explain to the parties what written materials they are to submit before trial.

READ THIS ORDER NOW

Both sides must review the order very carefully because it contains important instructions and it probably will answer many of your questions about the trial.

A. Proving Plaintiff's Claims

At the trial, it will be the plaintiff's responsibility to prove his claims against defendant. Because plaintiff has the burden of proof, he puts in his evidence first. In order to avoid having his case dismissed before defendant puts in his defense, 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.

Plaintiff's deliberate indifference claims may include the following elements:

(1) Plaintiff faced a life-threatening condition, or was likely to endure needless pain and suffering or otherwise faced a substantial risk of serious harm if he was not seen and treated by defendant for his tooth pain; and

(2) defendant knew this; and

(3) defendant failed to take reasonable measures to address plaintiff's pain.

Plaintiff's First Amendment retaliation claims may include the following elements:

(1) Plaintiff engaged in a constitutionally protected activity, namely protected speech; and

(2) Defendant caused plaintiff to suffer harm that would likely deter a person from engaging in this protected activity in the future; and

(3) Plaintiff's protected speech was a motivating factor in the defendant's decision to cause plaintiff to suffer harm.

During the period of pretrial discovery, plaintiff should have been collecting the evidence necessary to prove his claims. In determining what evidence to present to the jury at trial, plaintiff should keep in mind these things:

- **The jurors know nothing about this case.**

The jurors have never heard of this lawsuit before coming in for jury duty. They have not reviewed the complaint, the evidence or any of this court's orders in the case. They will not know the law about plaintiff's claim. This means that it is plaintiff's job to provide the jury with enough evidence and explanation to persuade the jury to enter a verdict in his favor. All the jury will know is what the parties present during the trial. This means that even if a piece of evidence was filed with a party's summary judgment materials or other court filings, the jury will not know about it unless somebody introduces it as evidence during the trial.

- **All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence.**

Every trial has different evidence problems and objections, but the problems and objections that happen most often involve **relevance** (Rules 401 and 402), **unfair prejudice** (Rule 403), **character evidence** (Rules 404 and 608), **prior statements of witnesses** (Rule 613) and **hearsay** (Rules 801-807). If one party asks a question or offers an exhibit that violates these rules or that violate some other Federal Rule of Evidence, then the other party may object and get a ruling from the court.

- **The Federal Rules of Evidence limit the testimony of witnesses.**

Witnesses may give testimony on any relevant matter when they have personal knowledge of that matter. In general, witnesses cannot testify about what someone else said outside the courtroom, because the accuracy of that statement cannot be tested by the opposing

party. Such statements are called hearsay. There are a number of exceptions to this general rule against hearsay that are set out in Rules 803 and 804.

- **Documentary evidence will not be admissible unless the document is "authenticated."**

Under Federal Rule of Evidence 901, a party who wishes to rely on a piece of evidence at trial must show that the evidence is what that party claims it to be. For example, if you want to introduce a particular document, you may satisfy Rule 901 by calling a witness who has personal knowledge that your document is an accurate copy of the original. This is the most common method of satisfying Rule 901, but other methods are listed in the rule. Alternatively, the parties may stipulate, or agree to the authenticity of a piece of evidence. *The court strongly encourages the parties to stipulate to the authenticity of documents before trial.*

- **A party may not introduce affidavits into evidence or read from them at trial.**

Affidavits are a form of hearsay. Unless the affidavit fits some exception to the hearsay rule, then it cannot be used as evidence at trial. The person who swore to an affidavit may appear as a witness at trial to testify in person about what he or she said in the affidavit if this is relevant to the trial. Also, if at trial a witness testifies to facts that are inconsistent with previous statements the witness made in an affidavit or some other document, then a party may use the witness's earlier statements to challenge the credibility of the witness.

♦ **Orders or opinions from this court, the court of appeals or the Supreme Court are not evidence.**

This court's orders and other case law might be useful guides to a party about how to prepare for trial, but a party may not submit orders or opinions as exhibits and a party may not discuss them in front of the jury because they are not trial evidence.

B. Witnesses

In its order of July 21, 2011, the court gave the parties a deadline of July 13, 2012 for disclosing the names and addresses of their trial witnesses. A copy of the procedures for calling witnesses to trial was sent to the parties with the preliminary pretrial conference order. Another copy is enclosed with this order.

♦ **Calling incarcerated witnesses to testify at trial**

The parties are reminded that if they wish to call an incarcerated witness to testify, they must serve and file a petition for the issuance of writs of habeas corpus ad testificandum. **The deadline for filing a petition is July 13, 2012** (four weeks before trial). With the motion, they must file supporting affidavits with the following information:

- a showing that the witness is willing to appear voluntarily;
- a description of the testimony the witness will give; and
- an explanation how the witness has personal knowledge of information relevant to a claim or defense.

The parties should make all efforts to submit any petition as soon as possible so that the court will be able to issue any writs in time to insure the witness's presence at trial.

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.

- **Calling the defendant to testify at trial**

Plaintiff cannot expect that the defendant actually will be present during the trial. This means that if plaintiff wishes to call the defendant as a witness at trial, then plaintiff should ask defendant's counsel whether the defendant will agree to be called as a witness by plaintiff without a subpoena. If defendant does not agree, then plaintiff will have to follow the procedures for calling unincarcerated witnesses if he wishes to obtain testimony from Dr. Sears.

C. Trial Materials and Motions

The parties must follow the deadlines for the submission of pretrial materials as set forth in the order issued on July 21, 2011. Aside from the deadline for disclosing the names and addresses for trial witnesses (which was mentioned above), the order provided the following deadlines:

- **Motions in limine: July 13, 2012**
- **Response to motions in limine: July 27, 2012**

A party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. Motions in limine are not intended to resolve disputes regarding all pieces of evidence because most evidentiary objections about individual documents can be made during trial. But sometime there are disputes about evidence that could have a big impact on the course of trial, and the parties probably will want to get a ruling from the judge about this evidence before the trial begins.

- **Voir dire, proposed jury instructions and verdict forms: July 13, 2012**
- **Exhibit list and a set of all of exhibits to be used at trial: July 13, 2012**

Although plaintiff has received a copy of this court's "Procedures for Trial Exhibits in the Western District of Wisconsin," another copy of the procedures is attached to this order.

In addition to following the exhibit procedures, the parties should exchange copies of their trial exhibits *in advance* of trial for two reasons. First, it will ensure that each party considers carefully what documents he will need to prove the elements of the claims for which he carries the burden of proof at trial and then try to obtain authentication of the documents before coming to trial, if necessary. Second, it will promote the efficient conduct of the trial by allowing each party to examine the opposing parties' exhibits in advance of trial so that objections to the admissibility of the documents may be taken up at the final pretrial conference outside the presence of the jury. The parties should be prepared to explain at the final pretrial conference their grounds for objecting to a particular exhibit.

Note well: The parties should keep the original copies of their exhibits in their possession so that they have them at the time of trial.

D. Trial Overview

1. 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. This is the parties' chance to observe the potential jurors while they are being questioned so that the parties can decide who to strike from the panel when the questioning is done.

The standard questions appear in the attachment to the magistrate judge's preliminary pretrial conference order. 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.

Thirteen possible jurors will be called forward. When the court has finished questioning these people, each side will be allowed to strike the names of three potential jurors. Plaintiff will strike one name, then defendant will strike one name, back and forth three times until six people are removed, leaving the seven people who will be the jury.

2. 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 to give testimony. What is said during opening statements is not evidence. Therefore, if one party begins to make comments that are more like testimony and the other party objects, then the court will instruct the jury not to consider the statements that are like testimony.

Following plaintiff's opening statement, defense counsel is allowed to make a statement about defendant's case. Defense counsel is allowed to delay this opening statement until the beginning of defendant's case.

3. Presentation of evidence

After the parties have given their opening statements, plaintiff will present his case by submitting evidence. This is called plaintiff's "case in chief." Plaintiff may provide his own testimony, and he may call other witnesses and submit properly authenticated documents.

After plaintiff has presented his case, then defendant may move to dismiss plaintiff's case on the ground that plaintiff has failed to present enough evidence to allow a jury to find that each element of his claims has been proven by a preponderance of the evidence. *See* Fed. R. Civ. P. 50. If defendant's motion is denied, then defendant will present his evidence.

After defendant is finished, plaintiff may present additional evidence to rebut defendant's case. Any testimony or other evidence presented during this phase of the trial is limited to responding to evidence introduced by defendant. Plaintiff may not introduce new evidence simply because he failed to address a matter in his case in chief.

4. Closing arguments

After both sides are done presenting evidence to the jury, plaintiff will give a closing argument explaining why the evidence supports a verdict in his favor. The closing argument is not a time to offer new testimony. Plaintiff should focus on the evidence presented during the trial and explain to the jury why this evidence proves his claim against defendant. In a closing argument, a party may explain why he believes his witnesses are more credible, why his evidence should be given more weight and what inferences may be drawn from the evidence presented. This explanation cannot be in the form of a personal opinion. For instance, it would be proper to argue to the jury "you should not believe the defendant because his story is different and doesn't make sense." It would not be proper to say "I think the defendant is lying."

E. Damages

If the jury returns a verdict finding that the defendant violated plaintiff's constitutional rights, then the jury may award "compensatory damages" in a dollar amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendant's acts. It will be plaintiff's burden at trial to prove that he has losses that should be compensated. *Memphis v. Community School District v. Stachura*, 477 U.S. 299 (1986). If plaintiff proves his claim but he cannot prove compensable harm, then he will be entitled to "nominal damages" of one dollar. If plaintiff presents evidence that he suffered a physical injury, then he may present evidence of mental or emotional injuries that he also suffered as a result of defendant's actions.

To recover "punitive damages," plaintiff would have to prove that defendant acted with "evil motive or intent" or with "reckless or callous indifference" to his constitutional rights. *Smith v. Wade*, 461 U.S. 30 (1983). If plaintiff satisfies the legal standard for punitive damages, the jury may, but is not required to, award these damages as a deterrent to defendant.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Christopher Sanders at trial beginning on August 13, 2012. Plaintiff should arrive at the courthouse no later than 8:00 a.m.

FURTHER, IT IS ORDERED that

(1) NOT LATER THAN July 13, 2012, the parties are to file and serve any motions for the issuance of subpoenas or writs of habeas corpus ad testificandum, together with supporting affidavits revealing the witness's willingness to appear voluntarily.

(2) NOT LATER THAN July 13, 2012, the parties are to file and serve any motions in limine they wish to bring. Responses to those motions are due July 27, 2012.

(3) NOT LATER THAN July 13, 2012, the parties are to file and serve:

(a) any proposed questions for voir dire examination (optional);

(b) a proposed form of special verdict (optional);

(c) any proposed jury instructions (optional); and

(d) a copy of all exhibits and an exhibit list (required).

The parties should not submit copies of the standard voir dire questions and jury instructions attached to the 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.

(4) The court will not consider 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 the party could not reasonably have anticipated before trial.

Entered this 8th day of June, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

PROCEDURES FOR CALLING WITNESSES TO TRIAL

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendant. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. ("Party" means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

1) A defendant to be called to testify by a plaintiff; or

2) A plaintiff to be called to testify by a defendant; or

3) A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court's satisfaction that

1) The witness has agreed to attend voluntarily; and

2) The witness has actual knowledge of facts directly related to the issue to be tried.

A witness's willingness to come to court as a witness can be shown in one of two ways:

a. The party can serve and file an affidavit declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without being subpoenaed. The party must say in the affidavit when and where the witness informed the party of this willingness;

OR

b. The party can serve and file an affidavit in which *the witness* declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways:

a. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

OR

b. The party can serve and file an affidavit in which *the witness* tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

1) State the name and address of the witness; and

2) Come with an affidavit described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit

1) Giving the name and address of the witness; and

2) Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has

ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

III. UNINCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at P.O. Box 432, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit declared to be true under penalty of perjury that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and

4) The party is prepared to tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the marshal, together with the necessary check or money order. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

V. SUMMARY

The chart on the next page may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

WITNESSES

INCARCERATED		UNINCARCERATED	
VOLUNTARY	INVOLUNTARY	VOLUNTARY	INVOLUNTARY
A court order that the witness be brought to court is required. Papers are due 4 weeks before trial.	A court order that the witness be brought to court and a subpoena are required. A motion must be served & filed 4 weeks before trial. Subpoena forms must be completed 2 weeks before trial.	Nothing need be sought or obtained from the court.	Pro se parties must obtain an order granting issuance of a subpoena. Papers are due 4 weeks before trial. Completed forms and fees are due 2 weeks before trial.

Revised May 2006

CURRENT SUBPOENA RATES
(as of January 2010)

Daily Witness Fee - $40

Milage - $0.51

Room and Meals (Per Diem) - $144

PROCEDURES FOR TRIAL EXHIBITS
IN THE WESTERN DISTRICT OF WISCONSIN

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits.

1. Each party is to label all exhibits with labels provided by the clerk's office.

2. If more than one defendant will be offering exhibits, that defendant should add an initial identifying the particular defendant to the label.

3. Each party is to list the exhibits on the yellow exhibit sheet provided by the clerk's office. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.

4. Each party is to provide the court with the original exhibit list and a copy of each exhibit that may be offered for the judge's use.

5. As a general rules, the plaintiff should use exhibit numbers 1-500 and the defendant should use exhibit numbers 501 and up.

6. Each party is to maintain custody of his or her own exhibits throughout the trial.

7. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain his or her exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.

8. Each party should be aware that once reference is made to an exhibit at trial, the exhibit becomes part of the record, even though the exhibit might not be formally offered or might not be received.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.