IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff, ORDER

v. 02-C-459-C

GEORGE DALEY, Director for the Bureau of Health Services; SHARON ZUNKER, Assistant Director of B.H.S.; MARC CLEMENTS, W.C.I.'s security director; BETH DITTMANN, Health Services Unit (H.S.U.) Supervisor at W.C.I.; PAM BARTELS, Supermax's H.S.U. Supervisor; DR. PHILLIPE BELGADO, Doctor at W.C.I.; DR. HASSELHOFF, doctor at Supermax; S. HOUSER, Captain at W.C.I.; WILLIAM SCHULTZ, staff at W.C.I.; KEN LANGE, nurse at Supermax; C.O. FRIDAY, guard at W.C.I.; and SGT. BURNS, a sergeant at W.C.I.;

Defendants.

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Plaintiff Nathaniel Lindell has filed a motion for an "evidentiary hearing and [preliminary] injunctive relief," a 15-page brief, 24 pages of proposed findings of fact, a 28-page declaration with 115 exhibits, and affidavits from several inmates at the Wisconsin Secure Program Facility. Distilled to its essence, the motion seeks an order directing defendants to approve surgery to straighten a broken nose plaintiff allegedly sustained on

December 8, 2000.

Plaintiff's consumption of extremely limited legal loan funds to pursue this motion is unfortunate. His own evidence suggests strongly that he has received medical attention in response to his complaints of facial pain allegedly relating to his nose and that at least one doctor (defendant Hasselhof) has made a professional medical determination not to prescribe surgery, stating "[Lindell] advised that rebreaking of the nose would probably give him more problems than he has now." Plt.'s Exh. 23, page 3. Nothing in plaintiff's vast assemblage of evidentiary materials is sufficient to show that he has more than a negligible chance of success on the merits of a claim that he needs immediate nose surgery.

Plaintiff appears to recognize that he cannot obtain preliminary injunctive relief without evidence to show that he has more than a negligible chance of success on the merits of his claim. Also, he appears to realize that in order to meet this burden, he will have to obtain the opinion of a medical expert who will testify that the decision not to order nose surgery was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996).

What plaintiff does not understand is that although he is proceeding in forma pauperis, he is nevertheless responsible for securing his own expert witnesses. He has asked for appointment of an expert to examine his injuries and testify on his behalf at an

evidentiary hearing.

Fed. R. Civ. P. 35 allows a court to appoint a medical expert at government expense, but not in circumstances such as this. Rule 35 provides in part:

> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the person or persons by whom it is to be made.

Under this rule, the court could order plaintiff to submit to an examination at the request of the *opposing party*. Also, under proper circumstances, this rule would allow a party who has a person in his or her custody or under his or her legal control to be compelled to produce that person for a physical examination, on motion by an opposing party. For example, a father suing to recover for injuries to his infant son allegedly sustained as the result of a defendant's negligence may be required to produce the son for a physical examination, on motion by the defendant,

The rule is not intended to cover a situation such as the one here, where plaintiff wishes an examination of himself. Obtaining evidence to prove his case is plaintiff's

responsibility, not the government's. Plaintiff suggests no basis for an order compelling the government to provide him with the services of an expert at government expense.

Because plaintiff has not yet secured an expert witness who is willing to testify that defendants' failure to allow him nose surgery is so blatantly inappropriate as to demonstrate intentional mistreatment likely to seriously aggravate plaintiff's condition, I will deny his motion for preliminary injunctive relief for his failure to show more than a negligible chance of success on the merits of his medical mistreatment claim. In addition, I will deny plaintiff's motion for appointment of an expert at government expense. With the denial of plaintiff's motion for preliminary injunction, plaintiff's motions for the issuance of subpoenas and writs of habeas corpus ad testificandum and an evidentiary hearing will be denied as moot.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for a preliminary injunction is DENIED.

2. Plaintiff's motion for appointment of an expert witness under Fed. R. Civ. P. 35 is DENIED.

3. Plaintiff's motions for an evidentiary hearing and issuance of subpoenas and writs of habeas corpus ad testificandum are DENIED.

Entered this 30th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge