IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRENTFORD TAYLOR,

Petitioner, ORDER

v. 02-C-0548-C

PHYILLIS J. DUBE, in her official and individual capacity; JON E. LITSCHER, in his official and individual capacity; BYRON BARTOW, in his official and individual capacity; MARIO CANZIANI, in his official and individual capacity; KELLY ZAREMBR, in her official and individual capacity; MICHELLE COOPER, in her official and individual capacity; DAM SMITHBACK, in his official and individual capacity; and SARAH CORCORAN in her official and individual capacity,

Respondents.

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It appears that petitioner remains confused about the status of this case. He has filed a motion to amend and supplement his complaint, despite the fact that the court of appeals has not yet ruled on the question whether this court erred in denying him leave to proceed in forma pauperis and dismissing his case.

In an effort to set the record straight once more, I will recount the history of the case, which has been dismissed twice in the district court and appealed three times.

Petitioner filed his complaint in October of 2002 and requested pauper status. Because he is a prisoner, he is subject to the 1996 Prisoner Litigation Reform Act, which requires that his complaint be screened before it is served on the respondents. If the complaint lacks legal merit, it is to be dismissed. I examined petitioner's complaint on October 31, 2002. From the allegations in the complaint, I understood petitioner to be contending that respondents had injured him through their negligence, causing him to slip and fall while working at the prison. Negligence is a claim that arises under state law rather than federal law. State law claims may be brought in federal court only if the parties are citizens of different states and the amount in controversy exceeds $75,000. Because petitioner and the proposed respondents are not residents of different states, I dismissed the case for lack of jurisdiction. Judgment was entered that same day, October 31, 2002.

Subsequently, petitioner moved pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment. Although it was difficult to make out precisely what prompted petitioner's Rule 59 motion, it appeared that he was arguing that he intended the court to view respondents' behavior as violating his Eighth Amendment constitutional rights rather than his rights under state law. Federal courts have jurisdiction to review claims arising under the constitution or federal law. Therefore, in an order dated November 22, 2002, I granted

petitioner's Rule 59 motion and vacated the October 31 judgment so that I could consider petitioner's Eighth Amendment claim. However, vacating the judgment did not result in the lawsuit going forward, as petitioner appears to believe was the case. Under the 1996 Prisoner Litigation Reform Act, I was required to review petitioner's Eighth Amendment claim to determine whether it rose to the level of a constitutional violation and, if it did not, to dismiss the case for lack of legal merit. I reviewed petitioner's Eighth Amendment claim in the same order as I had granted petitioner's Rule 59 motion. I concluded the allegations of the complaint were insufficient to make out a valid Eighth Amendment claim and I denied petitioner leave to proceed and dismissed the case. An amended judgment of dismissal was entered on November 22, 2002.

On November 26, 2002, petitioner filed a notice of appeal from the amended judgment (docketed as number 02-4135 in the court of appeals) and requested leave to proceed on appeal in forma pauperis. I denied the request in an order dated November 27, 2002, and certified that the appeal was not taken in good faith. Petitioner then filed a proposed amended complaint and asked for permission to withdraw his appeal from the court of appeals. In a memorandum dated December 9, 2002, I told petitioner it was too late for him to amend his complaint and that in any event, his appeal divested this court of jurisdiction to consider anything more relating to the merits of his case. I told him that if he still wished to withdraw his appeal knowing that he would not be allowed to amend his

complaint in this court, he would have to make the request directly to the court of appeals. Petitioner did exactly that. On December 11, 2002, the court of appeals dismissed petitioner's appeal at petitioner's request.

Meanwhile, petitioner filed in this court a notice of appeal from the December 9, 2002 memorandum (docketed in the court of appeals as appeal no. 02-4303). In an order dated December 19, 2002, I denied petitioner leave to proceed in forma pauperis with this appeal because it was legally frivolous and I certified that the appeal was not taken in good faith.

Next, on December 30, 2002, petitioner filed a third document titled "notice of appeal," which was a repeat of the appeal he filed originally, challenging the November 21, 2002 order of dismissal and amended judgment. (The court of appeals docketed this appeal as appeal no. 03-1052.) I understood this filing to be an attempt on petitioner's part to reinstate his original appeal. Therefore, I forwarded petitioner's third "Notice of Appeal" directly to the court of appeals and requested that the submission be construed as a motion for reinstatement of appeal no. 02-4135. On March 24, 2003, the court of appeals ordered appeal no. 02-4135 reinstated and dismissed appeal no. 03-1052. In the March 24 order, the court of appeals directed petitioner either to file a motion to proceed in forma pauperis on appeal or pay the appellate filing fees with the clerk of the district court in appeal no. 02-4135 by April 14, 2003. It noted, also, that if petitioner wanted to move to supplement the

record on appeal (apparently a request petitioner had made directly with the court of appeals), he was to make such a motion in the district court.

That brings us to the present. On April 2, 2003, petitioner filed a "Motion to Amend and Supplement Pleading Pursuant to Fed. R. Civ. P. 15-A-B-D) and Circuit Rule 10-b and Fed. R. App. P. 10-3, Modification of Record to Conform with Evidence" and a document titled "Complaint under Civil Rights Act 42 U.S.C. 1997 (CRIPA) and 42 U.S.C. § 12101 Title II of the Americans with Disabilities Act/1990." On April 8, 2003, he filed a document titled "Amended Complaint under Civil Rights Act 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act/1990," and asked that the court substitute this complaint for the complaint he filed on April 2.

As I told petitioner in the memorandum of December 9, 2002, I cannot consider a motion to amend his complaint because the proposed amendment comes too late. His case has been dismissed in this court and the file has been closed. More important, petitioner's appeals from the November 22, 2003 judgment and the December 9 order divest this court of jurisdiction to consider any new motion relating to the merits of this case. A motion to amend the complaint is a motion relating to the merits of the case. Indeed, it goes to the heart of the matter to be considered on appeal, which is whether this court made a mistake by concluding that petitioner's original complaint failed to state a legally valid claim under the Eighth Amendment.

Although petitioner labels his motion as one including a motion to supplement the record on appeal to conform to the evidence as allowed under Fed. R. App. P. 10(e), it is clear that he wants the record on appeal to include his proposed amended complaint. Because the proposed amended complaint was not a part of the court's record before petitioner filed his appeal, it is not material to the appeal and has not been omitted from the appeal record erroneously. Petitioner's motion to modify the record on appeal pursuant to Fed. R. App. P. 10(e) will be denied.

One final clarification may be useful. As I noted above, when the court of appeals issued its order allowing petitioner to reinstate appeal no. 02-4135, it ordered petitioner to file a motion for leave to proceed in forma pauperis or pay the appellate filing fees with the clerk of the district court no later than April 14, 2003. The record reveals that this court already has ruled on petitioner's motion for leave to proceed in forma pauperis on appeal. In an order dated November 27, 2002, I denied the request and certified that petitioner's appeal is not taken in good faith. I believe that with the reinstatement of appeal no. 02-4135, this court's November 27 order still stands. Therefore, if petitioner files a motion for leave to proceed in forma pauperis as the court of appeals has suggested he might do no later than April 14, 2003, his motion is to be filed directly with the court of appeals pursuant to Fed. R. App. P. 24(a)(5), together with a copy of this court's November 27 order and an affidavit as prescribed in Fed. R. App. P. 24(a)(1). If petitioner intends to pay the $105 fee

for filing his appeal, however, the payment is to be made to this court.

ORDER

IT IS ORDERED that

1) petitioner's motion to amend his complaint is DENIED; and

2) petitioner's motion to modify the record on appeal pursuant to Fed. R. App. P. 10(e) is DENIED.

Entered this 9th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge