

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

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FRED ODELL,

Plaintiff,

v.

ORDER

02-C-0691-C

THOMAS BORGAN,

Defendant.  
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This is a civil action for monetary relief brought pursuant to 42 U.S.C. § 1983. On January 6, 2003, I granted plaintiff Fred Odell leave to proceed in forma pauperis on his claim that unknown prison officials at the Fox Lake Correctional Institution were deliberately indifferent to his serious medical needs by (1) denying him prescribed surgery for his heart, prostate and kidney problems and (2) requiring him to re-use his urethral catheter. I allowed plaintiff to proceed against defendant Thomas Borgan, the warden, for the sole purpose of discovering the name of the individuals who were allegedly responsible for denying him medical treatment and requiring him to re-use his catheters. In that same order, I denied plaintiff leave to proceed on his claims that prison officials had violated the

Constitution by (1) confining him in prison and subjecting him to parole; (2) shackling him in handcuffs and leg irons and allowing guards to observe him during medical exams; and (3) allowing prisoners with contagious diseases to serve him food. In addition, I denied plaintiff's request for leave to proceed on behalf of his three daughters.

On February 26, 2003, the magistrate judge gave plaintiff until April 4, 2003, to file an amended complaint naming the "John Doe" defendants in lieu of defendant Borgan. That deadline was extended to April 8, 2003. On April 8, plaintiff filed a "motion for reconsideration and leave to amend complaint." However, instead of naming the John Doe defendants in his amended complaint as instructed, plaintiff merely sought reconsideration of the claims on which I had denied him leave to proceed. On April 24, 2003, I denied plaintiff's motion in all respects.

Presently before the court is defendant's motion for summary judgment, in which defendant argues that he was not personally involved in the medical care given to plaintiff and thus cannot be liable for any alleged deliberate indifference. I agree. In fact, I granted plaintiff's request for leave to proceed against defendant Borgan for the sole purpose of discovering the name of the individuals who were allegedly responsible for denying plaintiff medical treatment and requiring him to re-use his catheters.

A final issue needs to be addressed. On May 14, 2003, plaintiff filed a notice of appeal, which I construed as a request to certify an interlocutory appeal (because no final

judgment had been entered), coupled with a request for leave to proceed in forma pauperis on that appeal. Plaintiff appealed those portions of the January 6 order (request for leave to proceed) and April 24 order (motion for reconsideration and leave to amend complaint) that were adverse to him. On May 21, 2003, I denied plaintiff's request to certify an interlocutory appeal in forma pauperis because his appeal lacked legal merit and was not taken in good faith.

Plaintiff's only argument in his brief in opposition to defendant's motion for summary judgment is that this court cannot decide defendant's motion because plaintiff's appeal is pending and to do so would fragment the case. Plaintiff is incorrect. See Ohio-Sealy Mattress Mfg. Co. v. Duncan, 714 F.2d 740, 743 (7th Cir.1983) ("The final disposition of one claim in a multi-count complaint is not final within the meaning of section 1291 unless the district court certifies it for direct appeal under Fed. R. Civ. Pro. 54(b)."). Moreover, four requirements must be satisfied before the collateral order doctrine is triggered to render an interlocutory decision final for the purpose of appeal. "The challenged order must: (1) present an important and unsettled question of law; (2) operate to preclude effective review after final judgment of the entire action; (3) deal with a matter separate from the main cause of action; and, (4) involve great danger of injustice which outweighs the policy against piecemeal review." See id. at 743-44 (citing First Wisconsin Mortgage Trust v. First Wisconsin Corp., 571 F.2d 390 (7th Cir.1978), aff'd on this issue,

584 F.2d 201 (7th Cir. 1978) (en banc). As I explained in the May 21 order in which I denied plaintiff's motion to certify an interlocutory appeal, plaintiff's appeal did not present a controlling issue of law as to which there is a substantial ground for difference of opinion and an appeal would not materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292. Thus, plaintiff's continued pursuit of an appeal absent a final order or certificate of appealability does not deprive this court of jurisdiction to decide defendant's motion for summary judgment. Plaintiff may take solace in the fact that because defendant will prevail on his motion for summary judgment and therefore a final judgment will be entered in defendant's favor, plaintiff will be free to pursue an unfragmented appeal if he so chooses.

#### ORDER

IT IS ORDERED that

1. Defendant Thomas Borgan's motion for summary judgment is GRANTED; and

2. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 9th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB  
District Judge