

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

FRED ODELL,
CLEOPATRA ODELL ODELL,
VERONICA LEE ODELL and
LIBBY ODELL PALM,

Plaintiffs,

v.

ORDER

02-C-0691-C

JON LITSCHER, WILLIAM LUNDSTROM,
STEPHANIE JONES, KARI BERG,
PAUL HUMPHREY, MARGUERITE
MOELLER and THOMAS BORGEN,

Defendants.

On July 9, 2003, judgment was entered dismissing this case. Now plaintiffs have filed a notice of appeal. Because the notice is not accompanied by the \$105 fee for filing an appeal, I construe plaintiffs' notice as including a request for leave to proceed in forma pauperis on appeal.

As an initial matter, I note that plaintiffs' appeal may be untimely. However, only the court of appeals may determine whether it has jurisdiction to entertain an appeal. Hyche

v. Christensen, 170 F.3d 769, 770 (7th Cir. 1999). The district court's role with respect to an appeal is limited. A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is in bad faith or if the litigant is a prisoner, the prisoner has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780 (7th Cir 1998).

In this instance, Cleopatra Odell Odell, Veronica Lee Odell and Libby Odell Palm will not be permitted to proceed on appeal in forma pauperis because I must certify that their appeal is not taken in good faith. These plaintiffs were dismissed from the case at the outset because they are not represented by counsel and, as plaintiff Fred Odell's minor children, cannot proceed on their own behalves or be represented in the lawsuit by their father, who was proceeding pro se. In denying Cleopatra Odell Odell, Veronica Lee Odell and Libby Odell Palm leave to proceed in forma pauperis, I directed plaintiffs' attention to a decision of the Court of Appeals for the Seventh Circuit directly analogous to plaintiffs' situation, in which the court of appeals stated expressly that a non-lawyer father was free to represent himself but had no authority to appear as a child's legal representative. See Navin v. Park Ridge School District 64, 270 F.3d 1147 (7th Cir. 2001). Plaintiffs' attempt to raise on appeal a question on which the court of appeals recently has spoken unequivocally about is legally frivolous. Therefore, I will certify that the appeal of Cleopatra Odell Odell, Veronica

Lee Odell and Libby Odell Palm is not taken in good faith.

In an order entered in this case on January 6, 2003, I denied plaintiff Fred Odell leave to proceed in forma pauperis on claims that respondents violated his constitutional rights by (a) confining him in prison and subjecting him to a parole system; (b) humiliating him by shackling him and allowing guards to observe him during medical exams; and (c) allowing prisoners with contagious diseases to serve him food. I granted him leave to proceed on claims that respondents John Doe violated his Eighth Amendment rights by (a) denying him medical surgery for his heart, prostate and kidney problems and (b) requiring him to re-use his urethral catheters. Because plaintiff Fred Odell did not appear to know the names of the individuals personally involved in allegedly denying him medical care and requiring him to re-use his catheters, I allowed him to proceed against defendant Thomas Borgen for the sole purpose of discovering the names of the Does so that he could amend his complaint to name them.

On February 26, 2003, the magistrate judge held a preliminary pretrial conference in which plaintiff Fred Odell participated on his own behalf. At that time, the magistrate judge gave defendant Borgen until March 21, 2003, in which to provide plaintiff with a copy of his medical records and any other information in his possession that would help plaintiff identify the Doe defendants. He gave plaintiff until April 4, 2003, in which to amend his complaint to substitute the names of the Does in place of defendant Borgen. This latter

deadline was extended subsequently to April 8, 2003, at plaintiff's request.

Instead of amending his complaint to name the Doe defendants, plaintiff filed two motions to amend, both of which sought to reinstate his daughters as plaintiffs despite the fact that they were not represented by counsel and had no standing to recover on plaintiff's Eighth Amendment claims, the only claims on which plaintiff had been allowed to proceed. In addition, he requested millions of dollars in damages on his claim that he had been confined in prison and subjected to a parole system, despite the fact that I had denied him leave to proceed on this claim in January 2003, on the ground that the claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994), and thus was legally frivolous.

On May 21, 2003, more than six weeks after plaintiff was to have identified the Doe defendants, defendant Borgen moved for summary judgment, requesting dismissal of the complaint against him on the ground that plaintiff had not alleged defendant's personal involvement in the denial of plaintiff's constitutional rights. Plaintiff did not address the substance of the motion in his brief in opposition to it or propose an amendment to his complaint to identify the Doe defendants. Defendant Borgen's motion for summary judgment was granted on July 9, 2003.

In Lucien v. Roegner, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith on appeal where a plaintiff is appealing the same claims the court found to be without legal merit in denying plaintiff leave to proceed on his

complaint. Although the standard for finding bad faith was altered temporarily in a later case, Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997), the Lucien standard has been reinstated. See Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000).

I intend to certify that plaintiff Fred Odell's appeal from the denial of leave to proceed in forma pauperis on claims I found to be without legal merit in the January 6, 2003, order is taken in bad faith. In addition, I intend to certify that plaintiff's appeal from the grant of summary judgment in defendant Borgen's favor is taken in bad faith. Plaintiff was given abundant time and opportunity to amend his complaint to name the individuals who allegedly deprived him of his Eighth Amendment rights. His refusal to focus on the task of identifying the Does and amending his complaint so that they could be served with notice of his claims against them led directly to the dismissal of this action. At no time has plaintiff Fred Odell offered any justification for failing to identify the Does. Under these circumstances, his appeal must be certified as not taken in good faith.

ORDER

IT IS ORDERED that plaintiffs' request for leave to proceed in forma pauperis on

appeal is DENIED.

I certify that plaintiffs' appeal is not taken in good faith.

Entered this 18th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge