IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GARY BORZYCH,

Plaintiff,

v.

MATTHEW J. FRANK, STEVE CASPERSON, ANA M. BOATWRIGHT, GERALD BERGE, GARY BOUGHTON, PETER HUIBREGTSE, RICHARD RAEMISCH, SGT. JUDITH HUIBREGTSE, CPT. LEBBEUS BROWN, ELLEN RAY and TODD OVERBO,

Defendants.

OPINION AND ORDER

04-C-632-C

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This is a civil action brought under 42 U.S.C. § 1983 by plaintiff Gary Allen Borzych, who is currently incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Plaintiff claims among other things that defendants Matthew Frank, Steve Casperson, Ana Boatwright, Gerald Berge, Gary Bourghton, Peter Huibregtse, Richard Raemisch, Judith Huibregtse, Lebbus Brown, Ellen Ray and Todd Overbo denied him copies of the books "The NPKA Book of Botar," "Tower of Wotan" and "Creed of Iron" in violation of his First Amendment free exercise and free speech rights, the Religious Land Use

and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, the First Amendment establishment clause and the Fourteenth Amendment's equal protection clause.

Now before the court is defendants' motion for judgment on the pleadings. Defendants argue that they are entitled to judgment on plaintiff's claims as they relate to the denial of "Tower of Wotan" and "Creed of Iron" because I held recently in Lindell v. Casperson, 360 F. Supp. 2d 932 (W.D. Wis. 2005), that the Wisconsin Department of Corrections had a legitimate penological interest in banning these two texts and that no more narrowly tailored alternative was available. Although the holding in Lindell forecasts the likely outcome in this case, plaintiff is not bound to the holding in Lindell because he was not a party to that suit. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 37 (1940). Accordingly, I must deny defendants' motion.

OPINION

A. Lindell v. Casperson

In Lindell v. Casperson, 360 F. Supp. 2d 932 (W.D. Wis. 2005), the plaintiff, a self-proclaimed Wotanist/Odinist/Pagan/Wiccan, contended that several of the defendants had violated his free exercise rights and the Religious Land Use and Institutionalized Persons Act by denying him copies of the books "Temple of Wotan" and "Creed of Iron." Inmates are

afforded both constitutional and statutory protections in exercising the religion of their choosing. However, infringements on their ability to do so freely do not violate the First Amendment when reasonably related to a legitimate penological interest, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987),or the Religious Land Use and Institutionalized Persons Act when the restriction is the least restrictive means of furthering a compelling government interest, 42 U.S.C. § 2000cc-1; see also Cutter v. Wilkinson, 544 U.S. ___ , No. 03-9877 (May 31, 2005) (upholding Act's constitutionality).

In Lindell, defendants moved for summary judgment, submitting evidence to show that the text of the "Temple of Wotan" and "Creed of Iron" contained numerous symbols associated with notions of racial purity and white supremacy, such as swastikas, Thor's Hammers and Celtic Crosses. For purposes of deciding that motion, I assumed that the books were religious texts and that the plaintiff was sincere in asserting that he needed them to exercise his religion. Lindell, 360 F. Supp. 2d at 953-54. However, I concluded that defendants had shown that these two texts advocate racial purity, white supremacy and the use of force to those ends and thus, that the ban on these texts furthered the state's compelling interest in prison security. Id. at 954 (citing Sasnett v. Sullivan, 91 F.3d 1018, 1023 (7th Cir. 1996) ("[P]rison security is a compelling state interest.")).

In addition, I found that there is no less restrictive means to further the prison's interest in maintaining security. Relying on my explanation for denying plaintiff's motion

for a preliminary injunction in that case, I reasoned that permitting inmates to have redacted copies of these texts would not alleviate the problem the Supreme Court identified in Thornburgh v. Abbott, 490 U.S. 401, 413 (1989): "prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly." Lindell, 360 F. Supp. 2d at 955 (citing Borzych v. Frank, 04-C-632-C, 2005 WL 318820 (W.D. Wis. Feb. 8, 2005)). Accordingly, I concluded that although the denial of the texts might have burdened plaintiff's exercise of his religion substantially, defendants were entitled to summary judgment.

B. Binding Effect of Lindell on Plaintiff

Defendants ask the court to adopt the finding in Lindell and conclude that they are entitled to judgment on plaintiff's claims that the denial of the texts "Temple of Wotan" and "Creed of Iron" violate his First Amendment rights to free speech and free exercise, the Religious Land Use and Institutionalized Persons Act, the First Amendment establishment clause and the Fourteenth Amendment's equal protection clause. Defendants do not question whether adopting the conclusions of fact and law from Lindell into this case would be appropriate. However, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be

heard." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979); see also Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475 (1918) ("The opportunity to be heard is an essential requisite of due process law in judicial proceedings."). "This rule is part of our deep-rooted historic tradition that everyone should have his own day in court." Richards v. Jefferson County, 517 U.S. 793, 797 (1996) (additional citation omitted). The effect of a prior judgments is governed by the law of prior adjudication, or *res judicata*. The doctrines comprising this area of law include judicial estoppel, law of the case, stare decisis, claim preclusion and issue preclusion.

Neither judicial estoppel nor the law of the case doctrine is applicable here. Judicial estoppel bars a party from taking a position in a subsequent case that is contrary to a contradictory position it successfully asserted in an earlier case, New Hampshire v. Maine, 532 U.S. 742, 749 (2001); the law of the case doctrine "provides that courts should refrain from reopening issues decided in earlier stages of *the same* litigation." McMasters v. United States, 260 F.3d 814, 818 (7th Cir. 2001) (emphasis added).

The applicability of either claim or issue preclusion is murkier. Claim preclusion refers to the effect that a prior judgment has in foreclosing successive litigation of the same claim or cause of action against the same party; issue preclusion deals with "'the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not

the issue arises on the same or a different claim.'" New Hampshire, 532 U. S. at 748 (citing Restatement (Second) of Judgments §§ 17, 27 (1980)). Neither doctrine may be asserted against a person who was not a party to the prior action, in privity with a party or otherwise represented by a party. Brzostowski v. Laidlaw Waste Systems, Inc., 49 F.3d 337, 338 (7th Cir. 1995) (claim preclusion requires identity of parties); Meyer v. Rigdon, 36 F.3d 1375, 1379 (7th Cir. 1994) ("'the party against whom issue preclusion is invoked must be fully represented in the prior action'") (quoting La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 906 (7th Cir.1990)). Thus, the question is whether the close alignment of plaintiff's and Lindell's interests is a sufficient basis for holding plaintiff bound to the results of Lindell's efforts.

1. Claim preclusion

In the claim preclusion context, the Court of Appeals for the Seventh Circuit has recognized the doctrine of virtual representation, under which "'a person may be bound by a judgment even though he was not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.'" Matter of L & S Industries, Inc., 989 F.2d 929, 933 (7th Cir. 1993) (quoting Kerr-McGee Chemical Corp. v. Hartigan, 816 F.2d 1177, 1189 (7th Cir.1987)). However, because this doctrine clashes with an individual's due process right to litigate his own case, there are serious and substantial

limitations to its application. Tice v. American Airlines, 162 F.3d 966 (7th Cir. 1998). In fact, since the court's initial recognition of the doctrine, it has criticized the notion of "virtual representation" as adding little if nothing to the already flexible notion of privity and as permitting "a common law kind of class action" that avoids compliance with the procedural safeguards of Fed. R. Civ. P. 23. Id. at 971-73 ("the term itself illustrates the harm that can be done when a catchy phrase is coined to describe a perfectly sensible result"). Although the court has not declared the doctrine a nullity formally, Tice effectively forecloses the notion that the doctrine expands the scope of claim preclusion beyond the traditional bounds of privity by concluding that "[u]nless there is a properly certified class action, handled with the procedural safeguards both state and federal rules afford, normal privity analysis must govern whether nonparties to an earlier case can be bound to the result." Id. at 972-73; see also Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 760 (1st Cir. 1994) ("[C]ontemporary caselaw has placed the theory of virtual representation on a short tether, significantly restricting its range.").

In determining the existence of privity, the court of appeals has identified the following considerations: (1) how closely the two sets of interests coincide and the role the absentees played in the earlier litigation; (2) whether there is a formal kind of successor interest or some other indication that the second party was both aware that the first litigation was going on and that the earlier litigation would resolve its claims; (3) whether

the second party either had participated or had a legal duty to participate; (4) whether the rights involved were individual or group-based; and (5) whether there is express or implied consent to be bound by the earlier hearing. Tice, 162 F.3d at 973. Even where a second litigant brings the same cause of action, challenging the same policy as a first litigant, the second litigant's due process rights may be violated unless there is some evidence that the second party either waived that right or had a constructive day in court. Richards v. Jefferson County, 517 U.S. 793 (1996); Headwaters Inc. v. United States Forest Service, 399 F.3d 1047, 1054 (9th Cir. 2005) ("parallel legal interests alone, identical or otherwise, are not sufficient to establish privity or to bind a plaintiff to a decision reached in another case involving another plaintiff"); Banco Central Corp., 27 F.3d at 760 ("while identity of interests remains a necessary condition for triggering virtual representation, it is not alone a sufficient condition").

According to the court's records, plaintiff filed an affidavit in Lindell. At the time Lindell filed his case, it was this court's policy to bar multiple prisoner plaintiff suits. This policy was in effect until approximately one week before the defendants filed their motion for summary judgment in Lindell. At that advanced stage, I would not have granted plaintiff leave to intervene in Lindell had he moved to do so. "[T]he doctrine of virtual representation cannot be used to bar the claim of a person who was not a party to the earlier suit unless that person, at the least, had actual or constructive notice of the earlier suit and,

thus, a chance to join it." Perez v. Volvo Car Corp., 247 F.3d 303, 312 (1st Cir. 2001).

Moreover, there is no guarantee that plaintiff's affidavit was ever actually considered in Lindell; pursuant to this court's procedures, evidence is considered only insofar as a party points to it in support of or in disputing proposed findings of fact. See Procedure to Be Followed on Motions for Summary Judgment, I.B.3; I.C.1 (court will not search the record for evidence). Lindell was under no obligation to cite plaintiff's affidavit and plaintiff had no independent means of insuring that his voice would be heard. See, e.g., Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 423 (6th Cir 1999) (virtual representation requires "an express or implied *legal* relationship in which parties to the first suit are *accountable* to non-parties who file a subsequent suit raising identical issues.") (citations omitted, emphasis in original); Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F.2d 1172, 1175 (5th Cir.1987) (even when party to prior litigation and party had same attorney and same claim based on same set of facts, doctrine of virtual representation does not apply absent express or implied legal relationship).

Under these circumstances, I cannot conclude that the mere submission of an affidavit amounted to an opportunity to be heard that was meaningful enough to satisfy plaintiff's constitutional right to litigate his own claims. Although it is certainly conceivable that plaintiff's role in the Lindell suit was more involved, defendants have not shown this to be the case. Because claim preclusion is an affirmative defense, defendants bear the

burden of proving its applicability. Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1462 (7th Cir. 1994). A court may not apply an affirmative defense on its own unless it is clear from the face of the complaint that the defense applies. Gleash v. Yuswak, 308 F.3d 758, 760-61 (7th Cir. 2002).

2. Issue preclusion

As for issue preclusion, the recent trend in relaxing the traditional mutuality requirement seems promising at first blush but in fact has no applicability here. Until the 1970's, the prevailing rule on mutuality was that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative in the second action." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 at 320-21 (1971) (citing Triplett v. Lowell, 297 U.S. 638, 642 (1936)). This strict mutuality requirement has since been abandoned in favor of a rule that only the party against whom issue preclusion is being asserted must have been a party to or in privity with a party to the prior action. Id.; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Washington Group Intern., Inc. v. Bell, Boyd & Lloyd LLC, 383 F.3d 633, 636 (7th Cir. 2004) ("'party against whom estoppel is invoked must be fully represented in the prior action'") (quoting La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V., 914 F.2d 900, 906 (7th Cir.1990)).

In other words, the mutuality requirement has only been relaxed with respect to the party asserting the defense and not the party against whom it is asserted. Because only defendants were parties to the prior case and not plaintiff, the relaxed standard does not apply.

Of course, there is an exception to the general rule that issue preclusion does not apply against a person who was not a named party to the prior action somewhat analogous to the doctrine of virtual representation in the claim preclusion context. This exception applies to parties who had a "laboring oar" in the prior suit. Montana v. United States, 440 U.S. 147, 154 (1979). As the Supreme Court has explained, the notions of judicial economy and party fairness underlying application of issue preclusion in the traditional context "are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." Id.

In Montana, the United States brought a federal court challenge to a Montana state tax that applied to contractors of public, but not private projects. The same tax had been upheld in the Montana state courts in a suit brought by a public contractor. The Supreme Court held that the federal government was estopped from suing in federal court because it had exercised a high degree of control over the public contractor in plaintiff's state court action; the federal government had directed the filing of the complaint, reviewed and approved the complaint, paid the attorney fees and costs, directed appeals through the state

court system and appeared as amicus curiae in the state supreme court.

The only evidence of plaintiff's participation in Lindell, namely his providing an affidavit, falls far short of the "laboring oar" standard described in Montana. As noted above, under this court's procedures, affidavits are considered only insofar as they are cited as support for proposed findings of fact or responses thereto. Given that plaintiff had no means of insuring that his affidavit would even be considered in Lindell, it could hardly be said that he exercised any controlling force in that case. Banco Cent. Corp., 27 F.3d at 759 (party does not exercise substantial control simply by testifying as a witness); Ponderosa Development Corp. v. Bjordahl, 787 F.2d 533, 536-37 (10th Cir. 1986) (nonparty not bound by judgment in action to which he participated as witness and had access to all discovery materials); cf. Kerr-McGee Chemical Corp. v. Hartigan, 816 F.2d 1177, 1181 (7th Cir. 1987) (merely appearing as amicus curiae is not sufficient degree of participation to implicate rule stated in Montana); United States v. Murphy Oil USA, Inc., 143 F. Supp. 2d 1054, 1091-92 (W.D. Wis. 2001) (close monitoring does not satisfy the "laboring oar" standard); 18A Wright, Miller & Cooper, Federal Practice and Procedure 2d § 4451, at 373-76 ("lesser measures of participation without control do not suffice"). Lacking any indication that plaintiff exercised a sufficient degree of control in Lindell, I cannot find that it would be appropriate to bind him to the outcome in that case under the doctrine of issue preclusion.

3. Stare Decisis

Although I conclude that neither claim nor issue preclusion applies, "[p]reclusion is not an all or nothing matter; there are degrees [and] [t]he doctrine of stare decisis supplies some of the lesser degrees." Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358, 367 (7th Cir. 1987); see also In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763, 769 (7th Cir. 2003) ("outside the domain of class actions, precedent rather than preclusion is the way one case influences another"). The doctrine of stare decisis "imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning." Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457 (7th Cir. 2005). It "is not an inexorable command but instead reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Generally speaking, stare decisis bars a "different party from obtaining the over-ruling of a decision." Bethesda Lutheran Homes and Services, Inc. v. Born, 238 F.3d 8553, 858 (7th Cir. 2001).

Of course, stare decisis is limited to pure questions of law, 18 Moore's Federal Practice § 134.01[5] (3d ed. 2005), and the conclusion in Lindell was based on the

application of law to fact. Had defendants developed an argument on the application of stare decisis, they might have suggested that I take judicial notice of the content of "Creed of Iron" and "Temple of Wotan" under Fed. R. Evid. 201. Rule 201 governs judicial notice of adjudicatory facts and provides that a court may take judicial notice of any fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The specific content of the two books fits easily within this definition. By taking judicial notice of the books' contents under rule 201 and adhering to the legal conclusions in Lindell about the legal ramifications of these passages, a court might conclude that defendants are entitled to judgment without further need for litigation.

Certainly, this would seem to be a desirable route in this case. There is very little prospect that the result in plaintiff's case will be different from the one reached in Lindell. So little time has passed that there is no reason to believe that plaintiff might persuasively argue that there has been an intervening change in the underlying law. Bethesda, 238 F.3d at 858 (more recent opinions have stronger precedential force). Moreover, there is no reason to believe that the governing facts will be any different. The primary evidence on which I relied in Lindell was the actual text of the books; this is not the kind of evidence plaintiff might reasonably be expected to put into dispute. If plaintiff's brief in opposition to defendants' motion is any indication of the type of arguments he might raise in opposition

to a motion for summary judgment, it is unlikely that plaintiff's efforts will get him anywhere but sanctioned. Under the circumstances, there is every reason to believe that allowing plaintiff to go further with his claims will be a waste of time for everyone involved.

Although the desirability of dismissing plaintiff's claims at this stage seems obvious, the appropriateness of doing so is less clear. There are two considerations that militate against invoking stare decsis to bar plaintiff's claims. The first is that it is well-established that "a district court decision does not have stare decisis effect; it is not a precedent." Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457 (7th Cir. 2005) (citations omitted). As a matter of sound judicial practice, however, a court should give great weight to its own holdings and strive to decide cases in the most consistent and predictable manner possible. Hubbard v. United States, 514 U.S. 695, 711 (1995).

The second and more troubling problem is that combining stare decisis with Fed. R. Evid. 201 in this manner would create an end-run route around the due process-based limitations on the application of claim and issue preclusion to non-parties. In any case in which the governing facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," a non-party might effectively be barred from litigating a claim or issue decided in a prior case to which he was not a party, privy or otherwise represented. On the one hand, it could be argued that this makes good sense as a practical matter. The effective result would be a "futility" exception to a litigant's

due process right to litigate his own claims; a non-party should be bound to an earlier judgment when there is no real prospect that the party will be able to put the relevant facts into dispute.

Nonetheless, when considerations of judicial economy are on a collision course with a litigant's due process right to pursue his own claims, the former always gives way to the latter. Accordingly, I must conclude that unless and until the court of appeals holds otherwise, the due process considerations limiting the application of claim and issue preclusion operate similarly to limit the application of the doctrine of stare decisis and Rule 201 in a manner that would bind a litigant to the fact-based conclusions in a prior suit to which the litigant was not a party or represented in some manner. Because I find that it would be inappropriate to simply adopt the conclusion I reached in Lindell to this case, I must deny defendants' motion.

Although remote, there is at least a possibility that the result in this case might be different from the one I reached in Lindell, animating plaintiff's right to pursue his own claim. Even though the ban on "Temple of Wotan" and "Creed of Iron" is a prison-wide policy of the Wisconsin Department of Corrections, Lindell dealt specifically with the denial of these texts in the Wisconsin Resource Center and at the Waupun Correctional Institution. Lindell, 360 F. Supp. 2d at 947-48. Plaintiff complains of the denial at the Wisconsin Secure Program Facility, where interaction among inmates is far more limited.

Whether a different outcome is warranted in this case than in Lindell will most likely turn on whether there are any meaningful differences in the security considerations at the various Wisconsin state correctional facilities, what kinds of problems might arise by allowing inmates at only the most restricted levels of confinement access to books they would not be allowed to have in otherwise less restrictive environments and whether the problematic passages are so pervasive that they cannot be reconciled with the state's interest in rehabilitating inmates despite whatever other security concerns might be present. The parties will be best served by focusing their efforts on these kinds of inquiries.

ORDER

IT IS ORDERED that the motion for judgment on the pleadings of defendants Matthew Frank, Steve Casperson, Ana Boatwright, Gerald Berge, Gart Boughton, Peter Huibregtse, Richard Raemisch, Judith Huibregtse, Lebbeus Brown, Ellen Ray and Todd Overbo is DENIED.

Entered this 8th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge