IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES R. SCHULTZ,

ORDER

Plaintiff,

10-cv-581-bbc

v.

ERIC JOHNSON, JOHN SEVERSON,
KENNETH MILBECK and BRADLEY HOOVER,

Defendants.

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Plaintiff James Schultz has filed a motion for reconsideration of the order in which I granted defendants' motion for summary judgment with respect to his claim that defendants Eric Johnson and John Severson violated his Eighth Amendment rights by assaulting him while he was at the hospital for back surgery. I concluded that defendants were entitled to judgment as a matter of law because plaintiff failed to adduce any admissible evidence that Johnson, Severson or anyone else had assaulted him.

Plaintiff does not support his motion with a brief, only an affidavit. Most of this affidavit is a rehash of arguments I rejected in the summary judgment opinion and I need not address these again. To the extent he is trying to submit new allegations to support his

claim, it is too late for him to do that. Sigsworth v. City of Aurora, Illinois, 487 F.3d 506 (7th Cir. 2007) ("[I]t is well-settled that a Rule 59(e) motion is not properly utilized to advance arguments or theories that could and should have been made before the district court rendered a judgment.") (internal quotations omitted).

Plaintiff points out one error regarding the following discussion in the summary judgment order:

> Defendants point out in their reply brief that plaintiff attached a letter to a motion he filed previously in this case in which he alleges that defendant Johnson "start[ed] to violently shake me" after he was anesthetized but before he fell unconscious. Dkt. #35-1, at 12. Although defendants' thoroughness is appreciated, plaintiff does not rely on this letter in his summary judgment materials or even cite it. Even if he had, the letter is not admissible because it is not sworn. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006). Plaintiff cites no other evidence showing that he personally witnessed an assault by Johnson or Severson.

Dkt. #116, at 7.

A closer look at the letter shows that plaintiff swore under penalty of perjury that the information in the letter was true. However, even if I consider the allegation in the letter, it does not change the result. Like many of plaintiff's allegations, the statement that Johnson "start[ed] to violently shake me" is devoid of any detail or context. He does not say what prompted the shaking, so it is impossible to infer that Johnson used force maliciously and sadistically for the sole purpose of causing harm, which is one of the elements of an excessive force claim under the Eighth Amendment. Hendrickson v. Cooper, 589 F.3d 887,

890-91 (7th Cir. 2009). Further, he does not allege that the shaking injured him in any way and he does not cite any authority for the proposition that the act of shaking a prisoner is sufficient to sustain a claim for excessive force. Cf. DeWalt v. Carter, 224 F.3d 607, 620 (7th Cir. 2000) ("simple act of shoving" not sufficiently serious). Accordingly, I conclude that the allegation in the letter cannot save his claim.

Plaintiff expresses confusion in his affidavit about several matters and I will try to clarify these for him. First, he says that, even if defendants did not assault him, they are "responsible under Wisconsin law" for any assault that occurred while he was undergoing surgery because he was in their custody at the time. This argument assumes that someone *did* assault plaintiff, but I concluded in the summary judgment opinion that plaintiff had no evidence to support that view. In any event, plaintiff was proceeding on a claim for excessive force under the Eighth Amendment, which required him to show that *defendants* harmed him. He did not have a claim under state law, so he could not prevail by showing that defendants were negligent in some way. United States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010) ("[O]nly intentional conduct violates the Constitution.").

Next, plaintiff says that he does not "understand how the petitioners (the persons who filed this action in this court) can ask for summary judgment against themselves." Although plaintiff does not explain what he means by this, he seems to believe that defendants could not seek summary judgment on plaintiff's claims because they removed the

case from state court to federal court. That is incorrect. Defendants did not become "petitioners" simply because of the removal and they did not lose the right under Fed. R. Civ. P. 56 to seek summary judgment. Once a case is properly removed, it proceeds no differently from a case that was filed in federal court by the plaintiff.

Third, plaintiff says that he "believed the Court would rule on my renewed Motion for the Appointment of Counsel (R.86) and my Addendum to Renewed Motion for Appointment of Counsel (R.94) before it ruled on the summary judgment issue." In fact, I did deny this motion well before issuing the summary judgment opinion in an order dated September 15, 2011, that addressed other issues as well. Dkt. #98. Plaintiff must have received that order because he filed a motion for reconsideration of it, dkt. #104, which I denied. Dkt. #105.

In the event that the court denies his present motion for reconsideration, plaintiff asks for permission to file an interlocutory appeal. (The case is still proceeding on another claim by plaintiff under the First Amendment.) Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal of an order if it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although plaintiff argues that the court erred as a matter of law in dismissing his excessive force claim, he fails to explain why he believes it would advance the ultimate termination of the litigation

to allow an interlocutory appeal now. The parties are briefing defendants' motion for summary judgment regarding the remaining claim. Because the ultimate question on that claim is a legal one (whether defendants' censorship of plaintiff's mail violates the First Amendment), it is likely that the claim will be resolved as a matter of law in favor of one side or the other without the need for a trial. Thus, allowing plaintiff to file an appeal now would not serve the interests of efficiency. Once the court has resolved plaintiff's remaining claim and entered judgment, plaintiff is free to appeal any decision in this case that the court resolved in defendant's favor.

ORDER

IT IS ORDERED that plaintiff James Schultz's motion for reconsideration, dkt. #117, and his motion for leave to file an interlocutory appeal, dkt. #119, are DENIED.

Entered this 16th day of March, 2012.

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