IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alton D. Brown, Appellant v. PA. Dept. of Corrections, Prison Health Services, Michael Herbik, Robert Tretinik, Jeffrey A. Beard, Harry E. Wilson, William S. Stickman, Lori Lapina, Joe Geragi, Mike Pioparchy, Don Skunda, E.V. Swierczewsky, and Joan Delie	:	No. 1083 C.D. 2009 Submitted: December 18, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: March 31, 2010

Alton D. Brown, a former inmate at the State Correctional Institution at Fayette (SCI-Fayette), appeals, *pro se*, an order of the Court of Common Pleas of Fayette County (trial court) that dismissed his complaint because he did not timely file certificates of merit with respect to his medical malpractice allegations. Brown's complaint named two groups of defendants: (1) the Department of Corrections, the Secretary of Corrections, Jeffrey A. Beard, and certain of the Department's employees (DOC Defendants) and (2) Prison Health Services, Inc. and certain of its medical professional employees (Healthcare Defendants). The complaint alleged that

all Defendants violated Brown's civil rights and committed medical malpractice.[1] Brown also petitions to proceed before this Court *in forma pauperis*. We dismiss Brown's appeal as frivolous.

On September 7, 2005, Brown filed a Section 1983 complaint, 42 U.S.C. §1983, to recover damages for improper care he received while imprisoned at SCI-Fayette. In Count I, entitled "Diet," Brown averred that Hepatitis C patients need to avoid certain foods. Brown claimed that Defendants were negligent in not providing him with this advice; not training their staff to provide this advice; and not providing him with a proper diet and exercise. In Count II, entitled "Knee," Brown averred that all Defendants were negligent in not providing him with "a qualified licensed physician" to treat his knee injury and by not adequately supervising staff with respect to his treatment.[2] Healthcare Defendants' Supplemental Reproduced Record at 14b (S.R.R. ___).

On December 6, 2005, the DOC Defendants praeciped the trial court for a judgment of *non pros,* and on December 29, 2005, the Healthcare Defendants filed the same praecipe. Defendants sought this relief because Brown had failed to file certificates of merit as required for any medical malpractice claim. PA. R.C.P. No. 1042.3.[3] The prothonotary entered judgments of *non pros* against Brown on December 6 and December 29, 2005, respectively. *See* PA. R.C.P. No. 1042.7.[4]

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[1] Brown alleged "corporal punishment, denial of medical care, excessive force, and a violation of medical information privacy in violation of the 8th and 14th Amendments to the U.S. Constitution." Healthcare Defendants Supplemental Reproduced Record at 9b. On appeal, Brown focuses solely on Defendants' alleged denial of medical care.

[2] Count III, entitled "Medical Information Privacy," is not at issue on appeal.

[3] Rule 1042.3(a) states that

> [i]n any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if

(Footnote continued on the next page . . .)

On January 4, 2006, Brown filed certificates of merit as to Prison Health Services, Inc. and most of the individual defendants. These certificates of merit stated that "expert testimony of an appropriate licensed professional is unnecessary for the prosecution of the claim," and they were filed almost four months after Brown filed his complaint. S.R.R. 22b-26b. However, the Rules of Civil Procedure require that certificates of merit be filed within 60 days of the filing of the complaint. PA. R.C.P. No. 1042.3. On June 22, 2007, Brown filed a request for leave to file relief from judgment of *non pros nunc pro tunc*. The trial court denied this request on April 28, 2009, and it dismissed the complaint as to all Defendants. Brown then appealed to this Court and on June 3, 2009, requested leave to proceed *in forma pauperis* for this appeal.

The Prison Litigation Reform Act (PLRA), 42 Pa. C.S. §§6601-6608, was designed to give courts the ability to dismiss actions concerning prison conditions that are brought by "frequent filers" whose claims are found repeatedly to lack merit. More specifically, the PLRA provides two bases for dismissing "prison conditions litigation" brought by a prisoner seeking *in forma pauperis* status. First, an action may be dismissed if it is frivolous. Section 6602(e)(2) states:

(continued . . .)

> not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party….

PA. R.C.P. No. 1042.3(a). Defendants in this case include doctors and nurses, who constitute licensed professionals under Rule 1042. *See* PA. R.C. P. No. 1042.1(c)(1)(i), (vii).

[4] Rule 1042.7(a) states in relevant part that

> [t]he prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time.

PA. R.C.P. No. 1042.7(a).

> **(e) Dismissal of litigation. --** Notwithstanding any filing fee which has been paid, the court shall dismiss prison conditions litigation *at any time*, including prior to service on the defendant, if the court determines any of the following:
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> . . . .
>
> (2) The prison conditions litigation is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude the relief.

42 Pa. C.S. §6602(e)(2). Second, an action may be dismissed if the prisoner is an "abusive litigator" who has previously had three or more prison conditions lawsuits dismissed as frivolous, malicious, or failing to state a claim for which relief may be granted under 42 Pa. C.S. §6602(e)(2).

Brown's Section 1983 lawsuit constitutes "prison conditions litigation" for purposes of the PLRA. Prison conditions litigation is defined as

> [a] civil proceeding arising in whole or in part under Federal or State law with respect to the conditions of confinement or the effects of actions by a government party on the life of an individual confined in prison. *The term includes an appeal.*

42 Pa. C.S. §6601 (emphasis added). Brown's claims, all of which revolve around the denial of medical care at SCI-Fayette, deal with "conditions of confinement" and "effects of actions by a government party on the life of an individual confined in prison." *Id.* The same is true of his appeal to this Court. Additionally, it does not matter that Brown initiated part of his action under federal statute, *i.e.*, 42 U.S.C. §1983, because Section 1983 actions may be brought in state court. *See Richardson v. Thomas*, 964 A.2d 61, 64-65 (Pa. Cmwlth. 2009) (citing *Jae v. Good*, 946 A.2d

802, 809-10 (Pa. Cmwlth. 2008)). In short, the subject matter of Brown's appeal is covered by the PLRA.

Based on his litigation history, Brown is an abusive litigator.[5] However, we dismiss his appeal under Section 6602(e)(2) of the PLRA because it is frivolous.

The PLRA defines frivolous as "[l]acking an arguable basis either in law or in fact." 42 Pa. C.S. §6601. Brown's current action is frivolous on more than one basis. First, the certificate of merit requirement under PA. R.C.P. No. 1042.3 applies to Section 1983 actions brought in state court. *See Jae v. Good*, 946 A.2d at 809-810. Because Brown did not file certificates of merit within 60 days, the entries of judgment of *non pros* against Brown were proper. *See* PA. R.C.P. No. 1042.7. Second, the complaint does not state a cause of action under Section 1983. A claim of inadequate medical treatment under Section 1983 must be more serious than a claim of medical malpractice. For a violation of the Eighth Amendment, which Brown alleges, there must be a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) ("Consequently, accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment."). For our purposes, "the exercise by a doctor of his professional judgment is never deliberate indifference." *Gindraw v. Dendler*, 967 F. Supp. 833, 836 (E.D. Pa. 1997). In short,

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[5] Brown has a long history of filing prison conditions litigation that has been dismissed by this Court because it was frivolous. *See Brown v. Pennsylvania Department of Corrections*, 913 A.2d 301, 306 (Pa. Cmwlth. 2006) (describing Brown as "a well-qualified abusive litigator within the meaning of the PLRA"); *Brown v. James*, 822 A.2d 128, 129-31 (Pa. Cmwlth. 2003) (listing Brown's numerous "strikes" and finding that there was abusive litigation under the PLRA). Brown clearly has three or more strikes against him.

a prisoner does not state a valid Section 1983 claim where he asserts nothing more than professional malpractice.

Brown's complaint does not allege deliberate indifference. Brown takes issue with how he was treated, but does not deny that he *was treated* by Defendants. Brown merely disagrees with Defendants' approach to treating his Hepatitis C and alleged knee injury. Because their actions resulted from the exercise of professional judgment, not deliberate indifference, his claims do not implicate rights protected by the U.S. Constitution. His claims, if any, arise under the common law of torts.

Because Brown has been proceeding *in forma pauperis*, his action may be dismissed under the PLRA *at any time* if it is found to be frivolous. 42 Pa. C.S. §6602(e)(2). We find that it is, and we therefore dismiss Brown's appeal.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 31st day of March, 2010, the complaint filed by Alton D. Brown in the above-captioned matter is hereby DISMISSED as frivolous.

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MARY HANNAH LEAVITT, Judge