

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 12, 2008

Lawrence E. Benner
301 Morea Road
Frackville, PA 17932

RE: Benner v. Correction Medical Services, *et al.*, C.A. No. S06C-08-024 (THG)

DATE SUBMITTED: July 28, 2008

Dear Mr. Benner:

Pending before the Court are motions to proceed *in forma pauperis* and for appointment of counsel. These motions relate to your pending suit against numerous entities and persons alleging various claims arising from events occurring while you were held at Sussex Correctional Institution in 2006.

This Court sent you a letter decision dated June 30, 2008, wherein it ordered you to file the correct form of affidavit for a motion to proceed *in forma pauperis*, denied, without prejudice, your motion for appointment of counsel, and ordered the form captioned "DUTY TO AVOID UNNECESSARY COSTS OF SERVICE OF SUMMONS" not be sent to any defendant in this matter. Thereafter, you submitted the correct form of affidavit for a motion to proceed *in forma pauperis*, filed a revised motion for appointment of counsel, instructed the Prothonotary's office that the form captioned "DUTY TO AVOID UNNECESSARY COSTS OF SERVICE OF SUMMONS" should not be sent to any defendants, and submitted copies of grievances which are referenced in your complaint.

At this point, it is appropriate for me to consider your motion to proceed *in forma pauperis*, to review the complaint filed pursuant to 10 Del. C. § 8803(b),¹ and to address your motion for

¹In 10 Del. C. § 8803(b), it is provided as follows:

b) Upon establishing the amount of fees and costs to be paid, the court shall review the complaint. Upon such review, the complaint shall be dismissed if the court finds the action is factually frivolous, malicious or, upon a court's finding that the action is legally frivolous and that even a pro

appointment of counsel.

You have established you are indigent. Accordingly, the Court will grant your motion to proceed *in forma pauperis*. That decision, however, does not end the Court's consideration of your case. Instead, it must review the complaint to determine if it legally or factually frivolous or if it is malicious. 10 Del. C. § 8803(b).

A review of your complaint shows several problems.

First, your suit will not proceed against any unnamed defendants. A defendant must be named or the claims against the unnamed defendant(s) shall be dismissed. Haskins v. Kay, 2007 Del. Super. LEXIS 408, **13-14 (Del. Super. Sept. 27, 2007); Johnson v. Paul's Plastering, Inc., 1999 Del. Super. LEXIS 502, **4-5 (Del. Super. Oct. 8, 1999); Smith v. New Castle County Police Department, 1999 Del. Super. LEXIS 12, *4-5 (Del. Super. March 23, 1999); Mohl v. Doe, 1995 Del. Super. LEXIS 215, **2-5 (Del. Super. May 11, 1995); Hutchinson v. Fish Engineering Corp., 153 A.2d 594, 595 (Del. Ch. 1959), app. on other grounds dism., 162 A.2d 722 (Del. 1960).

Second, to the extent you allege any claims of malpractice against any defendant(s), you must submit an affidavit of merit pursuant to 18 Del. C. § 6853.² This Court does not provide

se litigant, acting with due diligence, should have found well settled law disposing of the issue(s) raised. Any order of dismissal shall specifically identify whether the complaint was factually frivolous, legally frivolous and/or malicious. Service of process shall not issue unless and until the court grants leave following its review.

²In 18 Del. C. § 6853, it is provided as follows:

(a) No healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

(1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been healthcare medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (2) of this subsection has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:

"CONFIDENTIAL SUBJECT TO 18 DEL. C., SECTION 6853. THE CONTENTS OF THIS ENVELOPE MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT."

Notwithstanding any law or rule to the contrary the affidavit of merit shall be and shall remain sealed and confidential, except as provided in subsection (d) of this section, shall not be a public record and is exempt from Chapter 100 of Title 29.

(2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60 day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert

review.

(3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

(4) The defendant(s) is not required to take any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit(s) of merit.

(b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section.

©) Qualifications of expert and contents of affidavit. -- The affidavit(s) of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant(s) and that the breach was a proximate cause of injury(ies) claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant(s), and the expert shall be Board certified in the same or similar field of medicine if the defendant(s) is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

(d) Upon motion by the defendant the court shall determine in camera if the affidavit of merit complies with subdivision (a)(1) and subsection (c) of this section. The affidavit of merit shall not be discoverable in any medical negligence action. The affidavit of merit itself, and the fact that an expert has signed the affidavit of merit, shall not be admissible nor may the expert be questioned in any respect about the existence of said affidavit in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness.

(e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:

(1) A foreign object was unintentionally left within the body of the patient following surgery;

(2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or

(3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health care provider.

Kronfeld, 1997 Del. LEXIS 230 (Del. June 24, 1997); Walls v. Cooper, 604 A.2d 419 (Del. 1991).

Third, you may not obtain injunctive relief from this Court; Superior Court has no jurisdiction to award equitable relief.

You also have filed a second motion seeking appointment counsel wherein you explain that you do not have access to the statutory and case law of Delaware nor will you be able to undertake discovery or litigation in this matter because you are incarcerated in Pennsylvania. This Court considers the fact that you could obtain trial counsel to constitute meaningful access to the courts. Many attorneys work on a contingency fee basis; i.e., you pay them only if you win an award. Furthermore, attorneys' fees may be awarded in a successful action filed pursuant to 42 U.S.C. § 1983. Thus, the fact you are indigent does not mean you cannot obtain an attorney. Although you have attempted to contact attorneys and had no results, that does not mean an attorney is not available to represent you. A resource which may help you locate an attorney is Legal Helplink, which may be contacted at (302) 478-8850. Whether you are successful in obtaining an attorney is irrelevant to the Court's decision on this motion. Because you do have the opportunity to obtain an attorney, the Court will not order State monies be used to fund the costs of an attorney in this civil litigation.

Finally, I address a letter dated July 7, 2008, which you sent to a Clerk in the Prothonotary's Office. The rules of the Court which she sent you are the applicable court rules. There are no separate local rules. The response to your general request for any information which can help you is that nothing more exists which a Clerk of this Court can send you.

You need more time to try to obtain an attorney, to submit an amended complaint which corrects the problems noted above, and to provide an affidavit of merit. I will grant you four (4) months to accomplish these tasks. As of **December 15, 2008**, the Court will reconsider the complaint and take appropriate steps at that time.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office
Ophelia M. Waters, Esquire
Aaron R. Goldstein, Esquire