

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

LAWRENCE E. BENNER, : C.A. No. S06C-08-024 THG  
Plaintiff, :  
v. :  
CORRECTION MEDICAL SERVICES, *et al.*, :  
Defendants. :

O R D E R

1) Plaintiff Lawrence E. Benner (“Benner”) has filed this action against a multitude of parties alleging various claims arising from his incarceration at Sussex Correctional Institution (“SCI”) and from alleged injuries he incurred during this incarceration.

2) Benner also has filed a motion to proceed *in forma pauperis* and a motion for appointment of counsel. By order dated August 12, 2008, this Court granted the motion to proceed *in forma pauperis*. *Benner v. Correction Medical Services*, Del. Super., C.A. No. S06C-08-024 (THG) (Aug. 12, 2008) (“August 12, 2008 Order”). However, the Court denied the motion for appointment of counsel. *Id.*

3) The August 12, 2008 Order also contained other rulings. First, the Court ruled that the complaint could not proceed against any unnamed defendants. Second, it ruled that Benner could not obtain injunctive relief. Third, it ruled that, to the extent Benner was alleging claims of malpractice, he must submit an affidavit of merit pursuant to 18 *Del. C.* § 6853. The Court granted Benner until December 15, 2008, to try to obtain an attorney; to submit an amended complaint which corrected the problems with claims against unnamed defendants and which omitted claims for injunctive relief; and to provide an affidavit of merit.

4) Benner submitted documentation on November 12, 2008. With regard to the amendment of the complaint, Benner did not revise the complaint and caption to eliminate unnamed persons and claims against those unnamed persons. Instead, he submitted a revised caption which, in some instances, sets forth some given names without surnames and, in other instances, eliminates the words “unknown, unnamed”. He did not submit an amended complaint

which eliminated claims for injunctive relief. He did not submit an affidavit of merit with regard to any malpractice claims, explaining he cannot obtain such an affidavit and arguing he does not need to produce an affidavit of merit because he has stated a rebuttable claim of malpractice pursuant to 18 Del C. § 6853(e).<sup>1</sup>

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<sup>1</sup>In 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.

(c) 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

NOW, THEREFORE, THIS 20TH DAY OF NOVEMBER, 2008, IT IS HEREBY ORDERED AS FOLLOWS:

1) To the extent Benner seeks to state a claim for malpractice, those claims cannot proceed. Contrary to Benner's contentions, Benner has not alleged any circumstances which give rise to a rebuttable inference of negligence. An affidavit of merit is required. Benner has not provided it, despite being given the opportunity to produce one. Thus, the malpractice claims are dismissed with prejudice and are deemed stricken from the complaint.

2) To the extent Benner seeks injunctive relief, that relief is denied and those requests are deemed to be stricken from the complaint.

3) The complaint shall not proceed against any unnamed parties. Claims against any unnamed parties are deemed to be stricken from the complaint.

4) Benner must file a praecipe instructing the Prothonotary to issue service. Benner must provide the address and full name of each person or entity to be served and must direct the method for service which complies with the applicable statutes and Court rules.

5) Once service of process commences, the Prothonotary's Office shall attach a copy of

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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.

this order to each complaint to be served so that each served party is aware of previous rulings of this Court and is aware of which claims have been deemed invalid and stricken from the complaint.

6) Allowing service of the complaint at this point shall not be construed as implied rulings of this Court that any of Benner's claims are meritorious.

/s/ T. Henley Graves

JUDGE

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