

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
RESIDENT JUDGE

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

December 9, 2009

Kevin E. Raphael, Esquire  
Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP  
1818 Market Street, Suite 3402  
Philadelphia, PA 19103

**RE: Sternberg v. Nanticoke Memorial Hospital, Inc., et al.  
Request for Documentation on Award of HCQIA Attorney's Fees  
C.A. No. S07C-10-011**

Dear Mr. Raphael:

I have received your letter dated October 8, 2009, in response to my order requesting documentation and affidavits regarding the award of attorney's fees to Nanticoke Memorial Hospital pursuant to the Health Care Quality Improvement Act (hereinafter "HCQIA"). This is my response to that correspondence.

Although your letter provides an affidavit regarding the attorney's fees incurred by Dr. Sternberg as requested by the Court, it also contains a "Plaintiff's response" in an attempt to challenge the propriety of the attorney's fees awarded to Nanticoke in the memorandum opinion dated September 18, 2009 (hereinafter "the opinion"). Because I do not have jurisdiction to consider these claims, I cannot take the "Plaintiff's response" into consideration.

In Delaware, as you know, "a motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision."<sup>1</sup> The five-day rule for filing and serving motions for reargument is jurisdictional, and judges do not have the discretion to extend this deadline.<sup>2</sup> Dr. Sternberg failed to file a motion for reargument within the five-day jurisdictional time limit related to the opinion dated September 18, 2009. Thus, I do not have jurisdiction to consider the merits of the "Plaintiff's response" as contained in your letter dated October 8, 2009.<sup>3</sup>

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<sup>1</sup> *Super. Ct. Civ. R. 59(e)*.

<sup>2</sup> *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1110 (Del. 2006).

<sup>3</sup> *Id.*

I will, however, take the liberty to respond to your suggestion that the award of attorney's fees was prematurely made in the opinion. In doing so, you claim that attorney's fees were awarded for reasons that were not fully briefed by either party. You also offer law indicating that HCQIA attorney's fees are inappropriate in cases where the record in that regard is incomplete.<sup>4</sup>

I certainly appreciate the holding in *Farr* even if the circumstances of that case differ substantially from the present matter. The *Farr* Plaintiff "filed no opposition or ever indicated any intention of opposing Defendants' motion."<sup>5</sup> In addition, as your letter points out, the plaintiff there neglected to respond to requests for discovery and ignored the motion for summary judgment.<sup>6</sup> Despite the plaintiff's conduct, the *Farr* Defendants apparently failed to develop a record on the award of attorney's fees. Thus, the *Farr* Court ordered the defendants to file a brief establishing a record to show that the plaintiff acted unreasonably or in bad faith, the legal standards by which that evidence should be reviewed, and upon whom costs should be imposed.<sup>7</sup>

In light of the plaintiff's conduct, the *Farr* Court found it necessary to establish a record prior to imposing HCQIA attorney's fees. Yet, it simply cannot be said that the record regarding attorney's fees has not been fully developed in the present matter. I remind counsel that Dr. Sternberg initially filed a motion for summary judgment on the issue of HCQIA attorney's fees. Thereafter, both sides provided the Court with multiple briefings and oral argument regarding the circumstances of this case. And, more specifically, I note that Dr. Sternberg provided the Court with arguments against an award of attorney's fees when Nanticoke filed its own counterclaim on this issue. As a result of such a substantial record here, *Farr's* holding is inapposite.

Moreover, a reviewing court "shall" award a reasonable attorney's fee at the conclusion of the action to a defendant when that defendant has established that they are among those persons covered by the HCQIA, that HCQIA standards were followed, that they substantially prevailed, and that the plaintiff's claim was frivolous, unreasonable, and without foundation or in bad faith.<sup>8</sup> In addition, the determination of whether the party's conduct was frivolous or without foundation is a question firmly committed to the sound discretion of the trial court.<sup>9</sup> I will not rehash the opinion; its conclusions on the attorney's fee matter need not be justified here given this discretionary authority and the considerable record developed in this case.

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<sup>4</sup> See *Farr v. Healtheast, Inc.*, 1993 WL 220680, at \*14 (E.D. Pa. June 9, 1993).

<sup>5</sup> *Id.* at \*1.

<sup>6</sup> *Id.* at \*14.

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 11113. See also *Matthews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 637 (3d Cir. 1996).

<sup>9</sup> *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992).

Because I do not have jurisdiction to consider these claims, the substance of the “Plaintiff’s response” contained in your letter cannot be further addressed at the trial level. However, a decision regarding the amount of attorney’s fees awarded to Nanticoke under the HCQIA is forthcoming.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary  
Matthew Carucci, Esquire  
Christopher A. Iacono, Esquire  
David Hackett, Esquire