

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES A. BIGGINS,	§	
	§	No. 668, 2010
Plaintiff Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Kent County
	§	
DR. ROBINSON, [<i>et al.</i>], ¹	§	
	§	
Defendants Below,	§	C.A. No. 10C-09-040
Appellees.	§	

Submitted: December 10, 2010

Decided: February 8, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 8th day of February 2011, upon consideration of the appellant’s opening brief, the appellees’ motion to affirm and the Superior Court record, it appears to the Court that:

(1) The appellant, James Arthur Biggins, is incarcerated at the James T. Vaughn Correctional Center serving a thirty-year sentence. On September 29, 2010, Biggins filed a complaint seeking compensatory and punitive damages in the Kent County Superior Court against employees of the Department of Correction

¹ The complaint in the Superior Court lists as defendants employees of the Department of Correction and the Department of Correction’s medical provider.

and the Department of Correction's medical provider.² Biggins filed a motion to proceed *in forma pauperis* (IFP) in connection with his complaint.

(2) As a frequent but consistently unsuccessful *pro se* litigant, Biggins is subject to the “three strikes” provision of title 10, section 8804 of the Delaware Code.³ Pursuant to section 8804(f), Biggins was, and is, enjoined from seeking IFP status unless he can demonstrate that he is “under imminent danger of serious physical injury at the time that the complaint is filed.”⁴

(3) By order dated October 1, 2010, the Superior Court denied Biggins' IFP motion. By order dated November 9, 2010, the Superior Court dismissed the complaint “without prejudice” for Biggins' failure to pay the filing fee. On appeal, Biggins argues that the Superior Court erred when denying his IFP motion without first considering, under section 8804(f), whether he was in “imminent danger of serious physical injury at the time that the complaint [was] filed.”

(4) Biggins is correct that the Superior Court neglected to make the “imminent danger” determination contemplated by section 8804(f).⁵ Nonetheless,

² In his complaint, Biggins alleged that the defendants “knowingly and wilfully allow unsafe and unsanitary infirmary housekeeping conditions” and serve “unregulate[d] food products.”

³ Del. Code Ann. tit. 10, § 8804 (1999 & Supp. 2010).

⁴ § 8804(f) (Supp. 2010).

⁵ See, e.g., *Biggins v. Danberg*, Del. Super., C.A. No. 09M-06-010, Witham, J. (July 13, 2009) (order denying motion IFP), *aff'd*, 2010 WL 376968 (Del. Supr.).

Biggins' claim of reversible error is unavailing as this Court, in the interest of justice, has once again made that determination *de novo*.⁶

(5) Having considered the parties' positions and the Superior Court record, the Court has concluded that neither the complaint nor Biggins' "affidavit of imminent danger and indigency" support a finding that Biggins was in "imminent danger of serious physical injury at the time that the complaint [was] filed."⁷ Biggins, therefore, was statutorily precluded from proceeding IFP, and the Superior Court's denial of Biggins' IFP motion and summary dismissal of his complaint for failure to pay the filing fee were both correct.

NOW, THEREFORE, IT IS ORDERED that the appellees' motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁶ See *Biggins v. Correctional Medical Services, Inc.*, 2010 WL 3447541 (Del. Supr.) (affirming summary dismissal of complaint after making *de novo* determination of appellant's § 8804(f) contention that he was in "imminent danger of serious physical injury at the time of filing" of the complaint).

⁷ Biggins' "affidavit of imminent danger and indigency" is attached to the opening brief as Exhibit A. Curiously, however, the Court notes that the "affidavit of imminent danger and indigency," which is captioned in the Superior Court and dated September 16, 2010 (the same date as Biggins' IFP motion), does not appear on the Superior Court's electronic docket.