SUPERIOR COURT
OF THE
STATE OF DELAWARE

NOEL EASON PRIMOS
JUDGE

KENT COUNTY COURTHOUSE
38 THE GREEN
DOVER, DELAWARE 19901
TELEPHONE (302) 739-5331

Stephen M. Parsons, SBI 00545643
Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *Stephen M. Parsons v. Richard P. Dushuttle, M.D., et al.*
C.A. No. K18C-12-022 NEP

Submitted: January 22, 2019
Decided: March 8, 2019

Dear Mr. Parsons:

Pending before the Court are your complaint, motion to proceed *in forma pauperis*, and motion for appointment of counsel.

You have sued Dr. Richard DuShuttle and Bayhealth Medical Center (hereinafter the "Defendants"), alleging, *inter alia*, that the Defendants committed medical malpractice after Dr. DuShuttle allegedly installed a hip replacement device improperly and you needed to undergo a second surgery. You have alleged damages in excess of $100,000.00 due to "debilitating pain that was suffered from the day of surgery…, the improper placement of [sic] artificial hip which caused the Plaintiff limited mobility and confinement to a wheelchair and the loss of wages…."

Included with your complaint is an application to proceed *in forma pauperis* and a motion for the appointment of counsel. This Court previously denied your *in forma pauperis* request for failure to fully complete the affidavit and answer all of the questions asked. You subsequently submitted a revised affidavit establishing to

the Court's satisfaction that you are indigent. Therefore, the Court grants your application to proceed *in forma pauperis*.

However, before your case may move forward, the Court must also review the complaint, and if the complaint is deemed to be legally frivolous, factually frivolous, or malicious, the Court must dismiss it.[1] While the Court views *pro se in forma pauperis* civil suits generously,[2] to protect judicial resources and the public good, the Court will not allow itself or members of the public "to become the victim[s] of frivolous or malicious claims which on their face are *clearly*: subject to a motion to dismiss under Superior Court Civil Rule 12(b)(6) or subject to a defense of immunity or subject to some other defect."[3] A claim is factually frivolous where the factual allegations are "baseless, of little or no weight, value or importance, [or] not worthy of serious attention or trivial."[4] A claim is legally frivolous where it is "based on an indisputably meritless legal theory."[5] A claim is malicious when "designed to vex, injure or harass, or one which is otherwise abusive of the judicial process or which realleges pending or previously litigated claims."[6]

In this case, you have previously sued Defendant Richard P. DuShuttle, M.D., twice in the United States District Court for the District of Delaware along with other Defendants who are not parties to this action, and in both suits you alleged medical malpractice pursuant to 42 U.S.C. § 1983.[7] In order to make out a viable claim under § 1983, "a plaintiff must allege facts showing a deprivation of a constitutional right,

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[1] 10 *Del. C.* § 8803(b).
[2] *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* pleadings held to less stringent standards than formal pleadings drafted by lawyers).
[3] *Lee v. Johnson*, 1996 WL 944868, at *1 (Del. Super. June 4, 1996) (emphasis in original).
[4] 10 *Del. C.* § 8801(4).
[5] *Id.* at § 8801(7).
[6] *Id.* at § 8801(8).
[7] *Parsons v. Delaware Department of Correction, et al.*, 2018 WL 1313974 (D. Del. Mar. 14, 2018); *Parsons v. Connections CSP, Inc., et al.*, 2018 WL 6521920 (D. Del. Dec. 12, 2018).

privilege or immunity by a person acting under color of state law."[8] Allegations of medical malpractice are not sufficient to establish a constitutional violation.[9] Rather, these claims fall within the purview of state law pursuant to 18 *Del. C.* §§ 6801-65, the "Delaware Health Care Negligence Insurance and Litigation Act." Thus, the District Court in both cases properly dismissed your complaints as legally frivolous.[10]

The claims you allege here are factually identical to certain claims that you alleged in the United States District Court. This Court finds that these claims have now been brought in the proper venue and that the claims do not rise to the level of a legally or factually frivolous or malicious suit. However, as explained below, your complaint cannot be accepted for filing due to the absence of an affidavit of merit.

Pursuant to 18 *Del. C.* § 6853(a), all healthcare negligence complaints must be supplemented with an affidavit of merit as to each defendant.[11] The affidavit of merit must be signed by an expert witness, be accompanied by a current curriculum vitae or resume of the witness, and state that there are reasonable grounds to believe that health-care medical negligence has been committed as to each defendant.[12] The General Assembly's purpose and intent behind Section 6853 was to reduce the filing of meritless medical negligence claims.[13] "By requiring an affidavit of merit,

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[8] *Parsons*, 2018 WL 6521920, at *4 (citing *Daniels v. Williams*, 474 U.S. 327, 330 (1986)).
[9] *Id.* at *3 (citing *White v. Napoleon*, 897 F.2d 103, 108-09 (3d Cir. 1990)).
[10] *Parsons*, 2018 WL 1313974, at *3 (dismissing Plaintiff's claim and stating that "[e]ven when reading the complaint in the most favorable light to Plaintiff, he fails to state an actionable constitutional claim against Defendants for deliberate indifference to a serious medical need."); *Parsons*, 2018 WL 6521920, at *3 (dismissing § 1983 claims, as the allegations fall under the aegis of a medical malpractice claim).
[11] 18 *Del. C.* § 6853.
[12] *Id.* at § 6853(a)(1).
[13] *Beckett v. Beebe Medical Center, Inc.*, 897 A.2d 753, 757 (Del. 2006).

Section 6853(a) simply requires a plaintiff to make a *prima facie* showing that there are reasonable grounds to believe that negligence occurred and caused an injury."[14]

Additionally, Section 6853(c) requires that the affidavit of merit "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."[15] The expert witness must be licensed to practice medicine as of the date of the affidavit, must have practiced or taught for at least three years in the same field as alleged in the medical negligence or malpractice complaint, and must be board certified in the same field as the defendant.[16]

If a litigant fails to include an affidavit of merit along with the complaint, this Court may not hear the case.[17] Specifically, Section 6853(a)(1) provides that if an affidavit of merit, or a motion to extend the time to file such an affidavit, is not filed with the complaint, the Prothonotary may not file the complaint or docket it. Section 6853(a)(1) does not provide an exception for indigent or *pro se* plaintiffs.[18] Although the Court will provide *pro se* litigants some degree of leniency, self-represented litigants must still

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[14] *Smith v. Correct Care Solutions, LLC*, 2012 WL 2352985, at *1 (Del. Super. June 20, 2012).
[15] *Id.* citing 18 *Del. C.* § 6853(c).
[16] 18 *Del. C.* § 6853(c).
[17] *Smith*, 2012 WL 2352985, at *2; *Dishmon v. Fucci*, 32 A.3d 338, 344-45 (Del. 2011). Pursuant to Section 6853(e), an affidavit of merit is not required if the complaint alleges a rebuttable inference of negligence and falls within one of three "exceptional circumstances," including (1) if a foreign object was unintentionally left within the body of the patient following surgery, (2) an explosion or fire occurred in the course of treatment, or (3) a surgical procedure was performed on the wrong patient or wrong body part. However, none of these exceptional circumstances have been alleged or are at issue in this case.
[18] *Enhaili v. Patterson*, 2018 WL 2272767, at *3 (Del. Super. Apr. 23, 2018); *Steedley v. Surdo-Galef*, 2013 WL 1228019, at *1 (Del. 2013).

abide by the same rules that apply to all other litigants, which includes filing an affidavit of merit.[19]

However, pursuant to Section 6853(a)(2), the Court may, in its discretion, grant a 60-day extension upon a timely motion made by the plaintiff and for good cause.[20] "Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review."[21] In this case, you did not file such a motion demonstrating good cause nor did you make a request for an extension of time to obtain the necessary affidavit(s). Nevertheless, there is precedent within this Court to grant additional time for filing an affidavit of merit even if the plaintiff has not filed a motion making such a request.[22] Therefore, you will be provided with an additional 60 days from the date of this order to obtain and submit an affidavit or affidavits of merit. If you do not submit an affidavit by that deadline, your complaint will not be accepted, and your case will be closed.

Lastly, the Court will address your motion for appointment of counsel. "There is a well-recognized right to appointed counsel for indigent defendants

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[19] *See Colatriano v. Roman*, 2017 WL 2889105, at *1 (Del. Super. July 7, 2017); *Hayward v. King*, 2015 WL 6941599, at *4 (Del. 2015); *Anderson v. Tingle*, 2011 WL 3654531, at *2 (Del. Super. Aug. 15, 2011).

[20] 18 *Del. C.* § 6853(a)(2).

[21] *Id.*

[22] *See Taylor v. Christiana Care Hospital*, 2015 WL 5004892, at *1 (Del. Super. Aug. 17, 2015) ("Although Plaintiff had not made a timely motion for a single 60-day extension for good cause pursuant to 18 Del. C. Sec. 6853(a)(2), in consideration of Plaintiff's self-represented status...the Court granted an additional 60 days for the filing of an affidavit of merit...."); *Smith v. Kobasa*, 113 A.3d 1081, at *1 (Del. 2015) (TABLE) (Superior Court denied defendants' motions to dismiss, holding that plaintiff was *pro se* and should be afforded additional time to obtain the affidavit of merit); *Forrest v. Fresenius Kidney Care*, 2018 WL 6261857, at *1 (Del. Super. Nov. 29, 2018) (Court granted plaintiff 60 days to file affidavit of merit, noting that dismissal is especially harsh penalty and justice requires some leniency with regard to *pro se* litigants); *Benner v. Correction Medical Services*, 2008 WL 4215972, at *2 (Del. Super. Aug. 12, 2008) (plaintiff allowed four months to obtain attorney, submit amended complaint correcting noted deficiencies, and submit affidavit of merit).

in criminal cases. Courts have been reluctant, however, to extend that right to indigent plaintiffs in civil cases, and have almost universally declined to do so."[23] This Court has previously held that simply being unable to undertake discovery or litigation or not having access to the statutory and case law of Delaware are not adequate bases for a court to appoint counsel.[24] Moreover, many attorneys work on a contingency fee basis wherein they are paid only if the plaintiff recovers monies through verdict or settlement.

In this case, you have indicated that you do not have the ability to present your own case, as you are "unskilled in the law and the complexity of the legal issues presented in the complaint...." You assert that appointment of counsel would serve the best interests of justice, and you argue that the six-pronged test from *Tabron v. Grace*,[25] and later adopted by the United States District Court for the District of Delaware in *Marvel v. Prison Industries*,[26] should be followed by this Court. This Court, however, has declined to follow the *Tabron* test on multiple occasions and instead has considered motions for the appointment of counsel under the more narrow purview of the 14th Amendment Due Process Clause.[27] Thus, the appropriate analysis for this

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[23] *Miller v. Taylor*, 2010 WL 1731853, at *1 (Del. Super. Apr. 28, 2010).

[24] *Benner*, 2008 WL 4215972, at *1; *Deputy v. Conlan*, 2008 WL 495791, at *1 (Del. Super. Feb. 13, 2008); *Jenkins v. Dover Police Comm'r*, 2002 WL 663912 (Del. Super. Apr. 5, 2002).

[25] 6 F.3d 147 (3d Cir. 1993). In *Tabron*, the Third Circuit Court of Appeals established the standard for evaluating a *pro se* litigant's motion for the appointment of counsel. First, the court must examine the merits of the plaintiff's claim in order to determine if it has some merit in fact or in law. If the court is satisfied that the claim is not malicious or frivolous, the analysis then proceeds to six factors that include: (1) the plaintiff's ability to present his own case; (2) the complexity of the legal issues; (3) the extensiveness of the factual investigation necessary to litigate the case; (4) the degree to which the case may turn on credibility determinations; (5) whether the testimony of expert witnesses will be necessary; and (6) whether the plaintiff can obtain and afford counsel on his own behalf. *Tabron*, 6 F.3d at 155-57.

[26] 2002 WL 199883 (D. Del. Feb. 7, 2002).

[27] *Miller*, 2010 WL 1731853, at *1. *See also Deputy*, 2008 WL 495791, at *1 (Court rejected plaintiff's attempt to raise some of *Tabron* factors and followed due process analysis); *Jenkins*, 2002 WL 663912, at *2 (following due process analysis).

Court to consider with regard to your motion for the appointment of counsel is the three-pronged analysis as laid out by the United States Supreme Court in *Matthews v. Eldridge*.[28] This analysis requires the Court to balance "(1) the private interests at stake, (2) the government's interest and (3) the risk that the procedure without counsel would lead to erroneous results."[29]

As to the first *Matthews* factor, the private interest at stake in this case is your right to meaningful access to the Courts. "Meaningful access has been interpreted to mean 'either access to an adequate law library or legal assistance in the preparation of complaints, appeals, petitions, etc., though the State is vested with discretion to select the method by which to implement this constitutional guarantee.'"[30] Here, you have not demonstrated that your meaningful access to the Courts has been restricted. You have access to a prison law library and have already filed a complaint, a petition to proceed *in forma pauperis*, two complaints in the United States District Court for the District of Delaware, and the present motion for appointment of counsel. Thus, the Court finds that you are sufficiently capable of following this Court's rules and procedures, and that there is nothing in the record demonstrating that you are being denied "meaningful access" to the Courts.[31]

The second *Matthews* factor requires the Court to examine the government's interest, which includes "...maintaining order and discipline in its penal institutions."[32] "This strong interest, when considered in the context

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[28] 424 U.S. 319, 321 (1976).
[29] *Jenkins*, 2002 WL 663912, at *2.
[30] *Deputy*, 2008 WL 495791, at *1 (quoting *Vick v. Department of Correction*, 1986 WL 8003, at *2 (Del. Super. Apr. 14, 1986)).
[31] *Cf. Miller*, 2010 WL 1731853, at *1. *See also Vick*, 1986 WL 8003, at *3 (holding that plaintiff's citation of case law diminished his claim that he had been denied "meaningful access" and was thus entitled to appointment of counsel by the Court).
[32] *Vick*, 1986 WL 8003, at *3.

of the extraordinary remedy Plaintiff seeks, means that Plaintiff must make a very strong showing that his private interest in meaningful access outweighs this strong and well-recognized State interest." [33] Here, you have failed to meet your burden of establishing how your case is different from the multitude of other cases in which inmates allege civil claims, including claims of medical malpractice.[34]

As to the last *Matthews* factor, this Court finds that the complexity of the issues, and the risk that proceeding without counsel would lead to erroneous results, do not justify the appointment of counsel in this case. This Court has previously held that "...a plaintiff's diminished chance of success in the absence of appointed counsel, without more, does not outweigh the State's strong interest in maintaining order in penal institutions."[35] Moreover, medical malpractice suits are not complex enough so as to justify the appointment of counsel for an indigent plaintiff, as "...both medical malpractice suits and inmate suits against prison officials are common."[36]

Additionally, it is worth noting that you have not made any representations to the Court regarding any attempts to retain private counsel.[37] As mentioned previously, many attorneys work on a contingency fee basis.[38] Thus, absent the presentation of any information to the contrary, this Court does not find that your indigence alone is responsible for your inability to retain counsel without assistance from this Court.

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[33] *Miller*, 2010 WL 1731853, at *1. *See also Jenkins*, 2002 WL 663912, at *2-3.
[34] *Cf. Miller*, 2010 WL 1731853, at *1; *Vick*, 1986 WL 8003, at *3.
[35] *Miller*, 2010 WL 1731853, at *2 (citing *Vick*, 1986 WL 8003, at *3)).
[36] *Id.*
[37] *See Jenkins*, 2002 WL 663912, at *3 (Court noted that there had been no showing of plaintiff's efforts to retain private counsel in denying plaintiff's motion for appointment of counsel).
[38] *See Benner*, 2008 WL 4215972, at *1.

WHEREFORE, for the foregoing reasons, your motion to proceed *in forma pauperis* is **GRANTED,** and your motion for appointment of counsel is **DENIED.** Your complaint will not be filed or docketed at this time due to the absence of an affidavit of merit, but you will be allowed an additional 60 days from the date of this order to file such an affidavit. Should you fail to do so, your case will be closed.

IT IS SO ORDERED.

/s/ Noel Eason Primos
Judge

NEP/dsc
Via File & ServeXpress & U.S. Mail
oc: Prothonotary