

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | |
|----------------------------------|------------------------------|
| JAMES A. BIGGINS, | § |
| | § No. 425, 2012 |
| Petitioner Below, | § |
| Appellant, | § |
| | § Court Below—Superior Court |
| v. | § of the State of Delaware, |
| | § in and for Kent County |
| CARL C. DANBERG, <i>et al.</i> , | § |
| | § C.A. No. K12C-05-016 |
| Respondents Below, | § |
| Appellees. | § |

Submitted: September 21, 2012
Decided: October 24, 2012

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

ORDER

This 24th day of October 2012, upon consideration of the appellant’s opening brief, the State’s motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, James Biggins, filed this appeal from a Superior Court order, dated July 13, 2012, which denied his motion for reargument and dismissed his complaint for failure to pay the required filing fee. Biggins sought to reargue the Superior Court’s order, dated May 14, 2012, denying his motion to proceed *in forma pauperis*. The State of Delaware, as the real party in interest, has moved to affirm the judgment below on the ground that it is manifest on the face of Biggins’ opening brief that his

appeal is without merit. We agree, and we grant the State's motion to affirm and affirm the Superior Court's judgment.

(2) The record reflects that Biggins is an inmate at the Vaughn Correctional Center. On May 7, 2012, Biggins filed his complaint against Department of Correction (DOC) personnel, alleging that they were grossly negligent in failing to dispense Biggins' prescribed Excedrin Migraine medicine. Biggins moved to proceed *in forma pauperis*. On May 14, 2012, the Superior Court denied Biggins' *in forma pauperis* motion, because he had failed to supply pertinent information and because Biggins' complaint failed to establish that he was in imminent danger of serious physical injury at the time his complaint was filed. The court noted that Biggins was required to establish "imminent danger of serious physical injury" in order to file as a pauper under 10 *Del. C.* § 8804(f), given his extensive history of filing frivolous lawsuits.¹ On May 29, 2012, Biggins filed an untimely motion for reargument² as well as a second motion to proceed *in forma*

¹ The "three strikes" rule of § 8804(f) provides that no prisoner shall file a complaint or an appeal *in forma pauperis* "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a federal court or constitutional or statutory court of the State that was dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may granted unless the prisoner is under imminent danger of serious physical injury at the time that the complaint is filed." DEL. CODE ANN. tit. 10, § 8804(f) (Supp. 2010).

² Pursuant to Delaware Superior Court Civil Rule 59(e), a motion for reargument "shall be served and filed within 5 days after the filing of the Court's opinion or decision."

pauperis. The Superior Court denied both motions and dismissed his complaint for his failure to timely pay the filing fee. This appeal followed.

(3) In his opening brief, Biggins summarily contends that the Superior Court abused its discretion in denying his *in forma pauperis* motion because he was, in fact, in “imminent danger” of serious physical injury. We find no merit to Biggins’ argument.

(4) A prisoner who has had three or more prior complaints or appeals dismissed as non-meritorious may only be permitted to file another complaint or appeal *in forma pauperis* if the prisoner can establish that he is under “imminent danger of serious physical injury at the time that the complaint is filed.”³ Biggins alleged in his complaint that the DOC’s failure to dispense Excedrin Migraine medicine to him caused him to endure unnecessary pain. In his opening brief on appeal, however, Biggins states that the matter was resolved on April 17, 2012, *i.e.*, before he filed his Superior Court complaint. Under no circumstances, therefore, could Biggins establish imminent danger of serious physical injury at the time the complaint was filed in order to overcome the “three strikes” rule. Accordingly, we find no abuse of discretion in the Superior Court’s denial of

³ DEL. CODE ANN. tit. 10, § 8804(f) (Supp. 2010).

his *in forma pauperis* motion or in the dismissal of his complaint for failure to pay the required filing fee.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice