

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>DEREK L. SIMMS, MR.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
<b>GLAXOSMITHKLINE</b>	:	<b>NO. 01-4528</b>
<b>Defendant.</b>	:	

**MEMORANDUM**

**DUBOIS, J.**

**DECEMBER 6, 2001**

Plaintiff, Derek L. Simms, a prisoner at a State Correctional Institution in Cresaptown, Maryland, seeks to bring a civil action in forma pauperis<sup>1</sup> without prepayment of fees or security therefor, asserting a product liability claim and claims under the Equal Protection Clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. In his Complaint, plaintiff alleges that defendant, SmithKline Beecham Pharmaceuticals, now known as GlaxoSmithKline,<sup>2</sup> failed to disclose certain side-effects associated with use of a medication which it manufactured, Paxil, and that plaintiff used Paxil and was injured as a result of such failure to disclose. The Complaint also states that, “. . .the plaintiff moves for equal protection of the law . . .,” and alleges that “[t]he defendants, Paxil, did act of deliberate indifference to serious medical needs of prisoner . . . constitutes unnecessary and wanton infliction of pain proscribed by the EIGHTH AMENDMENT. Estelle v. Gamble, 429 U.S. 97 (1976).”

With his Complaint, plaintiff filed a Motion to Proceed In Forma Pauperis. With respect

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1. Suits brought in forma pauperis are governed by 28 U.S.C. § 1915.
  2. The caption of the case was amended by Order dated September 13, 2001, so as to reflect the correct name of the defendant.

to the Motion, it appears that plaintiff is unable to pay the cost of commencing this action. Accordingly, leave to proceed in forma pauperis is granted. However, for the reasons that follow, plaintiff's Complaint will be dismissed under 28 U.S.C. § 1915(e) without prejudice to plaintiff's right to file an amended complaint if warranted by the facts and the law as set forth in this Memorandum.

**I. DISCUSSION**

Plaintiff, in the Complaint, appears to be alleging claims under the Equal Protection Clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. These are the only federal claims to which reference is made in the Complaint, and they provide the only basis of federal jurisdiction for the Complaint as it is presently worded.

Defendant, SmithKline Beecham Pharmaceuticals, now known as GlaxoSmithKline, cannot be liable to plaintiff under the Fourteenth Amendment or the Eighth Amendment because, inter alia, it is not a state actor. Thus, plaintiff's federal claims will be dismissed.

Dismissal of plaintiff's federal claims leaves open the question whether plaintiff may proceed in federal court on his product liability claim against defendant. He may do so only if there is federal jurisdiction and, under the facts of the case, there is federal jurisdiction only if plaintiff and defendant are citizens of different states, or if plaintiff is a citizen of a state and defendant is a citizen of a foreign state, and the amount in controversy exceeds the sum of

\$75,000.00, exclusive of interest and costs. 28 U.S.C. § 1332. Under § 1332, a corporation is deemed to be a citizen of the state in which it is incorporated and the state in which it has its principal place of business.

Because the Complaint fails to state anything about the citizenship of plaintiff and defendant, the Complaint will be dismissed for failure to allege sufficient facts to establish federal jurisdiction. The dismissal, pursuant to 28 U.S.C. § 1915(e), is without prejudice to plaintiff's right to file an amended complaint within forty-five (45) days if there is diversity of citizenship between the parties, and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

An appropriate order follows.

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	:	
<b>v.</b>	:	
	:	
<b>GLAXOSMITHKLINE</b>	:	<b>NO. 01-4528</b>
<b>Defendant.</b>	:	

**ORDER**

**AND NOW**, this 6<sup>th</sup> day of December, 2001, in accordance with the accompanying Memorandum, **IT IS ORDERED** that:

1. Plaintiff's Motion for Leave to Proceed In Forma Pauperis is **GRANTED**;
2. Plaintiff's federal claims under the Equal Protection Clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment are **DISMISSED** as legally frivolous pursuant to 28 U.S.C. § 1915(e);
3. Plaintiff's remaining claim - a product liability claim under state law - is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction; and,
4. Defendant is granted leave to file an amended complaint in the event there is federal jurisdiction for this claim under the diversity of citizenship provisions of 28 U.S.C. § 1332. Any such amended complaint shall be submitted to the Court within forty-five (45) days.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**

