STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN HENRY, a/k/a CAROLYN WRIGHT, Personal Representative of the Estate of RAYMOND WRIGHT,

Plaintiff-Appellant,

v

PATRICK LAUGHLIN, D.O., and LYNN BOWBEER,

Defendants-Appellees.

UNPUBLISHED
October 7, 1997

No. 196780
Ionia Circuit Court
LC No. 95-016961 NH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Plaintiff appeals by right from the order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). We reverse and remand.

Plaintiff's decedent, Raymond Wright, an inmate at the Ionia State Prison, died of a heart attack on December 18, 1990. Plaintiff filed the instant lawsuit alleging that defendants, prison medical personnel, failed properly to diagnose and treat Wright's condition. Plaintiff's complaint alleged a claim against defendants premised on the gross negligence exception to governmental immunity, and also alleged a claim, pursuant to 42 USC 1983, that defendants' conduct, done under color of state law, violated the Eighth Amendment's ban against cruel and unusual punishment. The trial court granted summary disposition to defendants on both claims. We review the trial court's decision to grant summary disposition de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994).

Plaintiff first argues that the trial court erred in granting summary disposition to defendants on her tort claim. We agree. The trial court granted summary disposition under MCR 2.116(C)(7) with respect to this claim. In deciding a motion for summary disposition pursuant to MCR 2.116(C)(7), a court must consider all documentary evidence submitted by the parties. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). All well-pleaded allegations are accepted as true and

construed most favorably to the nonmoving party in

determining whether the defendant is entitled to judgment as a matter of law. *Id*. at 162-163; *Summers v Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994). To defeat the motion for summary disposition, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Wade*, *supra* at 163; *Vargo v Sauer*, 215 Mich App 389, 398; 547 NW2d 40 (1996). A motion for summary disposition under MCR 2.116(C)(7) should not be granted unless no factual development could establish a basis for recovery. *Makris v Grosse Pointe Park*, 180 Mich App 545, 551; 448 NW2d 352 (1989).

To overcome the governmental immunity statute, plaintiff was required to prove that defendants' conduct rose to the level of "gross negligence," which is defined by statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). We believe that summary disposition was improper because plaintiff sufficiently alleged facts amounting to gross negligence on the part of defendants. Plaintiff's complaint alleged that Wright had a history of, and was taking medication for, various heart problems (including a triple post-coronary artery bypass performed while Wright was an inmate), and that he complained repeatedly, over the course of approximately ten months, of severe pain and numbness in his chest, shoulder, arms, and hands. The complaint further alleged that, despite all of this, defendants failed to conduct various diagnostic tests, to hospitalize Wright, or to obtain a cardiology consultation. In fact, plaintiff alleged that defendants even failed to read an EKG that was taken the night before Wright's death. Construing these well-pleaded allegations (which we accept as true) in favor of plaintiff, we conclude that reasonable minds could differ with respect to whether defendants demonstrated a substantial lack of concern for whether an injury would result. See *Johnson v Wayne Co*, 213 Mich App 143, 159; 540 NW2d 66 (1995). Accordingly, the trial court erred in granting defendants' motion for summary disposition with regard to plaintiff's tort claim.[1]

Plaintiff also maintains that the trial court erred in dismissing her claim brought under 42 USC 1983. We agree in part, but for reasons entirely different than those advanced by plaintiff. The trial court found that governmental immunity barred not only plaintiff's tort claim, but her § 1983 claim as well. We note initially that the trial court erred as a matter of law in granting summary disposition on that basis because state law immunities do not apply to claims brought under § 1983. *Rushing v Wayne Co*, 436 Mich 247, 259; 462 NW2d 23 (1990). Moreover, our review of the record indicates that the trial court evaluated plaintiff's § 1983 claim under the governmental immunity exception's "gross negligence" test. For the reasons stated below, this was error as well.

In order to state an actionable Eighth Amendment violation, a plaintiff must prove that prison officials acted with "deliberate indifference" to inmate health or safety. *Jackson v Detroit*, 449 Mich 420, 430; 537 NW2d 151 (1995), citing *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994). Thus, "[a] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official *knows of, and disregards, a substantial risk to inmate health or safety*." *Jackson*, *supra* at 431 (emphasis added); *Farmer*, *supra* at 837; *Carlton v Dep't of Corrections*, 215 Mich App 490, 506; 546 NW2d 671 (1996). For a claim such as this one, based on a failure to provide adequate medical treatment, the plaintiff must

show deliberate indifference to "serious medical needs." *Estelle v Gamble*, 429 US 97, 104; 50 L Ed 2d 251; 97 S Ct 285 (1976).

In *Farmer*, the Court rejected an objective deliberate indifference test in favor of a higher standard requiring *subjective* knowledge or awareness in order to impose liability under the Eighth Amendment. *Farmer*, *supra* at 837, 840; see also *Johnson*, *supra* at 152. In other words, it is not enough for a plaintiff to show that a substantial risk of harm was "obvious" and that a reasonable prison official would have noticed it. *Farmer*, *supra* at 841-842. As a result, mere negligence, or even "gross negligence," simply does not amount to deliberate indifference for Eighth Amendment purposes. See *Id*. at 835-836; see also *City of Canton v Harris*, 489 US 378, 389, n 7; 109 S Ct 1197; 103 L Ed 2d 412 (1989); *Jones v Wellham*, 104 F3d 620, 627 (CA 4, 1997); *Johnson*, *supra* at 162-163 (D.C. KOLENDA, J., concurring). As the *Farmer* Court explained:

> The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause of commendation, cannot under our cases be condemned as the infliction of punishment. [*Id*. at 837-838 (citations omitted).]

Having summarized the principles of law applicable to an alleged Eighth Amendment violation based on prison conditions, we now turn to the proceedings below. We conclude that the trial court erred in analyzing plaintiff's § 1983 claim under a "gross negligence" standard. Therefore, we reverse the trial court's order granting summary disposition to defendants with respect to that claim. On remand, the trial court is directed to reconsider plaintiff's § 1983 claim under the subjective "deliberate indifference" standard.[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] Plaintiff also submitted along with its motion for reconsideration the affidavit of Dr. Neil Farber, M.D., in which he stated that Wright demonstrated classic symptoms of unstable angina, and that defendants' failure to order a stress test or to read the EKG amounted to gross negligence. Dr. Farber averred that defendants displayed "a complete disregard for the well-being and life of Raymond Wright." However, because this affidavit was not before the trial court until after the trial court granted defendants' motion for summary disposition, we decline to consider it. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367, n 5; 547 NW2d 314 (1996).

[2] We express no opinion regarding whether summary disposition of plaintiff's § 1983 claim would be appropriate on remand.