

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 31, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2618**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**WILLIE HAMPTON,**

**PLAINTIFF-APPELLANT,**

**v.**

**DR. JOSE T. LLOREN, M.D., DR. GEORGE M.  
DALEY, M.D., DR. DOUGLAS E. ARMATO, M.D.,  
SHARON K. ZUNKER, S. ZIMMERMAN, ELAINE  
WHEELER, DAN BANIK, INDIVIDUALLY AND IN THEIR  
OFFICIAL CAPACITIES,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Dane County:  
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Willie Hampton appeals from a summary judgment denying his claim for monetary damages for medical malpractice and violations of

state and federal constitutional right to be free from cruel and unusual punishment. The issues on appeal are whether the trial court properly concluded that Hampton's failure to comply with the notice of claim requirements set forth in § 893.82, STATS., precluded his tort claims against the state employees and whether the court properly concluded that there was no genuine issue of material fact concerning the alleged Eighth Amendment violation by any defendant and Dr. Douglas Armato's negligence. We conclude that the trial court's grant of summary judgment was proper and therefore affirm.<sup>1</sup>

Willie Hampton was incarcerated at the Waupun Correctional Institution (WCI) from December 3, 1993, until June 15, 1995, when he was transferred to the Fox Lake Correctional Institution (FLCI). Hampton believed he was exposed to asbestos while on a work assignment at WCI.

On November 30, 1995, Hampton filed a complaint alleging that he requested health care and that the care he received from Department of Corrections (DOC) personnel was inadequate, that DOC personnel denied him access to his medical records, and that DOC employees' failure to respond to his requests for more care constituted medical negligence and violated his Eighth and Fourteenth Amendment rights. All of the defendants, with the exception of Dr. Armato, are medical personnel employed by the state.

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<sup>1</sup> The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment" and is applicable to the states through the Fourteenth Amendment. The state constitution counterpart is Article I, Section 6 of the Wisconsin Constitution. Hampton also argues that his First Amendment rights were violated by the defendants because they did not provide him with his medical records. This argument is not developed and not supported by legal authority. We therefore do not consider it. *State v. Gulrud*, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

The state employees moved for summary judgment on the grounds of failure to comply with the notice of claim requirement and lack of factual basis for a claim relating to any alleged denial of constitutional rights. In support of their motion, they submitted the notice of claim Hampton served on the attorney general. The notice bears the jurat form,<sup>2</sup> but that is blank. They also submitted affidavits from DOC medical personnel. Dr. Lloren, who is responsible for providing medical care to inmates at FLCI, and Dr. Daley, the medical director of the DOC Bureau of Health Services, stated that based upon their review of Hampton's medical records and their familiarity with the care given to him, they believe Hampton has not had a serious medical need for treatment during the time he has been incarcerated at FLCI and that there has not been any failure to provide him with adequate medical care. Sharon Zunker, the director of the DOC Bureau of Health Services, averred that she received a request from Hampton for treatment relating to asbestos exposure and that she discussed the request with Elaine Wheeler, the supervisor of the health services unit at FLCI. Wheeler averred that after reviewing Hampton's medical records from FLCI and WCI, she could find no information to suggest that Hampton had been exposed to asbestos.

The trial court granted the state employees' motion for summary judgment, concluding that it lacked subject matter jurisdiction over the tort claims against the state because Hampton failed to properly serve the notice of claim and that Hampton failed to show a genuine issue as to any material fact on the constitutional claims.

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<sup>2</sup> This consists of the phrase "subscribed and affirmed to before me this 26<sup>th</sup> day of November 1995" above a blank signature line. Below the blank signature line is: "STATE OF WISCONSIN—NOTARY PUBLIC. My Commission Expires \_\_\_\_\_."

Dr. Armato also moved for summary judgment. His affidavit in support of the motion averred as follows. He is a physician specializing in radiology with a private practice, Radiology Associates. Officials at WCI refer x-rays of inmates to Radiology Associates for reading. He is not employed by the State of Wisconsin and the state does not control the time or manner by which Radiology Associates reviews the x-rays that are sent to them.

In November of 1994, WCI officials sent two chest x-rays of Hampton to Dr. Armato. He read the x-rays and sent a report back to WCI officials. Neither Dr. Armato nor Radiology Associates was involved in the taking of the x-rays, the determination of necessary follow up care, nor the performance of such care. In August 1995, Dr. Armato received a letter from Hampton requesting a copy of Dr. Armato's report. Dr. Armato contacted WCI officials who confirmed that they had received a copy of the report and assured him that it would be made available to Hampton. In September 1995, Dr. Armato received another letter from Hampton requesting a copy of the report. Dr. Armato contacted WCI officials again who assured him that they had shown Hampton the report. The trial court granted summary judgment in favor of Dr. Armato, concluding that there were no genuine issues of fact as to his liability.

We review a trial court's grant of summary judgment de novo, applying the same methodology as the trial court. *Bauernfeind v. Zell*, 190 Wis.2d 701, 714, 528 N.W.2d 1, 5 (1995). A party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. Section 802.08(2), STATS.

First, Hampton argues that summary judgment was inappropriate because the notice served on the attorney general conformed to all the requirements of § 893.82, STATS.

A claimant may not bring an action against a state employee for acts committed in the discharge of the employee's duties "unless the claimant complies strictly with the requirements of [§ 893.82, STATS]." Section 893.82(2m), STATS. Failure to comply with the notice of claim requirements is a defect of subject matter jurisdiction that requires dismissal of the action. *Mannino v. Davenport*, 99 Wis.2d 602, 614, 299 N.W.2d 823, 828 (1981). A notice of claim must be properly "sworn to" by the claimant. Section 893.82(5). In order for a notice of claim to be properly "sworn to," the notice must be notarized. *Kellner v. Christian*, 197 Wis.2d 183, 198, 539 N.W.2d 685, 691 (1995). The notice served by Hampton was not notarized. Therefore with regard to the tort claims, the trial court correctly granted summary judgment in favor of the employees.

We also agree with the trial court that there was no genuine issue of fact regarding the alleged constitutional violations by the state employees. The government's failure to provide medical care for prison inmates constitutes an Eighth Amendment violation when it evinces deliberate indifference to an inmate's serious illness or injury. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). Medical negligence alone will not constitute an Eighth Amendment violation. *Lee v. Aklure*, 827 F. Supp. 556, 559 (E.D. Wis. 1993). The plaintiff must present evidence from which an intentional infliction of suffering, something beyond even gross negligence, might be inferred. *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7<sup>th</sup> Cir. 1991).

Hampton's affidavit in opposition to the defendants' summary motion disputes the adequacy of the medical care provided by the DOC medical personnel. This is not sufficient to create a genuine factual dispute on an Eighth Amendment claim. *See Davis v. Schmidt*, 57 F.R.D. 37, 41 (W.D. Wis. 1973) (difference of opinion between physician and patient concerning adequacy of medical care does not give way to a constitutional claim).

Second, Hampton argues that the court's grant of summary judgment on the claims against Dr. Armato was inappropriate because Dr. Armato denied him access to the x-ray report prepared at the request of the WCI officials and this constitutes medical malpractice and a violation of his Eighth Amendment rights. Again we disagree.

It is undisputed that the only record generated by Dr. Armato was the November 1994 x-ray report and that Dr. Armato sent the report to WCI officials to be included in Hampton's medical records. It is also undisputed that Dr. Armato contacted WCI officials on two occasions to confirm that the report was made available to Hampton. We agree with the trial court that there was no genuine issue of material fact regarding Dr. Armato's negligence.

Regarding the Eighth Amendment claim against Dr. Armato, it is undisputed that he is a private physician and not a state employee. In the case of an alleged violation of a constitutional right, an individual must be deprived of their rights "under color of state law" in order to maintain an action. *See* 42 U.S.C. § 1983. The requirement of conduct under color of state law can ordinarily be satisfied only if the action is brought against a state official. *Adkins v. Adkins*, 459 F. Supp. 406, 408 (S.D. W. Va. 1978). Hampton has presented no evidence or argument showing that this general rule does not apply in this case. Even if he

had, since the submissions do not show a genuine issue of material fact concerning Dr. Armato's negligence, it follows they are insufficient as a matter of law on the Eighth Amendment claim.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

