STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE, Minor, by Next Friend, Mother of JOHN DOE, ,	UNPUBLISHED December 8, 2009
Plaintiff-Appellant,	
v	No. 285274 Court of Claims LC No. 07-000119-MM
STATE OF MICHIGAN, DEPARTMENT OF HUMAN SERVICES, and DEPARTMENT OF HUMAN SERVICES WEXFORD-MISSAUKEE COUNTY,	
Defendants-Appellees.	

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims granting summary disposition to defendants under MCR 2.116(C)(7) (governmental immunity) and (C)(8) (failure to state a claim). We affirm.

This case involves an alleged sexual assault in the public restroom of a public beach of plaintiff by another minor who was a ward of the State.

Plaintiff brought the instant action against defendants, seeking monetary damages, and alleging that defendants failed to adequately supervise the ward's foster parent or adequately inform the ward's foster parent that a court order prohibited the ward from associating with minors without supervision, and that such failure constituted a "state-created danger" in violation of plaintiff's substantive due process rights guaranteed under the Michigan Constitution, art 1, § 17, and a violation of plaintiff's substantive due process rights guaranteed under the Michigan Constitution by virtue of custom and policy. We review constitutional questions and the grant of a motion for summary disposition de novo. *Travelers Insurance Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001); *People v Geno,* 261 Mich App 624, 627; 683 NW2d 687 (2004).

Plaintiff requests that we recognize the viability of the state-created danger doctrine under the Due Process Clause of Michigan's Constitution, Const 1963, art 1, § 17, and thus credit his cause of action. This doctrine provides that the Due Process Clause[1] of the United States Constitution protects individuals from private acts of violence in so far as the state caused or greatly increased the risk of such violence through an affirmative state action. *Kallstrom v City of Columbus*, 136 F3d 1055, 1066 (CA 6, 1998). Substantive due process claims are traditionally remedied by means of 42 USC 1983, when a plaintiff demonstrates a deprivation of a federal constitutional or federal statutory right and that the violation was committed by a person acting under the color of state law. See, e.g., *Harbin-Bey v Rutter*, 420 F3d 571, 575 (CA 6, 2005).[2] "The Due Process Clause of the Fourteenth Amendment does not impose upon the state an affirmative duty to protect its citizens against private acts of violence, but rather, places limitations on affirmative state action that denies life, liberty, or property without due process of law." *Kallstrom, supra* at 1065. Imposition of liability under the state-created danger doctrine requires a showing of (1) an affirmative act that creates or increases the risk of private acts of violence, (2) a special danger to the victim as distinguished from the public at large, and (3) deliberate indifference on the part of the state. *McQueen v Beecher Community School*, 433 F3d 460, 464, 470 (CA 6, 2006).

It is unnecessary for us to reach the issue of whether such a cause of action is or should be recognized in Michigan, because even if the state-created danger test was applicable, defendants' actions fail to satisfy its requisites. Plaintiff alleges that defendant's failure to adequately supervise the ward's foster parent and its alleged failure to inform her of a court order prohibiting the ward from associating with minors without supervision constitute affirmative actions. These are clearly alleged failures to act, and the "failure to act is not an affirmative act under the state created danger theory." *Cartwright v City of Marine City*, 336 F3d 487, 493 (CA 6, 2003).

Further, there was no foreseeable special danger to plaintiff in particular, because he was at a public beach when the alleged assault occurred, and the State's actions did not put him at any special risk as opposed to the public at large. See *Jones v Reynolds*, 438 F3d 685, 697-698 (CA 6, 2006) (a person injured as a result of a drag race that police officers permitted to take place was found to not have been an identifiable potential victim because she was one of 150 people present).

Alternatively, plaintiff argues that defendants had a custom or policy of deliberately withholding information about foster children's history or propensity for sexual abuse from foster parents, which in turn resulted in a violation of plaintiff's substantive due process rights. Governmental immunity is not available in a state court action alleging that a state governmental agency, by custom or policy, violated a right conferred by the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich

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[1] US Const, Am XIV.

[2] Section 1983 does not provide a remedy for a violation of the Michigan Constitution. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 196; 761 NW2d 293 (2008).

540, 544; 410 NW2d 749 (1987). "'A claim for damages against the *state* arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.'" *Powell, supra* at 336, quoting *Smith, supra* at 544 (emphasis added by *Jones*).[3]

We conclude, however, that we need not address the issue of whether a damages remedy is inferred by the state Constitution in this particular case, because the facts alleged by plaintiff do not establish a custom or policy that violates constitutional rights. Plaintiff alleges that defendants inadequately train and supervise their employees and foster parents and improperly place children in foster care. However, the factual allegations in the complaint are wholly conclusory and only recount the facts as they relate to the incident between the instant parties, rather than a wide-ranging policy or custom that the State and its agencies follow. Plaintiff fails to plead the existence of an officially executed policy or specific custom by the State, the identity of the policy maker, the course of action taken by the State in adopting the official policy or custom, or that the identified course of action was the policy maker's deliberate choice from among various alternatives. *Monell v New York Dept of Soc Services*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Accordingly, the trial court did not err in concluding that plaintiff failed to state a claim upon which relief could be granted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

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[3] *Jones* acknowledged that because a claimant can sue a municipality under 42 USC 1983, there is no need to infer a damages remedy for violation of the state Constitution allegedly committed by a municipality or municipal actor. *Jones, supra* at 337. "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy." *Jones, supra* at 337. "Our Supreme Court has held that there is no cause of action for damages against entities other than the state for a violation of state constitutional rights." *Bennett v City of Detroit Police Chief*, 274 Mich App 307, 316 n 3; 732 NW2d 164, 170 (2006), citing *Jones, supra* at 335-337. Therefore, as against the Department of Human Services of Wexford-Missaukee County, plaintiff has failed to state a claim on which relief can be granted. *Jones, supra* at 337; *Bennett, supra* at 316 n 3.