

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT PARKER, Personal Representative of  
the Estate of NICOLE KAREN SIMPSON,  
Deceased,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and FAMILY  
INDEPENDENCE AGENCY,

Defendants-Appellants.

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UNPUBLISHED  
March 9, 2004

No. 243828  
Court of Claims  
LC No. 00-017805-CM

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ROBERT PARKER, Personal Representative of  
the Estate of JORDAN WILLIAM SIMPSON,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and FAMILY  
INDEPENDENCE AGENCY,

Defendants-Appellants.

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No. 243829  
Court of Claims  
LC No. 00-017806-CM

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ROBERT PARKER, Personal Representative of  
the Estate of CHRISTOPHER KEVIN SIMPSON,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and FAMILY  
INDEPENDENCE AGENCY,

Defendants-Appellants.

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No. 243830  
Court of Claims  
LC No. 00-017809-CM

Before: Sawyer, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendants appeal as of right from an order of the Court of Claims denying their motion for summary disposition based upon governmental immunity. See MCR 7.202(7)(a)(v). We reverse and remand.

This case arises out of the deaths of plaintiff's decedents, three of Karen Simpson's adopted children, in a house fire in November 1998. A sibling is suspected of having started the fire. Thereafter, plaintiff brought actions in circuit court and the Court of Claims against Simpson, the State of Michigan and the Family Independence Agency, and three individual employees. The trial court granted summary disposition in favor of the FIA employees, but denied it as to the State of Michigan and the FIA. Accordingly, only the denial of summary disposition to the State of Michigan and the FIA on the basis of governmental immunity is at issue in this appeal.

Plaintiff's complaints against the State of Michigan are lengthy and detailed. At the risk of oversimplifying plaintiff's claims, plaintiff alleges that Karen Simpson was allowed to adopt more children than she was able to care for, especially in view of the children's special needs. Plaintiff additionally alleged that the FIA failed to properly investigate and take action when reports were made to the agency. Plaintiff describes various accidents and ailments suffered by Simpson over the years.<sup>1</sup> Under plaintiff's theory, not only should the State have not allowed Simpson to adopt all of the children, it should have intervened before the fire occurred. Had the State done so, according to plaintiff, the children would not have suffered from Simpson's inadequate supervision, which would not have lead to one of the children starting the fire, which in turn would not have lead to plaintiff's decedents' deaths.

We note that, in view of the procedural posture of this case, the only question before this Court is whether the trial court erred in denying in part defendants summary disposition under MCR 2.116(C)(7) based upon governmental immunity.<sup>2</sup> Thus, we must accept plaintiff's allegations as true and determine whether plaintiff has adequately stated a claim which avoids immunity. The issue whether plaintiff can establish those allegations and demonstrate proximate cause in order to succeed at trial is not at issue here.

We begin by noting that the burden is upon plaintiff to plead in avoidance of immunity. *Mack v Detroit*, 467 Mich 186, 190; 649 NW2d 47 (2002). Thus, it is not incumbent upon

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<sup>1</sup> The scenario set out by plaintiff essentially shows a situation spiraling out of control, with an abuse of prescription drugs leading to several accidents and ailments, which were then treated by increasing the prescriptions for various drugs. Plaintiff alleges that in the ten months previous to the house fire at issue here, Simpson had received 234 prescriptions, including 44 for narcotic drugs and 24 for psycho-stimulants.

<sup>2</sup> The trial court did grant summary disposition in favor of defendants on some aspects of plaintiff's claims.

defendants to establish that they are entitled to the protection of immunity, but upon plaintiff to establish that his claim as pled avoids the protection of immunity afforded defendants. As observed in *Mack, supra* at 204, a “plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function.” We review the trial court’s decision de novo. *Id.* at 193.

In the case at bar, plaintiff does not argue that one of the statutory exceptions to immunity applies. Rather, plaintiff relies on the constitutional tort concept set out in *Smith v Dep’t of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). In *Smith*, a sharply divided Court concluded that governmental immunity is not available in a state court action where “it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution” and that a “claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.” *Id.* In support of his claim, plaintiff alleged violations of the following constitutional provisions:

- Const 1963, art I, § 1: “Government is instituted for [the peoples’] equal benefit, security and protection.” (The trial court did grant summary disposition on this claim.)
- Const 1963, art I, § 2: “No person shall be denied the equal protection of the laws;”
- Const 1963, art I, § 9: “Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state.”
- Const 1963, art I, § 17: “No person shall be . . . deprived of life . . . without due process of law” and “The right of all individuals . . . to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.”
- Const 1963, art I, § 23: “The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.” (The trial court granted summary disposition on this claim.)
- Const 1963, art III, § 7: “The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.” (The trial court granted summary disposition on this claim.)
- Const 1963, art IV, § 51: “The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.” (The trial court granted summary disposition on this claim.)
- Const 1963, art VIII, § 8: “Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously disabled shall always be fostered and supported.”

We need not consider the constitutional provisions for which the trial court granted summary disposition. We turn now to consider those provisions with respect to which the trial court denied summary disposition.

Plaintiff's claim under the Equal Protection Clause, Const 1963, art I, § 2, is easily dealt with. In *Lewis v State of Michigan*, 464 Mich 781; 629 NW2d 868 (2001), the Supreme Court held that there can be no action against the state for violation of Const 1963, art I, § 2, under *Smith, supra*, because the final sentence in § 2 states that the "legislature shall implement this section by appropriate legislation." By this same rationale, art VIII, § 8, does not create an individual right, but is a direction to the legislature to foster and support institutions, programs and services for the care, treatment, education or rehabilitation of the disabled. This, too, clearly provides for legislative implementation and, therefore, does not allow for a cause of action against the state under the *Lewis* rationale.

Turning to plaintiff's remaining allegations of constitutional violations, under *Smith*, plaintiff must show either a violation of a constitutional right by virtue of a custom or policy or that this is otherwise an "appropriate case" under *Smith* to recognize a cause of action against the state. With respect to a violation of a constitutional right by virtue of a custom or policy of the state, plaintiff alleges no such custom or policy. That is, plaintiff's allegations, if true, make the argument that the caseworkers involved in this case tragically failed in their duties by allowing inappropriate foster care or adoptive placements, coupled with a failure to take action when the children were not receiving adequate care. But that is not the equivalent to saying that the manner in which the Simpson household was handled was directed by policy or custom established by the state and that those policies or customs violate the constitution. The only argument advanced by plaintiff regarding policy or custom is this: that there was a policy or custom to "not investigate too vigorously complaints made against Karen Simpson or we will have to find homes for eight or nine 'special needs' children and that would be simply too much work." While that may identify the mishandling of a particular case, it does not identify a policy or custom of violating the constitution. Accordingly, we conclude that plaintiff has not made a case under the policy or custom rule of *Smith*.

This then leaves us with the rather nebulous "appropriate case" standard under *Smith*. This is the primary argument advanced by plaintiff, but that argument is heavily fact oriented and plaintiff offers little in the way of legal analysis. Plaintiff does acknowledge, however, that the Supreme Court has clarified that *Smith* provides for an exception to governmental immunity based on a constitutional violation only if there is no other remedy available than monetary damages. *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000). In reaching this conclusion, the *Jones* Court relied upon Justice Boyle's opinion in *Smith, supra* at 647:

Of the several separate opinions, the one that extensively considered the question was that of Justice Boyle. She noted the United States Supreme Court's recognition of a damage remedy in *Bivens v Six Unknown Named Federal Narcotics Bureau Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), and explained:

"We would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases. As the *Bivens* Court recognized, there are circumstances in which a constitutional right

can only be vindicated by a damage remedy and where the right itself calls out for such a remedy. On the other hand, there are circumstances in which a damage remedy would not be appropriate. The absence of any other remedy would, as in *Bivens*, heighten the urgency of the question. Justice Harlan, concurring in *Bivens*, states that '[t]he question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted.' 403 US 407. In answering this question in the positive, Justice Harlan commented, '[f]or people in *Bivens*' shoes, it is damages or nothing.' *Id.*, p 410. Where a statute provides a remedy, the stark picture of a constitutional provision violated without a remedy is not presented. While a *Bivens*-type action may still be inferred, see *Carlson v Green* [446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980)] (federal tort claims remedy no bar to *Bivens* action), the existence of a legislative scheme may constitute 'special factors counseling hesitation,' *Bivens, supra*, p 396, which militate against a judicially inferred damage remedy.

*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy. [*Jones, supra* at 336-337.]

Thus, plaintiff has plead a claim in avoidance of immunity only if the only remedy available, assuming plaintiff is able to establish his claim, is monetary damages. Turning to the remaining alleged constitutional violations, we see none that compel a remedy of monetary damages. Art I, § 9, provides that slavery shall not be tolerated in Michigan. Although we find it offensive to equate adoption with slavery, even assuming that plaintiff could establish such a claim, monetary damages are not the appropriate remedy for slavery. Emancipation is the appropriate remedy. Indeed, it is the only acceptable remedy. Thus if we must accept plaintiff's argument that adoption constitutes slavery, the available remedy would be to invoke art I, § 9, as a basis to set aside the adoption itself.<sup>3</sup> If plaintiff only advances the more limited argument that it is the payment by the state of a subsidy to Simpson for adopting special needs children that makes this a case of slavery, then there would be an additional remedy available, namely a restraining order against the payment of such subsidies. In any event, there would be available remedies other than the payment of money to the adoptee for the state having allowed them to be adopted.

Next, plaintiff alleged a violation of the due process clause in art I, § 17. We are not prepared to say that there would always be an available remedy other than monetary damages where the state deprives a person of life, liberty or property without due process of law. But, in the case at bar, we are not persuaded that plaintiff has plead in avoidance of immunity. That is, plaintiff has pled that a private individual (the person who set the fire) deprived his decedents of life, not that defendants did. Therefore, plaintiff has not sufficiently pled the Due Process Clause to avoid the application of immunity. Similarly, with respect to the other clause of § 17 invoked by plaintiff, that his decedents' right to fair and just treatment in the course of executive

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<sup>3</sup> Indeed, the ultimate logic in plaintiff's argument would be a declaration that Michigan's adoption statute as a whole must be declared unconstitutional.

investigations, plaintiff failed to plead any mistreatment of the decedents which can only be remedied by monetary damages. That is, plaintiff pled a failure of the decedents to be protected by the investigation, but not an affirmative act committed against the decedents which constituted unfair or unjust treatment of the decedents. Therefore, the pleadings on this point fail to avoid immunity.

Finally, in *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989), the United States Supreme Court concluded that there was no governmental liability under the Due Process Clause for the failure to protect a child. The Due Process Clause does not establish an affirmative right to governmental assistance, but protects from unwarranted government interference. *Id.* at 196. While the procedural posture of this case does not put the question whether plaintiff has stated a claim under the Due Process Clause (the question addressed in *DeShaney*) before us, the following comments from *DeShaney*, *id.* at 202-203, do aptly summarize this case:

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. . . .

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

For the above reasons, we conclude that plaintiff has failed to plead in avoidance of immunity and that the trial court erred in denying defendants' motion for summary disposition.

Reversed and remanded with instructions to enter an order of summary disposition in favor of defendants. We do not retain jurisdiction. Defendants may tax costs.

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski