

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH RYBICKI and STEVEN RYBICKI,

Plaintiffs-Appellants,

v

HURON CLINTON METROPOLITAN
AUTHORITY,

Defendant-Appellee.

UNPUBLISHED

January 29, 2008

No. 276107

Macomb Circuit Court

LC No. 2005-004861-CZ

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's order granting defendant's motion for summary disposition in this case alleging a violation of Judith Rybicki's constitutional rights under 42 USC 1983. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs were operating their boat in a canal adjacent to Metro Beach Park, a facility operated by defendant. Steven Rybicki navigated the boat toward the pump-out station, but the station was closed. Judith Rybicki placed her hand on a post in order to push the boat away from the dock. In doing so, she caught her wedding ring on a rusty nail that protruded from the post. Judith Rybicki's finger was severed from her hand, and fell into the water.

Kathleen Kane, a passerby, testified that a sheriff's deputy dived into the water in an attempt to retrieve the finger, but could not do so. Kane telephoned a friend, Craig Brooks, whom she knew to be a certified diver, but he was not at home. A lifeguard arrived on the scene with diving equipment, told a park official that he was a certified diver, and offered to dive and search for the finger. Kane testified that the park official refused to allow the lifeguard to dive because the lifeguard was not in possession of proof of diver certification. Kane succeeded in contacting Brooks, who informed Kane that his diving tank did not contain sufficient oxygen for him to make a dive. The park official refused to allow Brooks to use diving equipment that belonged to the park. Eventually, Brooks brought his own equipment to the scene, made a dive, and retrieved the finger. Due to the passage of time, Judith Rybicki's finger could not be reattached.

Plaintiffs filed suit, alleging negligence,¹ and that “[d]efendant’s actions in depriving [Judith Rybicki] of her constitutionally protected property interest in the use of diving equipment abridged [Judith Rybicki’s] right to due process of law in violation of the Fourteenth Amendment of the U.S. Constitution, made actionable pursuant to 42 U.S.C. 1983.”²

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that it was entitled to governmental immunity because the operation of the park and marina constituted a governmental function. MCL 691.1407(1). Defendant asserted that in order to create an exception to the doctrine of governmental immunity as it applied to the alleged violation of 42 USC 1983, plaintiffs were required to demonstrate that defendant’s acts were grossly negligent.

In response, plaintiffs relied on *Beck v Haik*, 234 F3d 1267 (CA 6, 2000) (unpublished), in support of their assertion that a municipality can be held liable for constitutional violations for demonstrating an indifference to the safety of individuals.³ The trial court granted defendant’s motion for summary disposition.

We review a trial court’s decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

42 USC 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

¹ This count is not at issue in this appeal.

² Steven Rybicki sought damages for loss of consortium.

³ In *Beck, supra*, the plaintiffs’ decedent jumped or fell into the Manistee River from a bridge in Manistee. Two volunteer divers from a group that contracted with the City to provide rescue services if County divers were unavailable reached the scene, and offered to dive into the river to search for the decedent. The Chief of Public Safety prohibited the men from making the dive, noting the arrangement with the County, and stating that County divers were enroute to the scene. County divers arrived and recovered the decedent’s body. The plaintiffs filed state and federal claims against the County and the City, as well as against various individuals. The federal district court entered summary judgment in favor of the defendants. The *Beck* Court affirmed in part and reversed in part, holding that while no constitutional right existed to state-provided rescue, slip op at 3, a question of fact existed as to whether the decedent was deprived of an unhindered private rescue attempt in the absence of an available and timely state-sponsored alternative. *Id.* at 4. The *Beck* Court reinstated the claims against the County and the City based on 42 USC 1983.

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

To establish a claim based on 42 USC 1983, the facts, viewed in a light most favorable to the plaintiff, must show that a constitutional violation occurred, and that the violation involved clearly established constitutional rights of which a reasonable person would have known. If no constitutional violation occurred, the defendant has qualified immunity from liability. *Dean v Childs*, 262 Mich App 48, 53-54; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005). A political subdivision, such as defendant, is a "person" for purposes of liability under 42 USC 1983. However, such an entity cannot be held vicariously liable for the acts of its employees. *Monell v Dep't of Social Services*, 436 US 658, 690-691; 98 S Ct 1818; 56 L Ed 2d 611 (1978). Rather, liability depends on whether the plaintiff's constitutional rights were violated as a result of a policy or custom attributable to the political subdivision. *Id.* at 694.

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition. Plaintiffs contend that, the park official prevented the lifeguard, who represented that he was a certified diver, from making a dive to attempt to retrieve the finger. Plaintiffs assert that the actions of the park official were akin to those of the public safety official in *Beck*, *supra*, and effectively impeded a private rescue effort when no state-sponsored alternative was readily available. We disagree.

It is undisputed that there exists no constitutional right to state-sponsored rescue efforts. *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 196; 109 S Ct 998; 103 L Ed 2d 249 (1989). However, a state cannot arbitrarily assert its power in a manner that results in loss of life. See *Ross v United States*, 910 F2d 1422, 1433 (CA 7, 1990). Plaintiffs' assertion that the actions of the park official in preventing the lifeguard from diving to recover the finger were akin to those of the public safety official in *Beck*, *supra*, is without merit. In *Beck*, *supra*, the public safety official knew that the civilian volunteers on the scene were certified to make rescue dives, but prevented the volunteers from attempting to rescue decedent, notwithstanding the fact that no county divers were available to make a timely rescue attempt. Here, the lifeguard represented that he was a certified diver, but was unable to substantiate that claim. Moreover, the lifeguard was not a civilian volunteer, but rather was an employee of the park. Under these circumstances, the decision to prohibit the lifeguard from making a dive did not constitute a deprivation of Judith Rybicki's constitutional rights. *DeShaney*, *supra*.

Furthermore, the park official did not prohibit Brooks, a civilian volunteer, from making a dive to retrieve the finger, using his own equipment. Plaintiffs alleged that Judith Rybicki had a constitutionally protected property interest in the use of diving equipment. However, plaintiffs cite no authority to support their apparent assertion that the park had a duty to loan diving equipment to Brooks. The park had no duty to attempt to retrieve the finger, *id.*, and did not prevent a civilian volunteer from using privately owned equipment to do so.

Finally, plaintiffs have not demonstrated that the park official acted pursuant to any policy established by defendant. Such a showing is necessary in order to sustain a claim based

on 42 USC 1983. *Monell, supra* at 694. The trial court correctly granted defendant's motion for summary disposition.

We affirm.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto