STATE OF MICHIGAN

COURT OF APPEALS

BESTWAY RECYCLING, INC., and AARO DISPOSAL, INC.,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN and AL HOWARD,

Defendants-Appellees,

and

LAWRENCE BEAN and JAMES SYGO,

Defendants.

UNPUBLISHED
June 4, 2002

No. 226926
Court of Claims
LC No. 99-017517-CM

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiffs Bestway Recycling, Inc., and Aaro Disposal, Inc. (plaintiffs), appeal as of right from the court of claims' order granting summary disposition in favor of defendants State of Michigan, Department of Environmental Quality f/k/a Department of Natural Resources (DNR), and Al Howard, Lawrence Bean, and James Sygo (defendants). On appeal, plaintiffs do not challenge the grant of summary disposition in favor of Bean and Sygo. We affirm.

Plaintiffs first argue that the court of claims erred in granting summary disposition in favor of defendant State of Michigan pursuant to MCR 2.116(C)(8) because they have properly pleaded and supported with factual allegations a valid state constitutional tort claim.[1]

[1] Const 1963, art 1, § 17 provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair

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We review a court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion under MCR 2.16(C)(8), a court considers only the pleadings and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is appropriate under this subsection "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

In appropriate cases, a claim for damages against the state arising from the state's violation of the Michigan Constitution may be recognized. *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989); *Reid v State of Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000). However, the law in this area is undeveloped. *Marlin v City of Detroit (After Remand)*, 205 Mich App 335, 337; 517 NW2d 305 (1994). In *Johnson v Wayne County*, 213 Mich App 143, 156; 540 NW2d 66 (1995), this Court stated:

> In *Smith*, Justice Boyle explained that liability should be imposed on the state only where the action of a state agent implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers or governmental custom even though such a custom has not received formal approval through the body's official decision-making channels. *Smith, supra*, at 643 (Boyle, J.).

In *Reid, supra* at 629, this Court explained that "the state will be liable for a violation of the state constitution only in cases where a state custom or policy mandated the official's or employee's actions."

According to plaintiffs, "it is unnecessary to the existence of state constitutional tort liability that the 'policy' at issue emanate directly from an official policy statement, statute, ordinance or regulation, or even a decision 'officially adopted and promulgated by the [s]tate,'" rather a single decision by a policymaker may constitute an act of official government policy, and their complaint demonstrates a state policy of appeasement to political pressures. However, plaintiffs' claim is based on the Michigan Constitution and plaintiffs cite no Michigan law in support of their claim, nor have we found any. Absent direction from the Michigan Supreme Court, we are not inclined to expand the law of constitutional tort in Michigan in these unpersuasive circumstances. Plaintiffs have failed to demonstrate a custom or "policy of appeasement" to political pressures.

Next, plaintiffs argue that the court of claims erred in dismissing on jurisdictional grounds, MCR 2.116(C)(4), plaintiffs' gross negligence claim against defendant Al Howard, then chief of the Waste Management Division of the DNR. We disagree.

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> and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

We review a grant of summary disposition pursuant to MCR 2.116(C)(4) "'to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact.'" *Genesis Center, PLC v Comm'r of Financial & Ins Services*, 246 Mich App 531, 540; 633 NW2d 834 (2001), quoting *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). The court of claims is a legislatively created court of limited jurisdiction, *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 272; 583 NW2d 512 (1998), which extends to suits against state officers when the acts complained of were performed in the officer's official capacity, *Carlton v Dep't of Corrections*, 215 Mich App 490, 501; 546 NW2d 671 (1996). "State officers are the executive officers of state departments or commissions." *Steele v Dep't of Corrections*, 215 Mich App 710, 715-716; 546 NW2d 725 (1996).

Here, although Howard's position as Chief of the Waste Management Division of the DNR is a management position, it does not rise to the level of state officer. *Steele*, *supra*; see MCL 16.355; MCL 324.501(2), (4). Thus, the trial court properly granted summary disposition for lack of jurisdiction pursuant to MCR 2.116(C)(4).

Because we have concluded that the court of claims' grant of summary disposition to the State of Michigan and Howard were proper, we need not address plaintiffs' final argument.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra