

STATE OF MICHIGAN
COURT OF APPEALS

MARIE DEAN, Personal Representative of the
Estates of TALEIGHA MARIE DEAN, Deceased,
AARON JOHN DEAN, Deceased, CRAIG
LOGAN DEAN, Deceased, and EUGENE
SYLVESTER, Deceased,

Plaintiff-Appellee,

v

JEFFREY CHILDS and CHARTER TOWNSHIP
OF ROYAL OAK,

Defendants-Appellants.

FOR PUBLICATION
May 13, 2004
9:05 a.m.

No. 244627
Oakland Circuit Court
LC No. 01-029844-NO

Official Reported Version

Before: Cooper, P.J., and Griffin and Borrello, JJ.

COOPER, P.J.

Defendants Jeffrey Childs and the Charter Township of Royal Oak (the township) appeal by leave granted, following remand from our Supreme Court, the trial court's order partially denying their motion for summary disposition.¹ We affirm the trial court's denial of Childs's motion with regard to the state law claims, reverse the denial of the township's motion with regard to the failure to train claim pursuant to 42 USC 1983, and remand for further proceedings.

I. Facts and Procedural History

On April 6, 2000, plaintiff's home in Royal Oak Township was set on fire, allegedly by an arsonist. The fire was initially limited to the front of the house. Plaintiff successfully escaped while a firefighter attempted to rescue her four children, who were trapped in the rear of the home. Childs² ignored a fire hydrant directly across the street from the burning home, choosing

¹ We denied defendants' application for leave to appeal in *Dean v Ford*, unpublished order of the Court of Appeals, issued August 2, 2002 (Docket No. 240573). In lieu of granting leave to appeal, the Supreme Court remanded the matter to this Court in *Dean v Ford*, 467 Mich 898 (2002).

² At the time, the position of fire chief was vacant. Childs was the Shift Supervisor and the top appointed official due to the vacancy.

instead to connect to a hydrant a block away. Although Childs was informed of the rescue attempt at the rear of the home, he ordered the fire crew to fight the fire by shooting water at the front of the home. This action immediately forced the fire and smoke toward the rear of the home. Plaintiff claims that the action destroyed any hope of rescuing the children. All four children perished in the fire.

In her third amended complaint, plaintiff alleged that Childs was grossly negligent and that his actions were the proximate cause of her children's deaths. Specifically, plaintiff alleged that Childs took "affirmative actions that significantly increased the risk of danger" to plaintiff by driving to a distant fire hydrant and by preventing the rescue of the Dean children by forcing the fire toward the rear of the house. Plaintiff further alleged that both defendants deprived her of life and liberty without due process of law in violation of the Fourteenth Amendment and 42 USC 1983, and that their actions showed "deliberate indifference to the risk of injury or death" and the safety of others. Specifically, plaintiff alleged that the township knowingly failed to adequately staff, fund, and train its fire department.

Defendants thereafter moved for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8), which the trial court granted in part.³ The trial court dismissed all claims against Childs under 42 USC 1983, because "there was no clearly established constitutional right to any particular level of competence in fighting fires."⁴ The trial court also dismissed plaintiff's § 1983 claims against the township regarding its failure to adequately fund and staff its fire department. Plaintiff's failure to train claim against the township was left intact, as that issue "was not raised or addressed" in defendant's motion for summary disposition. The trial court denied defendants' motion with regard to the state law wrongful death claims against Childs.⁵

II. Legal Analysis

We review a trial court's determination regarding a motion for summary disposition *de novo*.⁶ A motion under MCR 2.116(C)(7) "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties."⁷ A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.⁸

³ We note that plaintiff has not challenged those rulings adverse to her.

⁴ Opinion and order granting summary disposition, p 2, citing *Saucier v Katz*, 533 US 194; 121 S Ct 2151; 150 L Ed 2d 272 (2001).

⁵ Opinion and order granting summary disposition; opinion and order clarifying opinion and order granting summary disposition.

⁶ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

⁷ *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

⁸ *Beaudrie*, *supra* at 129-130.

A. 42 USC 1983

The power of citizens to sue the state for a deprivation of their civil rights is granted in 42 USC 1983. The statute 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 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.^[9]

The only remaining claim pursuant to § 1983 is that the township deprived plaintiff of life and liberty without due process of law under the Fourteenth Amendment in that its failure to properly train its fire department was the proximate cause of her children's deaths.

To establish a § 1983 claim, the facts, viewed in the light most favorable to the plaintiff, must show that a constitutional violation occurred.¹⁰ If a violation is found, the court must then determine "whether the violation involved 'clearly established constitutional rights of which a reasonable person would have known.'"¹¹ If no constitutional violation occurred, the defendant has qualified immunity from liability.¹² "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'"¹³

The township asserts that plaintiff has failed to show a constitutional violation based on the United States Supreme Court's decision in *DeShaney v Winnebago Co Dep't of Social Services*.¹⁴ According to *DeShaney*, the Due Process Clause does not confer an affirmative right to governmental aid, including protective services, even if the aid is necessary to secure life, liberty or property.¹⁵ There are two exceptions to this general rule. First, when the government places a person in custody, thereby preventing him from protecting himself, a special relationship is created. This special relationship places the government under a heightened duty to protect that person.¹⁶ Second, the government has a duty to protect under the "state-created

⁹ 42 USC 1983.

¹⁰ *Ewolski v Brunswick*, 287 F3d 492, 501 (CA 6, 2002).

¹¹ *Id.*

¹² *Saucier, supra* at 201.

¹³ *Id.* at 200, quoting *Mitchell v Forsyth*, 472 US 511, 526; 86 L Ed 2d 411; 105 S Ct 2806 (1985).

¹⁴ *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989).

¹⁵ *Id.* at 196.

¹⁶ *Id.* at 198-200.

danger theory" when the government either created the danger or took actions rendering the person more vulnerable to the danger.¹⁷

Plaintiff's claim clearly does not fall into the first *DeShaney* exception, as the Dean children were not in the custody of the township at the time of their deaths. Therefore, the issue before us is whether the township created the danger or rendered plaintiff more vulnerable to harm by failing to adequately train its fire department. To establish a claim under the state-created danger theory, a plaintiff must show

1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff.^[18]

The Sixth Circuit has held that the failure to act cannot form an affirmative act to support a state-created danger.¹⁹ However, the United States Supreme Court has held that a municipality may be liable under § 1983 for the failure to train municipal employees under certain circumstances.²⁰ In *Canton v Harris*, the Supreme Court held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."²¹ The inadequate training must represent a "city policy," which the *Harris* Court described as follows:

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.^[22]

¹⁷ *Id.* at 201.

¹⁸ *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003), citing *Kallstrom v Columbus*, 136 F3d 1055, 1066 (CA 6, 1998).

¹⁹ *Id.*, citing *Sargi v Kent City Bd of Ed*, 70 F3d 907, 912-913 (CA 6, 1995).

²⁰ *Canton v Harris*, 489 US 378, 380; 109 S Ct 1197; 103 L Ed 2d 412 (1989).

²¹ *Id.* at 388.

²² *Id.* at 390 (internal footnotes omitted).

Although the plaintiff in *Harris* was in police custody, failure to train has since been recognized as a valid cause of action in noncustodial situations.²³ However, in a noncustodial situation, the government action often relates to an emergency service, which must, by necessity, be carried out quickly without deliberation.²⁴ The standard is, therefore, much higher than deliberate indifference. A plaintiff must prove that the government action showed an affirmative intent to cause harm.²⁵ Unfortunately, plaintiff failed to properly plead her § 1983 claim regarding the township's failure to train its fire department. Plaintiff alleged that the township's actions showed "deliberate indifference" to the safety of others. This standard is insufficient to meet the burdensome requirements of a § 1983 state-created danger claim in a noncustodial situation. Therefore, we are compelled to reverse the trial court's partial denial of summary disposition with regard to the township.

B. State Law Claims

As we noted *supra*, the trial court denied Childs's motion for summary disposition with regard to plaintiff's state law wrongful death claims. Childs asserted both a statutory and common-law basis for immunity from liability.

Under MCL 691.1407(2), a municipal employee is immune from tort liability if: (1) the employee reasonably believes that his actions are within the scope of his authority; (2) the employee is discharging a governmental function; and (3) the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."²⁶ "Gross negligence" is defined in the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."²⁷

Plaintiff presented evidence of Childs's gross negligence through the affidavit of firefighter John Soave. Soave stated that Childs ignored a fire hydrant in the immediate area in favor of one a block away and ordered water shot at the front of the home, forcing fire and smoke into the rear of the home despite the knowledge that a firefighter was attempting to rescue

²³ See *Holiday v Kalamazoo*, 255 F Supp 2d 732, 736 (WD Mich, 2003), citing *Berry v Detroit*, 25 F3d 1342, 1345 (CA 6, 1994) (involving allegation that city's failure to train regarding use of deadly force resulted in individual's death during an arrest), *Russo v Cincinnati*, 953 F2d 1036, 1045-1046 (CA 6, 1992) (involving allegations that individual's death during arrest resulted from city's inadequate training regarding the mentally ill and the use of excessive force); *Hill v McIntyre*, 884 F2d 271 (CA 6, 1989) (involving allegations that the city failed to properly train its officers in the method of obtaining search warrants).

²⁴ *Bukowski v Akron*, 326 F3d 702, 710 (CA 6, 2003).

²⁵ See *Sacramento v Lewis*, 523 US 833, 854; 118 S Ct 1708; 140 L Ed 2d 1043 (1998) (government action must show intent to harm or worsen condition); *Claybrook v Birchwell*, 199 F3d 350, 359 (CA 6, 2000) (government actions must have been malicious, sadistic, and "for the very purpose of causing harm").

²⁶ MCL 691.1407(2).

²⁷ MCL 691.1407(2)(c).

the children from that area. This conduct can fairly be described as "so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Furthermore, plaintiff presented evidence that Childs's conduct was "the proximate cause" of the children's deaths. "The proximate cause" has been defined as "the one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'"²⁸ Soave stated in his affidavit that Childs caused the fire "to be pushed" toward the children and prevented the rescue attempt. While it is likely that the arsonist was "a proximate cause" of the children's deaths, plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner. As the factual development of plaintiff's claim may justify recovery, the trial court properly denied Childs's motion for summary disposition on the ground of statutory immunity.

Childs claims common-law immunity under the public duty doctrine. Our Supreme Court has defined the public duty doctrine as follows:

[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.^[29]

In *Beaudrie v Henderson*, our Supreme Court expressly limited the protection of the public duty doctrine to police officers.³⁰ The liability of all other municipal employees "should be determined using traditional tort principles without regard to the defendant's status as a government employee."³¹ Therefore, Childs is not entitled to the protection of this doctrine and the trial court properly denied his motion for summary disposition on the ground of common law immunity.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Borrello, J., concurred.

/s/ Jessica R. Cooper
/s/ Stephen L. Borrello

²⁸ *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000).

²⁹ *White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996), quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386.

³⁰ *Beaudrie, supra* at 134.

³¹ *Id.*