

STATE OF MICHIGAN
COURT OF APPEALS

Estate of NICHOLAS DANIEL BRAMAN.

REBECCA JASINSKI, Personal Representative
for the Estate of NICHOLAS DANIEL BRAMAN,

Plaintiff-Appellant,

v

SHERI TYLER, JAMIE LOVELACE, MARY
SOMMERS, RHODA DIETRICH, MARIANNA
UDOW, LAURA CHAMPAGNE, TED
FORREST, and DEPARTMENT OF HUMAN
SERVICES d/b/a MONTCALM COUNTY
CHILD PROTECTIVE SERVICES d/b/a
SAGINAW COUNTY CHILD PROTECTIVE
SERVICES,

Defendants-Appellees.

Estate of CALISTA SPRINGER.

SUZANNE LANGDON, Personal Representative
for the Estate of CALISTA SPRINGER,

Plaintiff-Appellant,

v

PATRICIA SKELDING, CYNTHIA BARE,
MARIANNA UDOW, LAURA CHAMPAGNE,
TED FORREST, and DEPARTMENT OF
HUMAN SERVICES d/b/a ST. JOSEPH
COUNTY CHILD PROTECTIVE SERVICES,

Defendants-Appellees.

UNPUBLISHED
March 1, 2012

No. 302545
Court of Claims
LC No. 10-000081-MM

No. 302622
Court of Claims
LC No. 10-000103-MM

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

In these consolidated appeals,¹ plaintiffs appeal as of right from the trial court's final orders granting defendants' motions for summary disposition. For the reasons that follow, we affirm the result reached in both cases.

I. FACTS AND TRIAL COURT PROCEEDINGS

A. DOCKET NO. 302545

On September 7, 2010, plaintiff, the personal representative of the estate of Nicholas Daniel Braman,² filed this complaint against defendants pleading a sole claim of a "Michigan Constitutional Tort Claim" ("MCTC"). The individual defendants were all employees or officers of the Michigan Department of Human Services ("DHS"), which is also a defendant.

Plaintiff alleged that defendants were derelict in their mandatory duties to investigate and safeguard Nicholas from his extremely abusive father, Oliver Wayne Braman. Plaintiff detailed a long history of reported child abuse/neglect complaints to DHS of abuse committed by the father against the Nicholas and his other siblings. From 1998 to 2006, DHS received a variety of abuse/neglect complaints against the father, claiming that he: (1) physically hit the children; (2) neglected the living conditions of the children; (3) emotionally abused the children; (4) used a cattle prod to shock the children as a method of physical discipline; (5) withheld medication from the children; (6) improperly bathed with his older children; (7) threatened to kill the children; and (8) abandoned his children miles from their home as punishment.³

According to the complaint, Saginaw County DHS investigated the allegations that the father was punching the children in the stomach and using a cattle prod to discipline them. On August 27, 2007, DHS substantiated these allegations against the father; while noting that the other children were safe, Saginaw DHS reports indicated concern over the fact that Nicholas was still residing with the perpetrator.⁴ Shortly thereafter, the father was charged with, and later

¹ We consolidated these cases because they raise the same legal issues, and so it is more efficient to decide them together. *Estate of Braman*, unpublished order of the Court of Appeals, entered February 9, 2012 (Docket Nos. 302545 & 302622).

² The two decedents in these consolidated cases will be referred to collectively as "the decedents."

³ Only one of these earlier complaints was substantiated (February 2004), on the grounds that the father had improperly disciplined the children with beatings on the buttocks and fingers with a pair of pliers; however, the case was quickly closed without any services being provided.

⁴ It is unclear whether Saginaw CPS petitioned to remove any of the children from the father's care, or whether he informally agreed to allow the children to stay with plaintiff in order to

pleaded guilty to, several counts of criminal child abuse. Although Saginaw DHS transferred the investigation to Montcalm DHS to determine whether Nicholas was safe with the father, Montcalm DHS allegedly refused to both investigate whether Nicholas was still safe and to provide plaintiff with copies of the CPS investigations against the father. This allegedly occurred notwithstanding the fact that both plaintiff and the Montcalm County Prosecuting Attorney informed Montcalm DHS that Nicholas was in danger and should be removed from the home.

According to the complaint, the father killed himself, his wife, and Nicholas. The Office of Children's Ombudsman, a state entity, investigated and discovered that DHS had failed to comply with several sections of the Child Protection Act ("CPA") and CPS investigation policies. Noting other recent failures by DHS to protect children all across the state, plaintiff claimed that defendants had acted: (1) pursuant to policies that were contradictory to the CPA; and (2) with reckless and deliberate indifference towards the welfare of the deceased. In so doing, plaintiff asserted that defendants violated the Nicholas' constitutional right to due process guaranteed under the Michigan Constitution.

Without disputing the facts raised by plaintiff, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). Defendants asserted that: (1) the Court of Claims lacked jurisdiction to hear this case; (2) an MCTC only exists in theory and has never been accepted as valid in Michigan; and (3) plaintiff's action was barred by sovereign immunity. Because the Michigan Constitution is not self-implementing, defendants also argued that the failure to investigate or protect people from injury is not actionable, particularly when the requested relief is for an award of damages. Defendants also asserted that, even if an MCTC did exist, plaintiff could not prevail because defendants did not have an official policy of disregarding the welfare of children or failing to investigate allegations of abuse or neglect.

Plaintiff responded by arguing that an implied cause of action lies in the Michigan Constitution because it is the only way to remedy its violations. Plaintiff further asserted that sovereign immunity does not apply to defendants' conduct because the Michigan Constitution trumps the common law and statutory immunity enjoyed by the government and its employees. Although defendants claimed that there is no official policy of disregarding the CPA when investigating child abuse/neglect allegations, plaintiff argued that she would be able to prove this after discovery, making summary disposition inappropriate.

After oral arguments, the Court of Claims held that the Michigan Constitution does not create a private cause of action for money damages against the state and that, although the Legislature had provided for a limited waiver of sovereign immunity in a limited range of circumstances, plaintiff's claim did not fall into that narrow range. Accordingly, the court granted defendants' motion for summary disposition and dismissed this case.

B. DOCKET NO. 302622

cooperate with the investigation. The complaint asserts that DHS did not petition to remove Nicholas.

On October 28, 2010, plaintiff, the personal representative of the estate of Calista Springer, filed this complaint against defendants also exclusively pleading a “Michigan Constitutional Tort Claim.” The defendants were employees or officers of the DHS, as well as the DHS.

In her complaint, plaintiff alleged that defendants failed to protect Calista from her parents, which resulted in the child’s death. Plaintiff asserted that defendants failed to properly investigate all the allegations of abuse or neglect against the parents, in spite of the fact that defendants were mandated by law to do so. From 1995 to 2005, numerous complaints were filed against Calista’s parents with the following abuse/neglect allegations: (1) inadvertent lead poisoning; (2) physical abuse (received untreated burns on her left hand; punched in the face and given a bloody lip and bruised cheek; kicked in the stomach; given a black eye by having her head slammed into the floor; beaten with a board); (3) being restrained to her bed with a rope or chain; (4) being locked in her room at night, forcing her to urinate in the bed; (5) emotional abuse (threatening to place Calista in foster care and hoping that she dies first); and (6) failing to feed, clothe, and provide Calista with proper hygiene. Although defendant Skelding investigated these allegations and found no abuse or neglect, she acknowledged that by being tied to the bed Calista was at risk of death in the event of a fire and warned the parents about this possibility.

In 2005, Calista’s parents removed her from school and home-schooled the child and no additional reports of abuse or neglect were received until Calista perished on February 27, 2008, in a house fire. Calista was chained to her bed when the house fire broke out; she asphyxiated from carbon monoxide poisoning as a result of the fire. Upon further investigation, the Office of Children’s Ombudsman found that defendants failed to properly investigate the allegations against Calista’s parents.

Plaintiff’s complaint asserted that defendants were all liable for violating Calista’s right to due process guaranteed under the Michigan Constitution because: (1) defendants’ failed to follow the requirements of the CPA in investigating allegations against the parents; and (2) defendants’ inaction was pursuant to an official policy or custom involving deliberate indifference towards Calista.

Again without disputing the facts raised by plaintiff, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). The parties made the same arguments as in Docket No. 302545. After oral arguments, the Court of Claims ruled in favor of defendants, holding that the Michigan Constitution does not create a private cause of action for money damages against the state and that, although the Legislature has provided for a limited waiver of sovereign immunity in a limited range of circumstances, plaintiff’s claim does not fall into that narrow range. Accordingly, the court granted defendants’ motion for summary disposition.

II. ANALYSIS

On appeal, this Court reviews de novo the trial court’s decision to grant a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as the trial court, giving no deference to its decision, in order to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

Additionally, because this appeal presents questions of constitutional and statutory interpretation, the lower court's interpretations are also reviewed de novo by this Court. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

Defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8), and in context it appears that the court granted defendants' motion under all three subrules. In reviewing a dispositive motion pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction) or MCR 2.116(C)(7) (barred by immunity), this Court considers all the evidence submitted by the parties to determine whether a genuine issue of material fact exists to preclude dismissal. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010); *PIC Maintenance, Inc v Dep't of Treasury*, ___ Mich App ___, ___ NW2d ___ (Docket No. 298358, issued June 16, 2011), slip op, p 2. However, a dispositive motion pursuant to MCR 2.116(C)(8) (failure to state a valid claim) should only be granted when, based solely on the pleadings, "the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maintenance*, ___ Mich App at ___ (slip op at 2) (quotation marks and citation omitted).

A. JURISDICTION

Jurisdiction—the power of a court to adjudicate a claim—is exclusively conferred by constitution or statute; if the court lacks jurisdiction to hear a claim, any actions taken by the court are void. *Todd v Dep't of Corrections*, 232 Mich App 623, 628; 591 NW2d 375 (1998). The Court of Claims was created by statute and is conferred with only limited jurisdiction to hear certain claims against "the state and any of its departments, commissions, boards, institutions, arms or agencies." MCL 600.6419(1)(a); see, also, *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767-768, 774; 664 NW2d 185 (2003). Because "individuals" are not stated in the statute, jurisdiction of the Court of Claims does not extend to suits against individuals unless the individual is an executive officer of a state department or commission. *Steele v Dep't of Corrections*, 215 Mich App 710, 716; 546 NW2d 725 (1996).

Although the Court of Claims did not decide this issue, whether the Court of Claims had subject matter jurisdiction to issue a judgment against the individual defendants can be raised and decided at any point in the proceedings. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Here, only defendant Marianna Udow qualifies as an executive officer. Although it appears that some of the individual defendants may have been involved in certain limited policy-making decisions, none (other than Udow) were head of a state department, commission or agency. Additionally, the other individual defendants were, according to the allegations in the complaint, non-policymaking government employees who provided "first-line" services to the public. Because none of these individual defendants (aside from defendant Udow) are or were state officers, the Court of Claims lacked jurisdiction over them. Accordingly, plaintiffs' claims against the employee defendants were properly dismissed

by the lower court, albeit for different reasons.⁵ However, the Court of Claims does have jurisdiction to hear claims against the state and Udow.

B. THE MERITS

1. CONSTITUTIONAL TORT

Plaintiffs' sole cause of action is premised upon the principle that the Michigan Constitution contains an implied cause of action for money damages when the state, or its agents/agencies, infringe on a resident's due process rights guaranteed under the Michigan Constitution. Const 1963, art 1, § 17.

An implied cause of action for damages under the state constitution against the state was initially considered in *Smith v Dep't of Pub Health*, 428 Mich 540, 544-546; 410 NW2d 749 (1987), where our Supreme Court held in a short memorandum opinion 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.* at 544.⁶ The *Smith* Court also held that "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Id.*⁷

⁵ Even if the Court of Claims had jurisdiction, plaintiff's MCTC does not state a valid claim against the employee defendants. Because plaintiffs may pursue common law tort claims and § 1983 claims against these defendants in the federal court or circuit court (and both plaintiffs have done so), they have other remedies available. Although plaintiff claims that her available remedies before the circuit courts are not viable, this is irrelevant because the law is concerned with the availability, not the outcome, of plaintiffs' cause of action. *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000).

⁶ Although defendants repeatedly assert that the *Smith* Court's decision regarding an MCTC was dicta, that is not the case. One of the questions presented in *Smith* was "whether a plaintiff may sue the state for damages for violations of the Michigan Constitution." *Smith*, 428 Mich at 544. Our Supreme Court's ruling in its memorandum opinion answered that question and directed the Court of Claims to determine "whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged[.]" *Id.* at 545. Accordingly, the *Smith* decision regarding the MCTC was not dicta.

⁷ The *Smith* decision was later limited by our Supreme Court's ruling in *Jones*, 462 Mich at 336-337. Noting that the policy underpinning *Smith* was to vindicate a person's rights where there were no other remedial alternatives to an award of money damages, the *Jones* Court opined that municipalities and individual government employees could not be liable under a MCTC. *Id.* at 335-336. This is because a plaintiff may vindicate his or her rights by suing individuals and municipalities under common-law torts or 42 USC § 1983. Because the state and its officials are not "persons" under § 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, a plaintiff would have no recourse to enforce his rights against these parties. *Id.* at 335-337.

Relying upon Justice BOYLE's opinion in *Smith*, our Court later held that the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself." *Marlin v Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994) (quotation marks and citation omitted).⁸

Subsequently, in *Carlton v Dep't of Corrections*, 215 Mich App 490; 546 NW2d 671 (1996), this Court followed *Smith* and held that to establish a violation of the state constitution a plaintiff must show that the state action at issue: (1) was executed pursuant to an official custom or policy (where the custom or policy mandated the state action); and (2) deprived the plaintiff of his or her constitutionally guaranteed rights. *Id.* at 504-505, citing *Monell v New York City Dep't of Social Servs*, 436 US 658, 694; 98 S Ct 2018, 56 L Ed 2d 611 (1978). "The policy or custom must be the moving force behind the constitutional violation in order to establish liability." *Id.* at 505.

Thus, before we decide if this case would be an appropriate one to recognize a cause of action under the due process clause of our state constitution, we must first determine whether plaintiffs' allegations could even establish a violation. To do so, we must examine their allegations of a procedural and substantive due process violation.

The Michigan Constitution commands that the state cannot deprive any person of "life, liberty, or property without due process of law." *Kyser v Kasson Twp*, 486 Mich 514, 521; 786 NW2d 543 (2010), quoting Const 1963, Art 1, § 17.⁹ Plaintiffs first assert that defendants deprived the decedents of their substantive due process rights. Substantive due process exists to protect the individual from abusive and arbitrary uses of governmental power; certain fundamental rights cannot be infringed regardless of the procedures adopted by the government. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).¹⁰

⁸ In light of *Jones*, 462 Mich at 336-337, it is clear that liability could not be imposed on the municipality in *Marlin*, but the principle we rely upon is still a correct statement of law. See *Reid v Michigan*, 239 Mich App 621, 628-629; 609 NW2d 215 (2000).

⁹ Interestingly, in one way relevant to this appeal the language of the Michigan due process clause substantively differs from the Michigan equal protection clause. Const 1963, art 1, § 2; Const 1963, art 1, § 17. Specifically, the equal protection clause confers the Legislature with the duty to adopt legislation to enforce the rights within the clause; the due process clause does not contain this language. Because the Legislature was imparted with responsibility to craft remedies for equal protection violations, there is no need for a judicially-created remedy. See *Lewis v Michigan*, 464 Mich 781; 629 NW2d 868 (2001).

¹⁰ The *Sierb* Court noted that the Federal and Michigan due process clauses should be interpreted to grant the same protections because they both use the same language. *Sierb*, 456 Mich at 523. Therefore, federal decisions regarding due process violation brought in § 1983 claims are persuasive.

Plaintiffs assert that the decedents were deprived of their rights to life and liberty. Unfortunately, that is true. However, it was the fire and the decedents' negligent parents, not the state, who deprived them of these rights. Plaintiffs acknowledge that the Constitution does not require the government to protect its citizens from harm imposed by third parties in order to comport with due process requirements. This critical point is made clear by decisions from both the United States Supreme Court and our Court, and those decisions preclude plaintiffs from successfully pursuing their tort claim under the state due process clause.

In *DeShaney v Winnegabo Co Dep't of Social Servs*, 489 US 189, 201-202; 109 S Ct 998; 103 L Ed 2d 249 (1989), a case very similar to the instant one, the Supreme Court declared that in the absence of a special relationship the government's failure to protect a child from his parents cannot qualify as a violation of due process, notwithstanding the government imposing affirmative duties on its employees.¹¹ It explained that the due process clause confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. Because the state did not currently have custody of the child, and the harm he faced was no greater because of any state action, no due process violation could be established:

Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. [*Id.* at 201 (footnote omitted).]

Likewise, our Court in *Gazette v Pontiac*, 212 Mich App 162, 173-174; 536 NW2d 854 (1995), held that no special relationship existed for purposes of a due process violation when a police officer failed to timely investigate the disappearance of the victim. The Court followed the rationale of *DeShaney* and held that because the ultimate danger to the victim was from a private individual, not the state, and no special relationship existed between the victim and the state because the state had never taken the victim into custody or otherwise deprived her of her liberty, no due process violation could be established:

The danger to Bandy was created by Hogan, not defendants. A state's failure to protect an individual from private violence does not constitute a

¹¹ The *DeShaney* Court noted that not "all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment." *DeShaney*, 489 US at 202 (quotation marks and citation omitted).

violation of the Due Process Clause. [*DeShaney*, 489 US] ... at 197. The United States Constitution imposes upon a state affirmative duties of care and protection with regard to particular individuals only if a special relationship exists. Such a special relationship is created when the state takes a person into custody or otherwise deprives him of his liberty. *Id.* at 198-200. In this case, defendants did not take Bandy into custody or deprive her of her liberty in any way. [*Id.* at 173-174.]

Here, the undisputed facts show that there was no special relationship between the decedents and the state. Neither was ever taken into custody, nor did the state deprive them of their liberty. Instead, the facts show that the state unfathomly failed to act, leaving both children in the same perilous position they had always been in – no more or no less vulnerable then they had always been. Under *DeShaney* and *Gazette*, plaintiffs cannot prevail.

However, the *DeShaney* Court implied that it was possible for state actors to be liable when the government took affirmative acts to increase or create the risk of harm and the government's conduct "shocks the conscience." *DeShaney*, 489 US at 197-201. Courts that have considered the state-created danger doctrine have refused to impose liability upon the government unless: (1) the state takes an affirmative act to create or increase the risk of violence by third parties; (2) the victim is placed in a special danger different from the public at large; and (3) "the state knew or should have known that its actions specifically endangered the plaintiff." *Dean v Childs*, 262 Mich App 48, 55; 684 NW2d 894 (2004) rev'd in part on other grounds 474 Mich 914 (2005), quoting *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003). Where the government's inaction – as opposed to its action – is the alleged bad conduct that created the danger, a plaintiff must also prove that the government was deliberately indifferent to the rights of the injured. *Id.*

Here, plaintiffs have failed to properly plead a substantive due process violation against the state under the Michigan Constitution. Plaintiffs' pleadings are sufficient to establish that the decedents faced special dangers because they resided in the custody of their respective parent(s). However, the only affirmative act alleged by plaintiff to have imposed a duty on the state for increasing the risk to the decedents was warning the parents of the danger presented by chaining a child to a bed. Defendants' failure to remove the decedents was not an affirmative act, and plaintiffs fail to show that DHS and Udow were deliberately indifferent to the well-being of the decedents. In addition, as we previously indicated nothing the state or Udow did increased the risk to the decedents, as the parents were already tying the child to the bed before defendant Skelding warned the parents of the risks, and providing advice to the parents (or not taking any action at all) did not actually increase the risk to the children.

Plaintiffs also fail to sufficiently allege that defendants' conduct of inaction was mandated by an official custom or policy. *Carlton*, 215 Mich App at 505. Although plaintiffs recited several failures by the employee defendants to comply with their official CPS investigation policies and guidelines, these failures merely prove the state's failure to act, not that it was acting pursuant to a mandatory policy of inaction. Plaintiffs do not point to any official policy or custom that mandated CPS investigators to improperly investigate the abuse allegations against the decedents' parents or to fail to protect the decedents. In fact, plaintiffs' complaint highlights the fact that the state did not act pursuant to an official policy of inaction

because defendants investigated the decedents' parents and found insufficient evidence to substantiate the allegations against them; accordingly, defendants had no basis to remove the decedents. While the facts of these cases are indeed tragic, this is not an appropriate case in which to impose a damage remedy on the state for a state constitutional due process violation, as no violation can be established. Accordingly, the Court of Claims properly dismissed plaintiffs' MCTC claim against the state and Udow.

Plaintiffs also argue that defendants violated their decedents' procedural due process rights by creating an entitlement by law in procedures designed to protect the decedents from harm and impermissibly depriving the decedents of those rights. To prevail, plaintiffs must demonstrate: (1) they had a liberty or property interest that was infringed upon by the state; and (2) the procedures used to deprive plaintiffs were unconstitutional. *In re Vandalen*, 293 Mich App 120, ___; ___ NW2d ___ (Docket Nos. 301126 & 301127, issued June 16, 2011), slip op, p 6. Three factors must be considered in evaluating the propriety of the procedures due before the government may infringe upon the person's interest: (1) the importance of the private interest being invaded; (2) the government's interest in avoiding the procedural burdens; and (3) the relative weight of the risk of an erroneous deprivation with the existing procedures, contrasted with the probable value of additional procedures. *Id.*; *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

In addition to fundamental rights guaranteed under the United States and Michigan Constitutions, the government itself can add to this list of rights by creating entitlements by law. *Alan v Wayne Co*, 388 Mich 210, 347; 200 NW2d 628 (1972). Although statutes and governmental regulations can create a protectable liberty interest under the due process clause by imposing duties on agents, to do so, these rules must mandate specific action in a manner that constrains bureaucratic discretion. *Ky Dep't of Corrections v Thompson*, 490 US 454, 463; 109 S Ct 1904; 104 L Ed 2d 506 (1989).

However, for a benefit to qualify as an "entitlement" that is protected under procedural due process, it must mandate and guarantee a specific result and remove all discretion. *Town of Castle Rock v Gonzales*, 545 US 748, 756, 760-761; 125 S Ct 2796; 162 L Ed 2d 658 (2005). In fact, the *Castle Rock* Court criticized the notion that procedural directions guiding the discretion of law enforcement agents could grant entitlements under due process, even if phrased in mandatory language. *Id.* at 761. Further, the property interest being guaranteed by an entitlement must be distinguishable from the procedures themselves; otherwise, the property interest is illusory and does not qualify as an entitlement. *Id.* at 764. If a specific outcome is not guaranteed by the procedure—such as when a judge must grant a warrant request by the police—then the procedure is not an entitlement. *Id.*

Plaintiffs claim that MCL 722.638 granted the decedents an entitlement to protection. MCL 722.638 states, in relevant part:

- (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(iii) Battering, torture, or other severe physical abuse.

The language of the statute makes evident that plaintiffs cannot sustain their procedural due process claims against the state because the statute does not grant an entitlement that is protectable under due process. Plaintiffs' claims make "no articulable distinction between the object of . . . entitlement and the process she desires in order to protect her entitlement[.]" *Castle Rock*, 545 US at 772 (SOUTER, J., concurring). Because plaintiffs' claims rest on an alleged entitlement to procedures, their claims fail to identify a property right of which the decedents were deprived by the state.

In addition, the above statute does not mandate or guarantee a particular result. Although the state could have filed a petition for removal, its success would depend entirely on the discretion and decision of a trial court judge, and before that the DHS' discretion whether to remove a child, which only takes effect after DHS has conducted an investigation. Plaintiffs fail to realize that the "mandated outcomes" they claim defendants failed to take were dependent upon several judgment calls; such is the nature of discretionary decisions. Plaintiffs have not shown that the state violated any rights of the decedents protected by due process. Accordingly, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

No costs, a public question being involved. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray