

STATE OF MICHIGAN
COURT OF APPEALS

MARK LUTZ,

Plaintiff-Appellant,

v

WILLIAM RICHARD SIETMAN, SHERRY KAY
SIETMAN, ALDEN E. LOVELY, JR., KENNETH
RAY COLLINS and WILLIAM RAY
BLOOMFIELD,

Defendants-Appellees.

UNPUBLISHED

July 25, 1997

No. 194046

Crawford Circuit Court

LC No. 95-003478 NI

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition, granted separately as to defendant Bloomfield and the remaining defendants, based on the fireman's rule. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff acknowledges that, as a DNR officer engaged in the performance of his duties in relevant particulars in this case, the fireman's rule applies to him. However, whether the fireman's rule bars this tort action against these defendants is not conceded. As to the defendants other than Bloomfield, for purposes of summary disposition the facts being viewed in a light most favorable to plaintiff, and therefore accepting plaintiff's version of the incident, those defendants are guilty of resisting arrest or otherwise obstructing a law enforcement official in the performance of duties, and are tantamount to willful or wanton misconduct or other intentionally tortious activity for which the fireman's rule provides no defense. *Wilde v Gilland*, 189 Mich App 553, 555-556; 473 NW2d 718 (1991); *McAtee v Guthrie*, 182 Mich App 215, 220; 451 NW2d 551 (1989). We note here that while the opinions in those cases referred to "willful and wanton" misconduct, conceptually willful misconduct cannot be combined with wanton misconduct, and the expression should properly be read as "willful or wanton misconduct" for the reasons set forth in *Jennings v City of Southwood*, 446 Mich 125, 141; 521 NW2d 230 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

As to defendant Bloomfield, who was never in physical contact with plaintiff, he claims that liability will not attach merely because he yelled words of encouragement to the other defendants to refuse compliance with the plaintiff's signal to them to stop their vehicles. However, as in criminal cases, civil litigants may be liable for tortious misconduct arising from counseling, instigating, aiding or abetting actionable misconduct by others. *Brink v Purnell*, 162 Mich 147, 149; 122 NW 322 (1910). A triable issue of fact in that regard is presented by this record and summary disposition under MCR 2.116(C)(10) was therefore improperly granted. *Wilde supra*, at 556.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ Patrick R. Joslyn