STATE OF MICHIGAN

COURT OF APPEALS

JERRY E. GORNEY and PATRICIA GORNEY,

Plaintiffs-Appellants,

v

ROBERT BRUCE RENNIE, JR.,

Defendant-Appellee.

UNPUBLISHED
August 26, 1997

No. 185671
Macomb Circuit Court
LC No. 94-002120-NI

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

I

NATURE OF THE CASE

While on routine traffic patrol and while stopped at a red light, plaintiff, a police officer, was rear-ended by defendant. The circuit court granted defendant's motion for summary disposition, pursuant to the fireman's rule. We reverse and remand for further proceedings, in light of the recent decision in *Gibbons v Caraway*, ___Mich___; ___NW2d___ (No. 102190, July 22, 1997).

II

FACTS

Plaintiff was on routine traffic duty as a Fraser police officer on February 3, 1994, when he was involved in an automobile accident with defendant. Immediately prior to the accident, plaintiff was "basically watching traffic" from a parking lot. He pulled out of the parking lot to check the license plate of a vehicle heading northbound on Utica Road. Plaintiff then stopped at a red traffic light at the Groesbeck intersection, and continued to watch traffic and check license plates. While stopped at the traffic light, plaintiff's police vehicle was struck from behind by defendant's pickup truck.

The trial court determined that checking license plates and watching traffic are customary duties of a patrol officer, and that plaintiff was performing these duties while on "routine patrol" at the time of

the accident. Thus, the trial court granted defendant's summary disposition motion (MCR 2.116(C)(10)), finding the fireman's rule applicable. Plaintiff now appeals as of right.

III

ANALYSIS

In 1992, the Michigan Supreme Court ruled that the fireman's rule bars recovery for injuries to safety officers, where the injury derived "from the negligence causing the safety officer's presence" or where it stemmed "from the normal risks of the safety officer's profession." *Woods v City of Warren*, 439 Mich 186, 195; 482 NW2d 696 (1992). In *Woods*, the police officer left his routine patrolling activities to pursue a stolen car, and was injured when he collided with the stolen vehicle. The Court determined that the police officer was injured while performing a "classic police function." 429 Mich at 192. Thus, although he had abandoned his routine patrol duties to pursue the stolen vehicle, the fireman's rule applied to bar recovery because plaintiff was engaged in one of the police officer's most common duties. *Id*. *Woods* also states that in determining the applicability of the fireman's rule, "the starting point is to consider the kind of duty involved." *Id* at 193. If it is the officer's duty to patrol a designated precinct in a designated vehicle, and the officer is injured while performing this duty, then that injury must logically stem directly from the normal risks of the officer's chosen profession. *Id.* at 193.

In *Stehlik v Johnson (On Reh)*, 206 Mich App 83; 520 NW2d 633 (1994), we held that the fireman's rule barred recovery by an officer who was assigned to traffic enforcement and injured in a traffic accident while on patrol, because "the risk of a traffic accident is inherent in fulfilling the duties of a police officer assigned to traffic enforcement." *Id*. at 87. Thus, we held that the fireman's rule barred plaintiff's action because his injury "stemmed directly from his duty as a traffic enforcement officer." *Id*., citing *Woods*, *supra* at 193-194. Cf. *Atkinson v Detroit*, 222 Mich App 7; 564 NW2d 473 (1997).

Defendant argues that the fireman's rule, as interpreted by *Stehlik*, bars plaintiff's claim because the collision arose directly from the normal risks of the safety officer's profession. Plaintiff contends that the scope of the fireman's rule "does not include all risks encountered by a safety officer," and that an officer "may be able to recover for injuries suffered while merely on patrol under other circumstances." *Stehlik*, 206 Mich App at 87-88. And, while it is true that not all risks are encompassed in the fireman's rule, plaintiff overlooks the crux of the *Stehlik* holding, found in the same paragraph:

> The circumstances of this case are that plaintiff was a traffic enforcement officer assigned to patrol the area in which he was hit and the accident occurred during his normal job hours. . .the starting point is to consider the kind of duty involved, and it was plaintiff's duty to patrol the Thirteenth Precinct on his police motorcycle for traffic violations. . .(therefore) *the circumstances of this case indicate that the injury stemmed directly from this officer's police functions. Id.* [Emphasis added.]

Dissatisfaction with this common law rule has been the subject of widespread scholarly criticism and judicial dissent. See, e.g., *Stehlik v Johnson*, 448 Mich 928; 535 NW2d 494 (1995) (Justice Levin's dissent to the Court's order denying reconsideration of denial of leave to appeal). Many courts

have sought to curtail the rule's applicability through judicially created exceptions, such as actions arising out of defendant's "wilful, wanton or intentional" conduct. See e.g., *Miller v Inglis,* 223 Mich App 159; ___ NW2d ___ (1997); *McAtee v Gutherie*, 182 Mich App 215; 451 NW2d 551 (1989). Indeed, the Michigan Supreme Court in *Gibbons v Caraway*, ___ Mich ___; ___NW2d___ (No. 102190, July 22, 1997) made clear that its earlier rulings in *Kreski v Modern Wholesale Electric Co,* 429 Mich 347; 415 NW2d 178 (1987) and *Woods v City of Warren*, 439 Mich 186, 195; 482 NW2d 696 (1992) should not be read to say that there are no exceptions to the rule. In overruling the Court of Appeals' decision in *Gibbons,* the Supreme Court expressly held that there is an exception to the fireman's rule where the defendant acted in a wilfil, wanton, or grossly negligence manner.

Here, the rule itself (as enunciated by *Stehlik*) applies, but this does not end the inquiry, because if an exception to the rule also applies, then the suit may proceed. Plaintiff's complaint alleges that defendant's conduct constituted "gross negligence," but the parties did not brief this aspect of the case either at the circuit court or on appeal. We therefore do not have an adequate record to evaluate this matter in light of the "wilful, wanton and grossly negligent" exception discussed in *Gibbons*. We therefore reverse and remand with directions to reconsider this matter in light of *Gibbons*.

Reversed and remanded with directions.

/s/ Clifford W. Taylor
/s/ Henry William Saad

I concur in result only.

/s/ Richard Allen Griffin