

STATE OF MICHIGAN
COURT OF APPEALS

GARY BROWN and WALTER FOREMAN,

Plaintiffs-Appellants,

v

MARCUS ROBINSON,

Defendant-Appellee.

UNPUBLISHED

December 12, 1997

No. 190183

Wayne Circuit Court

LC No. 94-431790-NO

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant pursuant to the fireman's rule. We affirm.

Plaintiffs sued defendant for negligence. The facts in the following two paragraph are taken from plaintiffs' complaint. Plaintiffs are police officers. In July, 1992, at approximately 12:30 a.m., plaintiffs and other police officers, as part of the Detroit Police Department's Narcotics General Enforcement Section, executed a search warrant at a residence located at 13534 Appleton, Detroit. As plaintiffs were in the process of searching the residence's front living area, Kevin Johnson, a resident of 13534 Appleton, arrived outside. Allegedly believing that his residence was being burglarized, Johnson went to 12676 Appleton where he obtained a gun. Johnson returned to his residence and fired the gun into his residence, injuring plaintiffs. Johnson then fled to and concealed himself at 12676 Appleton.

Defendant owns the residence where Johnson resided. Plaintiffs' complaint alleged that defendant "negligently allowed the house he owned to be inhabited by Johnson who [defendant] knew, or should have known, to be in possession of numerous firearms" and that defendant "knew that a probable consequence of allowing the house he owned to be inhabited by Kevin Johnson was that someone was likely to be injured by the numerous weapons being kept by Johnson on the premises." The complaint further alleged that defendant's negligence caused plaintiffs' injuries.

Defendant moved for summary disposition without specifying the precise ground therefore. In so moving, defendant argued that he did not owe a duty to plaintiffs to protect them from the unforeseeable criminal acts of a third-party. Defendant also contended that plaintiffs had failed to state

a claim against defendant where Johnson had retrieved the gun not from defendant's premises but from other premises. Defendant neither raised the fireman's rule as a bar to plaintiff's claim nor did defendant offer documentary evidence in support of his motion.

Plaintiffs responded to defendant's motion but, likewise, did not offer any documentary evidence in support of this response. However, plaintiffs did allege that the search of defendant's premises had yielded over twelve-thousand grams of cocaine, approximately \$85,000 cash and eighteen guns. Plaintiffs contended that, therefore, they had stated claims upon which relief could be granted where their claims were

that Defendant knew or should have known that as probable consequence of negligently allowing a know [sic] drug dealer to store narcotics, narcotics proceeds, and weapons at his house was that the drug dealer might injure an innocent party and that such negligence resulted in injuries to the Plaintiffs

The trial court granted defendant's motion, holding sua sponte that plaintiffs' claims were barred by the fireman's rule.

On appeal, plaintiffs contend that the fireman's rule does not apply to bar their claims. We affirm the trial court's grant of summary disposition.

We review the trial court's grant of summary disposition de novo. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Although the trial court did not specify the basis for its grant of summary disposition, we shall apply the rules for MCR 2.116(C)(8) because it is apparent that the decision was based on the pleadings alone. *Woods v City of Warren*, 439 Mich 186, 190 n 2; 482 NW2d 696 (1992). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 534; 542 NW2d 912 (1995). Thus, all factual allegations have been accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* Summary disposition is only appropriate if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify relief. *Id.*

In this case, plaintiffs' complaint alleges that defendant negligently allowed Johnson to inhabit defendant's residence knowing that Johnson might injure someone with the numerous weapons kept by Johnson at defendant's residence. However, the complaint also clearly alleges that Johnson shot plaintiffs with a weapon Johnson obtained from another residence. Even accepting all the factual allegations in plaintiffs' complaint as true, as well as the reasonable inferences arising therefrom, we believe that plaintiffs' complaint has failed to plead the element of causation, i.e., that any negligence by defendant caused plaintiffs' injuries. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). Accordingly, we conclude, albeit on a different ground, that the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8). *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

However, plaintiffs contend that summary disposition was erroneously granted in favor of defendant because plaintiffs “have a strong circumstantial case upon which a fact finder could find against” defendant. Specifically, plaintiffs contend that defendant

knowingly allowed a person in the narcotics business to live in [defendant’s] house and to store narcotics, narcotics proceeds, and weapons at that house. As such, [defendant] knew or should have known that such a probable consequence of his action was that the drug dealer might injure an innocent party and that such negligence resulted in injuries to [plaintiffs].

As indicated previously, a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Butler, supra*. In this case, plaintiffs did not plead any facts in their complaint indicating that Johnson was a drug dealer or that defendant knew that Johnson was involved in the drug trade. We note that plaintiffs did argue such facts in their response to defendant’s motion for summary disposition. However, again as indicated previously, plaintiffs did not offer any documentary evidence in support of such factual allegations. If plaintiffs desired to create questions of fact, plaintiffs were required to submit documentary evidence showing that there was a genuine issue of material fact for trial. MCR 2.116(C)(10) and (G)(4).

Finally, even if we treat the motion as granted pursuant to MCR 2.116(C)(10) and consider plaintiffs’ unsupported factual allegations, we nevertheless conclude that the trial court appropriately granted summary disposition in favor of defendant.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a claim. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 526 NW2d 633 (1994). Summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997). In reviewing the grant of a motion under MCR 2.116(C)(10) we must grant the benefit of any reasonable doubt to the opposing party. *Stehlik, supra*.

The fireman’s rule precludes a safety officer from recovering damages for two types of injuries. First, a safety officer may not recover damages for injuries occasioned by the negligence that caused their presence on the premises in their professional capacity. *Gibbons v Caraway*, 455 Mich 314, 323, 333; 565 NW2d 633 (1997) (Cavanagh, J., with Mallett, C.J., and Kelly, J.), (Boyle, concurring). Second, the fireman’s rule precludes a safety officer from recovering damages for injuries arising from the risks inherent in fulfilling the police or fire fighting duties. *Gibbons, supra* at 323-324 (Cavanagh, J., with Mallett, C.J., and Kelly, J.), 333 (Boyle, J.); *Woods, supra* at 194-195.

In *Rozenboom v Proper*, 177 Mich App 49; 441 NW2d 11 (1989), a husband became paranoid and locked himself into an apartment with several loaded weapons after sending his wife out of the apartment. *Id.* at 51. Several days later, the husband shot the plaintiff police officer, who had responded to a dispatch concerning a man with a gun at an apartment complex. *Id.* at 52-53. The husband was then shot dead by the police. *Id.* at 51. The plaintiff filed an action against the husband’s estate for assault and battery and against the wife for negligence premised on a theory that the wife had

voluntarily assumed control over her husband, a known dangerous person. *Id.* at 53. Specifically, plaintiff alleged (1) that the wife had failed to remove weapons and ammunition from the apartment knowing that her husband had threatened to shoot people, including police officers; (2) that the wife had left the apartment knowing that her husband had threatened injury to persons, including police officers, and had the ability to carry out these threats, and; (3) that the wife had aggravated her husband's condition by calling and warning him that she would have him committed. *Id.* The wife and the estate moved for summary disposition on the ground that the plaintiff's claims were barred by the fireman's rule. *Id.* 53. The trial court granted the defendants' motions. *Id.* at 51.

With respect to the wife, this Court affirmed the grant of summary disposition on the ground that the wife's alleged negligence had caused the plaintiff's presence on the premises in his official capacity and the plaintiff's injury was a normal, inherent, and foreseeable risk of the plaintiff's professional duty. *Id.* at 55, 58. With respect to the estate, this Court reversed the grant of summary disposition on the ground that the fireman's rule did not extend to intentional abuse directed at a police officer. *Id.* at 57.

In this case, plaintiffs contend on appeal that "the negligence complained of is [defendant's] allowance of his home to be used by a known drug dealer" to engage in "drug trafficking and the accumulation of narcotics, weapons and drug proceeds" Clearly, defendant's alleged negligence was the reason for plaintiffs' presence on defendant's premises. Plaintiffs' likewise contend that defendant's negligence caused their injuries. However, under the fireman's rule a safety officer may not recover damages for injuries occasioned by the negligence that caused the safety officer's presence on the premises in his official capacity. *Kreski, supra* at 376; *Rozenboom, supra* at 55, 58. Accordingly, even granting plaintiffs the benefit of any reasonable doubt arising from their unsupported factual allegations, we conclude that summary disposition was warranted under MCR 2.116(C)(10). *Rozenboom, supra*.

However, plaintiffs contend that they "have alleged gross negligence or conduct which was willful, wanton or intentional misconduct" It is true that the fireman's rule does not include all risks inherent in fulfilling the police or fire fighting functions. *Gibbons, supra* at 324 (Cavanagh, J., with Mallett, C.J., and Kelly, J.), 329 (Boyle, J.); *Kreski v Modern Wholesale Electric Supply Co.*, 429 Mich 347, 372; 415 NW2d 178 (1987). The fireman's rule is not a license to act with impunity, without regard for a safety officer's well-being. *Gibbons, supra* at 324 (Cavanagh, J., with Mallett, C.J., and Kelly, J.), 333 (Boyle, J.); *Kreski, supra*. Thus, in the appropriate case, gross negligence, willful or wanton misconduct, or intentional conduct may preclude application of the fireman's rule. See, e.g., *Gibbons, supra*; *Rozenboom, supra*. However, gross negligence, willful or wanton misconduct, or intentional conduct transcends negligence. *Miller v Inglis*, 223 Mich App 159, 166-167; 567 NW2d 253 (1997). In this case, plaintiffs' complaint simply pleads negligent conduct on the part of defendant. "Mere negligence cannot be cast as 'wilfulness' simply for the purposes of bringing a complaint." *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 61; 498 NW2d 5 (1993). Plaintiffs' unsupported factual allegations that defendant allowed a known drug dealer to live and store narcotics and weapons on defendant's premises similarly sounds solely in negligence. Even giving plaintiffs the benefit of any reasonable doubt, we conclude that plaintiffs have failed to create

a question of fact concerning gross negligence or intentional conduct that would justify disregarding the fireman's rule.

Plaintiffs also contend that the fireman's rule should not apply because the negligence that they are alleging is such that it continued after or during the time that plaintiffs arrived at defendant's premises. This claim lacks merit because there were no allegations that defendant was present during the execution of the search warrant, that defendant was aware of the search warrant, that defendant was aware of plaintiffs' peril, or that defendant otherwise committed affirmative acts of misconduct after plaintiffs entered the house. The particular act that defendant is alleged to have done is to let Johnson inhabit defendant's house. The continuity of this permission, under the circumstances alleged, does not preclude application of the fireman's rule.

Affirmed.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage