STATE OF MICHIGAN

COURT OF APPEALS

GARY BROWN and WALTER FOREMAN,

Plaintiffs-Appellants,

v

LAVERNE PEPPER,

Defendant-Appellee.

UNPUBLISHED
December 30, 1997

No. 194798
Wayne Circuit Court
LC No. 94-412288-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. We affirm.

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 front living area of 13534 Appleton, Kevin Johnson, a resident of that address, arrived outside. Allegedly believing that his residence was being burglarized, Johnson went to 12676 Appleton and obtained a gun. Johnson returned to and fired the gun into the living room of 13534 Appleton, injuring plaintiffs. Johnson then fled to and concealed himself at 12676 Appleton. Defendant is an equitable owner of record of 12676 Appleton.

Plaintiffs brought suit against defendant. Plaintiffs' complaint alleged that defendant "negligently allowed Kevin Johnson to store large quantities of narcotics, narcotics proceeds and numerous weapons at 12676 Appleton" and that defendant "knew, or should have known, that a probable consequence of allowing Kevin Johnson to store narcotics, narcotics proceeds and weapons at 12676 Appleton was that Kevin Johnson might injure an innocent party with one of the weapons." Plaintiffs' complaint further alleged that defendant's negligence caused their injuries.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), contending that the fireman's rule barred plaintiffs' claims. The trial court granted the motion, stating that "plaintiff's [sic] theory is a unique one but I still think the Fireman's Rule does apply . . . ."

On appeal, plaintiffs contend that the fireman's rule should not apply to bar their claims. We disagree.

The fireman's rule generally bars safety officers from recovering damages from a private party for injuries sustained in the course of duty. *Woods v City of Warren*, 439 Mich 186, 190; 482 NW2d 696 (1992); *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347; 415 NW2d 178 (1987). The rule was adopted by our Supreme Court in *Kreski* on the basis of various considerations of public policy stemming "from the nature of the service provided by fire fighters and police officers, as well as the relationship between these safety officers and the public they are employed to protect." *Id*. at 358, 365. The fundamental rationale underpinning the fireman's rule is that the job of safety officers is to confront risk or danger generally caused by negligence, and thus, as a matter of policy, the public should not be liable to safety officers in damages for injuries occurring in the performance of the very function police officers and fire fighters are intended to fulfill. *Woods, supra*; *Kreski, supra* at 368, 376.

The fireman's rule is not a rigid rule with certain bright-line, categorical exceptions. *Gibbons v Caraway*, 455 Mich 314, 323; 565 NW2d 663 (1997) (Cavanagh, J., with Mallett, C.J., and Kelly, J.); *Woods, supra* at 194. Rather, the fireman's rule is to be applied flexibly on a case by case basis as the circumstances of each particular case requires. *Woods, supra* at 191, 194. In adjudicating a safety officer's suit, the rationales underlying the fireman's rule must be balanced with the interest of allowing recovery when these rationales are not implicated. *Id*. at 191. When the fundamental rational underlying the fireman's rule is implicated and no other considerations outweigh it, the fireman's rule requires dismissal of a safety officer's suit. *Id*. Conversely, where the fundamental policy rational underlying the fireman's rule is inapplicable, there can be individual exceptions in appropriate situations. *Gibbons, supra; Woods, supra* at 194, n 8.

The fireman's rule generally 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, supra* at 323 (Cavanagh, J., with Mallett, C.J., and Kelly, J.), 333 (Boyle, J., concurring). In this case, plaintiffs argue that defendant's negligence was not the reason for their presence at the residence where their injuries occurred. We agree.

However, the fireman's rule precludes a safety officer from also 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. Under this prong of the fireman's rule, the risk need not have been occasioned by the negligence that caused the officer's presence on the premises. *Woods, supra* at 196. The analytical focus is on the kind of duty engaged in by the safety officer and whether the injury stems directly from the safety officer's performance of this duty. *Woods, supra* at 193-194. If the circumstances indicate that the injury stems directly from the officer's police functions, the fireman's rule applies. *Id*. at 193. Conversely, if the circumstances indicate otherwise, the fireman's rule likely does not apply. *Id*.

In *Orozco v Yolo Co*, 814 F Supp 885, 889 (ED Cal, 1992), a police officer who was executing a search warrant in a residence as a member of a narcotics enforcement team was shot by a mentally ill person living at the residence. The officer brought suit against the shooter's family members, contending that they had been negligent in failing to warn him of the hidden danger represented by the mentally ill shooter. *Id*. at 888. In holding that the officer's claim was barred by California's fireman's rule, the federal court noted that the officer had been called to the residence "because drug activity was suspected. He knew that drug activities present a significant risk that an officer will be shot." *Id*. at 898.

Likewise, in this case, plaintiffs were called to 13534 Appleton as members of a narcotics enforcement team for the purpose of executing a search warrant. Plaintiffs recognized that "drug activities present a significant risk that an officer will be shot." *Id*. We conclude that plaintiffs' injuries were directly related to the performance of their duties. *Stott v Wayne Co*, 224 Mich App 422, 428; ___ NW2d ___ (1997). Accordingly, because the public policy rational of the fireman's rule applies to this case, we conclude that the trial court properly granted summary disposition to defendant. *Id*. at 426, 428.

Plaintiffs contend that they have alleged gross negligence or conduct that was wilful, wanton or intentional on the part of defendant, and that the fireman's rule does not bar claims for injuries incurred as a result of such conduct.

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, supra* at 372. 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*. The fireman's rule does not preclude recovery for injuries sustained as a result of gross negligence or conduct that was wilful, wanton or intentional. *Gibbons, supra* at 326 (Cavanagh, J. with Mallett, C.J., and Kelly, J.), 330 (Boyle, J., with Brickley, J.); *Stout, supra* at 428-429; *Rozenboom v Proper*, 177 Mich App 49, 57; 441 NW2d 11 (1989).

However, wilful and wanton misconduct is made out only if the conduct alleged shows an intent to harm, or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Stout, supra* at 429. In this case, plaintiffs have simply alleged negligence on the part of defendant. Mere negligence cannot be cast as wilfulness simply for the purpose of bringing a complaint. *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 61; 498 NW2d 5 (1993). Generally, where the act complained of is one of omission rather than commission, it is not an intentional tort. *Stout, supra*.

Plaintiffs argue that the "fireman's rule" does not apply because this is not a simple premises-liability type of issue involving a condition of the property (*e.g.*, a hole in the floor). While we agree that this is not a simple premises liability case, we reject plaintiffs' contention because, as explained above, the "fireman's rule" is not limited to conditions of property.

Next, plaintiffs contend that the fireman's rule should not apply because the "negligence" that they are alleging is such that it continued during and after the time that they arrived at the scene. This claim lacks merit because there was no allegation that defendant was present when Kevin Johnson obtained the gun from defendant's house, that defendant was aware of the search warrant being executed at Kevin Johnson's residence, that defendant was aware of plaintiffs' peril, or that defendant otherwise committed affirmative acts of misconduct after plaintiffs entered Kevin Johnson's residence. The particular act that defendant is alleged to have done was to negligently allow Kevin Johnson to store narcotics, narcotics proceeds and weapons at her own house. The continuity of this permission, under the circumstances alleged in the complaint, does not preclude application of the "fireman's rule." See also *Gibbons, supra* at 333 (Boyle, J., with Brickley, J.) (stating that mere negligence on the part of a third-party that takes place after the arrival of the safety officer and is unconnected to the incident that caused the officer's presence does not create an exception to the fireman's rule).

Finally, plaintiffs contend that the "fireman's rule" should not apply because there are allegations that the guns and money found at defendant's house were the product of illegal activities. While we agree that the complaint alleges illegal activities, the significant question is whether the injuries sustained by plaintiffs were normal risks of the profession associated with the execution of the search warrant for drug activities. *Woods, supra*. The fact that the house where Kevin Johnson obtained the gun to shoot plaintiffs may have also been the site of illegal activities, thus, does not preclude application of the "fireman's rule." To the extent that plaintiffs are suggesting that an ultrahazardous exception to the "fireman's rule" should be recognized for activities involving drugs and guns, we find plaintiffs' contention unpersuasive and decline to adopt it.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage