STATE OF MICHIGAN

COURT OF APPEALS

GREGORY HENKE,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 10, 1998

No. 202550
Oakland Circuit Court
LC No. 96-525053-CK

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order entered by the trial court granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and/or (10). We reverse and remand for further proceedings.

Before this Court is an action seeking uninsured motorist benefits as a result of injuries received by a police officer who was hit by a car while attempting to effectuate an arrest. On appeal, plaintiff argues that summary disposition was improper because he presented sufficient evidence to establish that his cause of action was not barred by application of the fireman's rule. While plaintiff was engaged in a classic police function, i.e., arresting a suspect, at the time he was injured, this Court believes that the record is insufficient to determine whether the suspect's conduct reached the requisite level of wilful and wanton to justify the application of the exception to the fireman's rule.

The fireman's rule bars public safety officials such as firefighters and police officers from suing tortfeasors for injuries sustained in the course of the public safety officer's employment. *Woods v City of Warren*, 439 Mich 186, 190; 482 NW2d 696 (1992); *Kreski v Modern Wholesale Electric Supply Company*, 429 Mich 347, 357-358; 415 NW2d 178 (1987); *Miller v Inglis*, 223 Mich App 159, 162-163; 567 NW2d 253 (1997). The rule is a creature of the common law and has been defined and refined on a case-by-case basis. *Id.* at 163. Typically, the public policy justifications behind the fireman's rule are: (1) rescue officers know the dangers of the job when they applied for it; (2) the purpose of the public safety profession is to confront danger, and (3) the public should not be held liable for damages for injuries that arise from the function that police officers and firefighters are intended to fulfill. *Id.* See also *Kreski, supra* at 368; *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 86; 520 NW2d 633 (1994).

According to the Michigan Supreme Court, the fireman's rule bars recovery for two types of injury: "those deriving from the negligence causing the safety officer's presence and those stemming from the normal risks of the safety officer's profession." *Miller, supra* at 163. See also *Woods, supra* at 196. However, the scope of the rule does not include all risks encountered by a safety officer, nor is the rule a license to act without regard for the well-being of the safety officer. *Miller, supra* at 164. See also *Kreski, supra* at 372; *Gibbons v Caraway and Mound Steel & Supplies*, 455 Mich 314; 565 NW2d 663 (1997). In *Gibbons*, the Michigan Supreme Court acknowledged that *Kreski* did not establish bright-line categorical exceptions to the fireman's rule, but that there may be individual exceptions in appropriate situations. *Id.* at 323.

While courts have refined the fireman's rule, they have also created a variety of exceptions to the rule. *Miller, supra* at 165. One exception is the wilful, wanton or intentional misconduct exception. *Id*. A tortfeasor who intentionally harms a police officer or firefighter should not benefit from the common law bar. *Id*. In other words, "a tortfeasor who acts wilfully and wantonly is so culpable that the fireman's rule ought not to preclude the injured officer from suing the egregiously culpable wrongdoer." *Id.*; *McAtee v Guthrie*, 182 Mich App 215; 451 NW2d 551 (1989).

In *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), the Michigan Supreme Court restated the elements required to establish wilful and wanton misconduct: "(1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *Miller, supra* at 166. The *Jennings* Court described the difference between a wilful act and a negligent act:

> If one wilfully injures another, or if his conduct in doing the injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. The act is characterized by wilfulness, rather than by inadvertence, it transcends negligence--is different in kind. [*Jennings, supra* at 137-138].

In the instant case, plaintiff seeks compensation from defendant, his insurance company, based upon an uninsured motorist provision contained in the policy which he purchased. The insurance policy states:

> We will pay damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of **bodily injury** sustained by an insured person. The **bodily injury** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. **We** will not pay any punitive or exemplary damages.

As the insured, plaintiff was entitled to recover damages from defendant for bodily injury resulting from an accident due to the ownership, maintenance or use of an uninsured automobile, provided that plaintiff was legally entitled to recover damages from the owner or operator of the uninsured auto. According to defendant, because the fireman's rule barred plaintiff's recovery of damages from the owner or operator of the suspects' uninsured auto, plaintiff was not entitled to recover damages from defendant.

Case law supports plaintiff's argument that there is an exception to the fireman's rule based on wanton and wilful conduct by a person resisting arrest. See *McAtee, supra*; *Wilde v Gilland*, 189 Mich App 553; 473 NW2d 718 (1991); *Rozenboom v Proper*, 177 Mich App 49; 441 NW2d 11 (1989). In the instant case, the suspects' vehicle was forced to a stop after patrol cars surrounded the vehicle in a church's parking lot. Plaintiff ordered the driver to get out of the vehicle. Fearing that he may be fired upon by the suspects, plaintiff attempted to search and handcuff the driver on the ground behind the suspects' vehicle. Meanwhile, the passenger of the suspect vehicle slid over into the driver's seat. In an effort to escape, the passenger of the suspects' vehicle placed the car in gear and drove forward hitting a police car. Moments later, the suspect placed his car into reverse, hitting plaintiff and the patrol car parked behind the suspects' vehicle. Because the patrol cars were in such close proximity with the suspects' vehicle, the suspect knew or should have known that his conduct was likely to result in injuries.

There was evidence present on the record to suggest that the suspect's conduct was wilful and wanton. In an effort to resist arrest and escape, the suspect acted with a complete disregard for the safety of the people present on the scene. Because this Court believes the record is insufficient to determine whether the suspect's conduct reached the requisite level of misconduct to justify application of the exception to the fireman's rule, summary disposition in favor of defendant must be reversed and the case remanded for a determination whether the suspect's misconduct qualifies under the wilful and wanton exception to the fireman's rule.

Next, plaintiff argues that he was injured from an accident covered by his insurance policy and therefore, summary disposition pursuant to MCR 2.116(C)(8) or (10) would be improper. While plaintiff objected to defendant's motion for summary disposition, the trial court did not rule on this issue since it granted summary disposition based on the fireman's rule. Therefore, the issue is not preserved. However, because it is an issue of law and all the necessary facts are before this Court, we will address the issue. *Miller, supra* at 168.

Because uninsured motorist benefits are not required by statute, the language of the insurance policy dictates when uninsured motorist benefits will be awarded. *Gentry v Allstate Ins Co*, 208 Mich App 109, 113; 527 NW2d 39 (1994); *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525; 502 NW2d 310 (1993). When a pivotal term, such as "accident," is not defined within the policy, the "commonly used meaning" controls. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 432; 531 NW2d 168 (1995); *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). The Michigan Supreme Court has analyzed the common meaning of "accident" and defined the term as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Arco Industries Corp, supra* at 432; *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 631; 527 NW2d 760 (1994). Furthermore, the accidental nature of the event must be evaluated from the injured party's standpoint, when the policy is silent with regard to perspective. *Marzonie, supra* at 634.

In the instant case, the insurance policy issued by defendant to plaintiff failed to define the term accident and was silent with regard to perspective. Therefore, the term's common meaning will be used in any further analysis and the accidental nature of the event will be evaluated from plaintiff's perspective.

Plaintiff was hit by a car which was driven by a suspect in an attempt to flee. While the suspect was surrounded by police cars, he rammed into the vehicles which blocked his escape. After he created an opening which was sufficient to drive a car through, the suspect fled. Such an event is certainly unusual. Plaintiff could not have anticipated being struck by the suspects' vehicle. The vehicle had already come to a complete stop, the driver of the vehicle was removed, and a number of police officers were supposed to be watching the suspect in the passenger seat. Plaintiff anticipated being shot by a suspect in an armed robbery, but he did not expect to be hit by a car. Regardless of the suspect's intentional wanton and wilful conduct, plaintiff had no reason to anticipate such an incident. Accordingly, because plaintiff was involved in an accident, plaintiff was covered by the uninsured motorist benefit provision of defendant's policy.

Next, plaintiff asserts that he has established that a question of fact remains regarding the insured status of the suspects' vehicle. Although plaintiff objected to defendant's motion for summary disposition, the trial court did not rule on this issue since it granted summary disposition based upon the fireman's rule. However, we find that there are insufficient facts to decide this issue. Therefore, we decline to review it.

Finally, plaintiff asserts that he is entitled to attorney's fees and interest as a result of defendant's unreasonable denial of uninsured motorist benefits. Because we have the necessary facts before us, we will address the issue.

Under the Uniform Trade Practices Act (UTPA), MCL 500.2006; MSA 24.2006, an insurer is liable for penalty interest if he fails to timely pay a claim not reasonably in dispute. *Burnside v State Farm Fire and Casualty*, 208 Mich App 422, 431; 528 NW2d 749 (1995). However, attorney fees incurred as a result of an insurer's bad-faith refusal to pay a claim are barred by the American Rule. *Id*. at 430. Under the American Rule, attorney fees are generally not allowed unless they are expressly authorized by statute, court rule, or a recognized exception. *Id*. at 426-427.

In the instant case, plaintiff has offered no legal authority which would grant him attorney fees and costs. Because attorney fees and costs are not expressly authorized by statute, the American Rule bars such recovery. However, MCL 500.2006; MSA 24.2006 does allow for an interest penalty in the event that an insurer denies a claim not reasonably in dispute. This Court believes that defendant denied plaintiff's claim based upon a reasonable dispute. The fact that the trial court supported defendant's position and granted summary disposition is evidence that the parties' dispute was reasonable. Because defendant did not indiscriminately deny plaintiff's claim and because defendant reasonably believed that the claim was barred under the fireman's rule, penalty interest is not appropriate.

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

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Jane E. Markey