STATE OF MICHIGAN

COURT OF APPEALS

LEONARD JOHN WOLONS and KATHY WOLONS,	UNPUBLISHED July 24, 1998
Plaintiffs-Appellants,	
v	No. 208616 Wayne Circuit Court
CHARLES WILLIAM DONALDSON,	LC No. 94-411517-NI
Defendant-Appellee.	ON REMAND

Before: Corrigan, C.J., Wahls, P.J., and Markey, J.

PER CURIAM.

This automobile negligence action is before us on remand from the Supreme Court for reconsideration in light of *Gibbons v Caraway*, 455 Mich 314; 565 NW2d 663 (1997). We previously issued an order affirming the trial court's decision granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). *Wolons v Donaldson*, unpublished order of the Court of Appeals, entered June 4, 1996 (Docket No. 182415). We reverse and remand.

Plaintiff Leonard Wolons, a police officer, was injured while on duty when his police car collided with a vehicle driven by defendant, who allegedly was intoxicated. Plaintiffs filed suit against defendant, alleging negligence and loss of consortium. Defendant moved for summary disposition, asserting that plaintiffs' cause of action was barred by the fireman's rule. Defendant's motion was granted pursuant to MCR 2.116(C)(8) and (10).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is reviewed de novo. *Stott v Wayne County*, 224 Mich App 422, 426; 569 NW2d 633 (1997), lv pending. When reviewing a motion under MCR 2.116(C)(8), this Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. *Id.* Summary disposition for failure to state a claim should be upheld only when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and thus justify recovery. *Id.*

This Court reviews de novo the grant of summary disposition pursuant to MCR 2.116(C)(10), examining the entire record, including pleadings, affidavits, depositions, admissions, and other documentary evidence, and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 708; 572 NW2d 216 (1997), lv pending. A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The trial court must ask whether a record might be developed that leaves open an issue upon which reasonable minds could differ. *Id.* The trial court may not make factual findings or weigh credibility in deciding a motion for summary disposition, and this Court will uphold the grant of summary disposition if it is satisfied that the claim or defense cannot be proved at trial. *Id.* at 709.

The fireman's rule prevents police officers and fire fighters from recovering for injuries sustained in the course of duty.[1] *Woods v City of Warren*, 439 Mich 186, 190; 482 NW2d 696 (1992). The rule's scope encompasses both injuries resulting from the negligence that caused the incident requiring a safety officer's presence and injuries resulting from those risks inherent in fulfilling the police or fire fighting duties. *Id.* at 195. In determining whether the rule should be applied, the analytical focus must be on whether the injury stems directly from an officer's police functions. *Id.* at 193.

In our original decision affirming the trial court's grant of summary disposition for defendant, we relied on *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83; 520 NW2d 633 (1994). In *Stehlik*, the plaintiff police officer was assigned to traffic enforcement and his duties were to patrol his precinct area for traffic violations. He was in the area that he patrolled at the time he was injured in a traffic accident. *Id.* at 87. Stating that "the risk of a traffic accident is inherent in fulfilling the duties of a police officer . . . assigned to traffic enforcement," the Court found that the circumstances of the case indicated that the officer's injury stemmed directly from his duty as a traffic enforcement officer and that his claim was barred by the fireman's rule. *Id.*

In *Gibbons*, *supra*, the plaintiff police officer was on duty directing traffic around an accident scene when he was struck by an automobile driven by the defendant. The Supreme Court held that the risks inherent in the plaintiff's fulfillment of his police duties did not include all possible risks that could arise in the situation. *Gibbons*, *supra* at 325. Because the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being, *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 372; 415 NW2d 178 (1987), the Supreme Court held that the defendant's allegedly negligent operation of her automobile, which occurred after the plaintiff was on the scene and which was alleged to have been wanton, reckless, careless, negligent, or grossly negligent, precluded any ruling as a matter of law at that stage of the proceedings that the plaintiff's claims were barred by the fireman's rule. *Gibbons*, 455 Mich 325-326.

This Court recently considered the wilful and wanton exception to the fireman's rule in a case similar to the one at bar. In *Miller v Inglis*, 223 Mich App 159; 567 NW2d 253 (1997), the defendant was operating his vehicle while under the influence of alcohol when he collided with the plaintiff police officer's patrol car. At the time of the accident, the officer was transporting a prisoner and had stopped at the site of a car accident. In reviewing the trial court's grant of summary disposition

in favor of the defendant based on the fireman's rule, this Court considered whether an intoxicated driver who causes injury to a police officer is considered to have engaged in conduct that is sufficiently wilful and wanton to fall within the "wilful and wanton" exception. This Court rejected the plaintiff's claim that she was acting in the role of an ordinary citizen. *Id.* at 165. The panel noted that the plaintiff was on duty transporting a prisoner, that the accident occurred during her working hours, that she activated the overhead lights and flashers on her patrol car when she pulled over, and that her car was struck while she was assisting in clearing the scene. *Id.* Under the circumstances, the Court found that the plaintiff was "obviously engaged in a classic police function at the time of the accident." *Id.* However, the Court recognized that courts have created a variety of exceptions to the fireman's rule, including the wilful, wanton, or intentional misconduct exception, which provides that a tortfeasor who intentionally harms a police officer or fire fighter should not benefit from the common-law bar. *Id.* See also *McAtee v Guthrie*, 182 Mich App 215; 451 NW2d 551 (1989).

The panel in *Miller* declined to hold that any time an intoxicated defendant injures a police officer, the fact of intoxication alone automatically requires the conclusion that the defendant engaged in wilful and wanton misconduct. However, the panel also rejected the trial court's opposite holding that intoxication automatically precludes the possibility of finding wilful and wanton misconduct. *Miller*, *supra* at 167. Rather, the Court held that the behavior of some defendants who become intoxicated may be so reckless as to constitute wilful and wanton conduct sufficient to remove the bar of the fireman's rule and thereby allow a police officer to sue for injuries. *Id.*[2] Because the trial court dismissed the case before addressing this narrow issue, the panel in *Miller* concluded that the record was insufficient to determine whether the conduct of the defendant reached the requisite level of wilful and wanton misconduct to trigger the exception to the fireman's rule, and reversed and remanded the case to the trial court. *Id.* at 167-168.

Like the police officer in *Miller*, plaintiff was engaged in a classic police function at the time of the accident. According to his deposition: (1) he was driving on routine patrol in his assigned patrol area at the time of his injury; (2) he was looking for suspicious activity or speeders while he drove; (3) he had made some traffic stops during that night's patrol; and (4) road patrol was his routine police activity. Because the risk of a traffic accident is inherent in fulfilling the duties of a police officer assigned to traffic enforcement, *Stehlik*, *supra* at 87, the circumstances of this case indicate that plaintiff's injury stemmed directly from his duty as a traffic enforcement officer. However, like the driver-defendant in *Miller*, defendant is alleged to have been intoxicated at the time his car collided with plaintiff's patrol car. As in *Miller*, the record is insufficient to determine whether defendant's conduct reached the requisite level of wilful and wanton misconduct to warrant application of the exception to the fireman's rule.[3] Therefore, we remand this case to the trial court for a determination of whether defendant's actions constitute wilful and wanton conduct sufficient to qualify as an exception to the fireman's rule.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Myron H. Wahls
/s/ Jane E. Markey

[1] We note that our state legislature is considering a bill that would abolish the fireman's rule.

[2] In a footnote, the Court noted that one or more of the following factors could lead a court to conclude that the conduct was sufficiently wilful and wanton to preclude the litigation bar of the fireman's rule: the intoxicated driver-defendant (1) is a repeat offender, (2) drinks heavily but is sufficiently lucid to know he is driving under the influence, or (3) drives recklessly in an area with a lot of traffic in utter disregard of other motorists' safety. *Miller, supra* at 167, n 3.

[3] Although defendant argues that there is no factual basis for a drunk driver exception in this case because no evidence was presented to the trial court that he was a drunk driver, the factual allegations in plaintiffs' complaint must be accepted as true under MCR 2.116(C)(8), *Stott, supra* at 426, and the facts must be viewed in the light most favorable to plaintiff as the nonmoving party pursuant to MCR 2.116(C)(10). *Henderson, supra* at 708.