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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

Ralph SALDANA, Plaintiff-Appellant,
v.
Anthony SMITH and Anthony V. Yakimowich,
Defendants-Appellees.

No. 214282.

July 11, 2000.

Before: JANSEN, P.J., and HOOD and SAAD, JJ.

PER CURIAM.

*1 Plaintiff appeals as of right from a trial court order that granted summary disposition to defendant Yakimowich [FN1] on the basis of the so-called fireman's rule. We remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

FN1. The record indicates that defendant Anthony Smith has been dismissed from the case because of non-service.

Plaintiff argues on appeal that summary disposition was improper because his complaint alleged gross negligence or other misconduct, which are exceptions to application of the fireman's rule, and the trial court erred as a matter of law in holding that the gross negligence/misconduct exception is limited to third-party or subsequent tortfeasors. Plaintiff further argues that summary disposition was premature given that no discovery was

conducted. We agree and remand.

In its most basic form, the fireman's rule precludes a firefighter or police officer from recovering damages from a private party for ordinary negligence in the creation of the reason for the safety officer's presence at the scene. *Kreski v. Modern Wholesale Electric Supply Co.*, 429 Mich. 347, 358; 415 NW2d 178 (1987); *Harris-Fields v. Syze*, 461 Mich. 188, 191; 600 NW2d 611 (1999). The rule has been the subject of fine-tuning over the years, resulting in various exceptions being created. One exception exists where the plaintiff alleges negligence rising to the level of gross negligence, or wilful, wanton, or intentional misconduct. *Kreski, supra* at 370. The gross negligence/intentional misconduct exception provides that a tortfeasor who causes harm to a police officer or firefighter should not benefit from application of the fireman's rule. "That is, 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." *Miller v. Inglis*, 223 Mich.App 159, 165; 567 NW2d 253 (1997). As noted in *Kreski, supra* at 371-372: The fireman's rule precludes recovery by firefighters and police officers for injuries "arising from the normal, inherent, and foreseeable risks of the chosen profession," but it should not be interpreted as "a license to act with impunity, without regard for the safety officer's well-being." See also *Gibbons v. Caraway*, 455 Mich. 314, 325-326; 565 NW2d 663 (1997) (plurality opinion).

The question presented here is whether the fireman's rule bars a plaintiff's claim based on the defendant's alleged gross negligence or intentional misconduct that directly results in the safety officer's dispatch to the scene. [FN2] We find it highly significant that the alleged acts of defendants may have directly resulted in the truck's collision with the concrete median and the loosening of the light pole that subsequently struck plaintiff after he arrived at the scene. Thus, a dispositive factual determination yet to be made in this case is a proper characterization of defendants' conduct. That is, if it is determined that defendants' alleged acts were mere ordinary negligence, the fireman's rule would

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apply to bar plaintiff's claim. On the other hand, if defendants' alleged acts--e.g., in hitching the trailer to the cab or in driving the truck into the median--were determined to rise to a level beyond ordinary negligence, the fireman's rule would be inapplicable. Thus, a remand is necessary to make this factual determination.

FN2. A case cited by both parties is *McCaw v T & L Operations, Inc (On Remand)*, 230 Mich.App 413; 584 NW2d 363 (1998), in which a police officer brought a dramshop action against the bar where an individual became intoxicated and that individual subsequently assaulted the officer at a residence where the officer had been dispatched to investigate a reported stabbing. After this Court reversed a jury verdict in favor of the officer, ruling that the claim was barred by the fireman's rule, the Michigan Supreme Court remanded for reconsideration in light of *Gibbons v. Caraway, supra*. On remand, this Court held that the fireman's rule barred the officer's dram shop claim because the individual who assaulted him was not a third-party unconnected to the situation that resulted in the officer's presence at the residence. *McCaw, supra* 230 Mich.App at 421. The Michigan Supreme Court remanded again for reconsideration, stating as follows in its order in pertinent part:

The Court of Appeals decision should include consideration of the significance of the facts that the conduct of the defendant occurred before the events that brought the officer to the place where the injury occurred, and that the alleged liability of the defendant is based on the Dramshop Act rather than common law negligence principles. [MSC Order, No. 112596, issued 2/15/00.]

The second remand is now pending before this Court.

*2 Finally, we note that the Legislature "abolished" the common-law fireman's rule in 1998 PA 389, M.C.L. § 600.2965; MSA 27A.2965, but went on to set forth specific circumstances in which a firefighter or police officer may recover for

damages. These statutory provisions are "very much like the common-law doctrine, with the exceptions that have been recognized in other jurisdictions ." *Harris-Fields, supra* at 198-199 n 11. For example, M.C.L. § 600.2967(1)(a); MSA 27A.2967(1)(a) provides for recovery if "[a]n injury or resulting death that is a basis for the cause of action was caused by a person's conduct and that conduct is 1 or more of the following: (i) Grossly negligent, (ii) Wanton, (iii) Willful, (iv) Intentional." Although the present case arose before the effective date of 1998 PA 389, and therefore must be decided under common law principles, we may look to the statute for guidance in applying the common-law and to reinforce "comity between the branches of government." *Id.* at 198. We find it notable that subsection 2967(1)(a) creates a potential liability for gross negligence and other intentional misconduct, but it does not impose a prerequisite that the person's conduct occur subsequent to the officer's arrival at the scene, or that the conduct be directed at the officer.

Accordingly, because no discovery has occurred in this case, we conclude that summary disposition was premature and we order this matter remanded to the lower court for further proceedings.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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