STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF L E E L A N A U

PHILIP C. WILLIAMS and
MARY E. WILLIAMS,
Husband and Wife,

Plaintiffs,

-v-

File NO. 93-3237-NO
HON. PHILIP E. RODGERS, JR.

BARBARA JEAN MARTELL and
EDDIE'S VILLAGE INN, INC.,
a Michigan corporation,
jointly and severally.

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Eddie's Village Inn, Inc.

DECISION AND ORDER

Defendant Eddie's Village Inn, Inc. (hereafter Defendant Inn) filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs timely responded to this Court's Pre-Hearing Order dated April 26, 1994. Defendant Inn late filed a reply to Plaintiffs response. Defendant Barbara Martell failed to file a response to the Pre-Hearing Order. Pursuant to MCR 2.119(E)(3), this Court dispenses with oral argument. This Court has reviewed the motion, the response, the reply, the briefs and affidavit, and the Court file.

The standard of review for a (C)(8) motion is set forth in Mitchell v General Motors Acceptance Corp. 176 Mich App 23; 439 NW2d 261 (1989).

A motion for summary disposition brought under MCR 2.116

(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741; 440 NW2d 101 (1989).

A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

This action arises from a shooting incident in which Defendant Barbara Martell shot Plaintiff/Sheriff's Officer Philip Williams while Officer Williams was arresting Roger Martell, the driver of a vehicle in which Ms. Martell was a passenger.[1] Plaintiffs sued Defendant Inn under the Dram Shop Act, MCL 436.22, 436.29; MSA 18.993, 18.1000. Plaintiffs' suit against Defendant Barbara Martell alleges the intentional tort of assault and battery. Defendant Inn, in this motion, argues that the "Fireman's Rule" applies to the underlying facts and defeats Plaintiffs' efforts to recover damages from Defendant Inn.

Michigan has adopted the public policy doctrine known as the "Fireman's Rule". Justice Brickley, who authored the opinion in Woods v City of Warren, 439 Mich 186, 190-191; 482 NW2d 696 (1992), provided the following synopsis of the rule and the public policy which supports it:

> The fireman's rule has a long and impressive common-law heritage. Michigan first embraced it in Kreski[2]. The fireman's rule prevents police officers and fire fighters from recovering for injuries sustained in the course of duty. Id. at 358. Even though several rationales have been advanced, the most basic is "that the purpose of safety professions is to confront danger and, therefore, the public should not be liable for damages for injuries occurring in the performance of the very function police officers and fire fighters are intended to fulfill." Id. at 368. When this rationale is implicated and no other considerations outweigh it, the fireman's rule requires dismissal of a safety officer's suit. Adjudicating these disputes requires "balanc[ing] the underlying rationales with the interest of allowing recovery when those rationales are not implicated." Id. at 371. Thus, the rule will develop mainly through case-by-case adjudication of concrete disputes. We follow that approach today. (Emphasis added.)

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[1] After the incident, Ms. Martell was charged with assault with intent to commit murder. She pled no contest to the charges and was sentenced on May 3, 1993. Ms. Martell is a prisoner of the Michigan Department of Corrections, serving a term of 20-30 years.

[2] Kreski v Modern Electric, 429 Mich 347; 415 NW2d 178 (1987).

This Court then, must first analyze the facts as pled by Plaintiff. In the Complaint, Plaintiff makes the following allegations, inter alia:

Count I

Assault and Battery - Defendant Barbara Jean Martell

> 6. The defendant Barbara Jean Martell committed assault and battery upon the plaintiff Philip C. Williams by shooting at him, with one of the bullets striking him in an area approximate to his right shoulder.
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> * * *
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> 9. The conduct of the defendant Barbara Jean Martell was malicious, willful, wanton, with total disregard to the rights of the plaintiff and, accordingly, the plaintiff is entitled to exemplary damages.
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> * * *

Count II

Dram Shop - Defendant Eddie's Village Inn, Inc.

> * * *
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> 11. During the evening and prior to this occurrence, defendant Eddie's Village Inn, Inc. by its agents and employees, caused and contributed to the intoxication of defendant Barbara Jean Martell by selling alcoholic beverages and intoxicating liquors to her although agents and employees of this defendant knew or should have known by observation of defendant Barbara Jean Martell that she was visibly intoxicated.
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> * * *
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> 13. The described occurrence resulted from the intoxication of defendant Barbara Jean Martell, which intoxication resulted from the sale of alcoholic beverages and intoxicating liquors to her by defendant Eddie's Village Inn, Inc. and/or its agents and employees when she was visibly intoxicated.

Defendant Inn did not submit affidavits or other evidence with the motion; for this reason, this Court must look only to the pleadings in its consideration of Defendant Inn's arguments.[3] MCR 2.116 (G)(5).

On September 6, 1992, Plaintiff Philip C. Williams was on duty

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[3] It is the opinion of this Court that the affidavit submitted by Plaintiff Philip Williams does not in any significant way enhance his arguments given this Court's obligation to review the facts most favorably from his perspective.

and acting in his capacity as a deputy in the Leelanau County Sheriff's Department when he stopped a vehicle driven by Roger Allen Martell in which Defendant Barbara Jean Martell was a passenger. Deputy Williams was arresting Roger Martell for OUIL when the alleged assault and battery took place.[4] It is undisputed that Plaintiff was injured by shots intentionally fired at him by Barbara Martell. Plaintiffs allege, in paragraph 14 of the Complaint, that Plaintiff/Officer Williams has suffered a loss of work capacity; the Court is informed that Plaintiff's injuries are permanently disabling and have precluded his return to police work.

Michigan case law addresses the application of the "Fireman's Rule" to premises liability and intentional tort actions. A review of Michigan cases reveals only two cases which discuss application of the "Fireman's Rule" to dram shop actions. Justice Levin, in a dissenting opinion in Woods, supra, made the following remarks, which contain the only discussion of dram shop actions found in Woods:

> This Court recognized in Kreski that the rationale for the fireman's rule may not justify barring recovery for negligence in every case that an officer is injured in the line of duty. The majority's statement that "[t]he fireman's rule prevents police officers and fire fighters from recovering for injuries sustained in the course of duty" should not be read as barring recovery simply because the officer was injured in the line of duty.
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> An officer, I agree with the majority, may not recover where a substantial cause of his injury is confronting a risk " 'inherent in fulfilling the police or fire fighting duties,' " or " 'the performance of the very function police officers and fire fighters are

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[4] The Court record in Leelanau File No. 92-624-FC includes testimony that Plaintiff acted alone in stopping the vehicle Mr. Martell was driving and arresting him for OUIL. The record further indicates that Mr. Martell, while hand-cuffed, assaulted and restrained Officer Williams so that Defendant Barbara Martell could remove the officer's firearm from his holster. She shot him. Plaintiff/Officer, in his affidavit, refers to an "unrelated arrest". The temporal elements of the arrest and the assault cannot be separated; the assault and arrest are inextricably linked.

intended to fulfill.'"

> It thus becomes necessary to distinguish between those risks that an officer "assumes" and those that he does not. An officer does not, for example, assume the risk so as to bar an action, any more so than any other citizen, of being struck by a person who runs a red light. Nor would it promote the public policy identified in Kreski as the underlying rationale of the rule to hold that a tavern is not subject to dramshop liability to a police officer who is injured, while taking a crime report from a citizen, by a drunken driver who went over the curb onto the sidewalk. Surely allowing the citizen, struck by the drunken driver at the same time, to maintain an action and denying the officer the right to do so would not advance that policy. Although the officer is on duty, the risk he assumed when he became an officer does not include being struck on the sidewalk by an automobile driven by a drunken driver. (Footnotes omitted.)

Woods, supra at pp 203-205. Here there is no question that Plaintiff was injured in the course of his duties as a police officer making an arrest, an inherently dangerous activity for any police officer. Kreski would eliminate liability for negligent acts but neither it nor its progeny eliminate responsibility for wilful and wanton misconduct or intentional acts. Dram shop liability is vicarious and hinges on the culpability of the allegedly intoxicated person (AIP). MCL 436.22 et seq; MSA 18.993 et seq.

The Court of Appeals, in the per curiam opinion in McAtee v Guthrie, 182 Mich App 215; 451 NW2d 551 (1989), also discussed whether the "Fireman's Rule" precludes dram shop liability. The McAtee Court held that application of the "Fireman's Rule" in cases involving wilful, wanton, or intentional misconduct was inappropriate:

> We will first address defendant Guthrie's claim that the trial court erred in denying his motions for summary disposition and directed verdict, based upon the "fireman's rule" adopted by our Supreme Court in Kreski v Modern Wholesale Electric Supply Co, 429 Mich 347; 415 NW2d 178 (1987). Kreski involved two separate premises liability actions brought by safety officers against the owners and occupiers of the premises where they were injured. The Kreski Court, noting that fire fighters and

police officers are hired, trained, and compensated by the public to deal with dangerous, but inevitable, situations generally caused by negligence, stated at p 372 that as a matter of public policy, we hold that fire fighters or police officers may not recover for injuries occasioned by the negligence which caused their presence on the premises in their professional capacities. This includes injuries arising from the normal, inherent, and foreseeable risks of the chosen profession.

However, the Court indicated it was not attempting to delineate the precise parameters of the rule, noting that several exceptions involving factual situations not presented there have developed in other states employing a fireman's rule. Id. at 370. As an example, the Court specifically noted that neither case before it involved allegations of negligence rising to the level of wilful, wanton, or intentional misconduct. Id. at 371.

In a recent case, a panel of this Court held that the fireman's rule did not preclude an action by an injured police officer against the estate of a barricaded gunman who intentionally shot and wounded the officer. Rozenboom v Proper, 177 Mich App 49, 57; 441 NW2d 11 (1989). In so holding, the Court agreed with the following remarks from Berko v Freda, 93 NJ 81, 90; 459 A2d 663, 667-668 (1983):

[T]he public policy underlying the "fireman's rule" simply does not extend to intentional abuse directed specifically at a police officer. "To permit this would be to countenance unlimited violence directed at the policeman in the course of most routine duties. Certainly the policeman and his employer should have some private recourse for injuries so blatantly and criminally inflicted" Krueger v City of Anaheim [130 Cal App 3d 166, 170; 181 Cal Rptr 631, 634 (1982)]. [Rozenboom, supra at 57.]

We find the above rationale to be equally applicable to the case at hand. Both the deposition testimony at the time of Guthrie's motion for summary disposition and the evidence produced at trial indicated plaintiff's injuries were caused by Guthrie's wilful and wanton, if not intentional, misconduct in resisting arrest. Thus, he should not be permitted to receive the benefit of the fireman's rule to shield him from civil liability for his actions. Rozenboom, supra at 58. Accordingly, the trial court did not err in denying Guthrie's motions for summary disposition and directed verdict.

* * *

> Plaintiff's action against Oakland Hills was brought under the dramshop act MCL 436.22; MSA 18.993. In order to prevail, plaintiff was required to prove that defendant or its agent served intoxicating liquor to Guthrie. McKnight v Carter, 144 Mich App 623, 629; 376 NW2d 170 (1985), lv den 424 Mich 859 (1985). In granting Oakland Hills' motion, the trial court concluded there was no competent evidence that intoxicating liquor was served to Guthrie. We disagree.
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> Initially, we agree with the trial court that a statement made by Guthrie to plaintiff's patrol partner, Officer Price, that he had been drinking at "Oakland Hills" was inadmissable against Oakland Hills. Smith v Woronoff, 75 Mich App 24, 30; 254 NW2d 637 91977), lv den sub nom Smith v Love, 402 Mich 902 91978). Nevertheless, we believe there was competent evidence requiring the issue of service to be resolved by the jury.

McAtee, supra at pp 219-221.

Defendant Inn seeks to be shielded from all liability for Plaintiff/Officer's injuries caused by Defendant Barbara Martell. Certainly, the Defendant Inn may not use the "Fireman's rule" to preclude liability for wilful, wanton or intentional acts. Id., at 220. Plaintiffs allege that employees or agents of Defendant Inn served Barbara Martell alcoholic beverages when they knew or should have known that she was visibly intoxicated.[5] If the acts of the AIP are not shielded by application of the "Fireman's Rule", then the vicariously liable dram shop should not be able to use the rule to escape liability.

Yet, this Court acknowledges that there is no allegation or evidence before it that the alleged serving of alcoholic beverages was in and of itself malicious, wilful, wanton or done with total disregard for the rights and safety of Plaintiff Williams.

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[5] In paragraph 13 of the Complaint, Plaintiffs claim as follows:

> The described occurrence resulted from the intoxication of defendant Barbara Martell, which intoxication resulted from the sale of alcoholic beverages and intoxicating liquors to her by defendant Eddie's Village Inn, Inc. and/or its agents and employees when she was visibly intoxicated.

Construing the facts most favorably from Plaintiffs' point of view, the Defendant Inn may have negligently served Defendant Martell (AIP) and the AIP committed a malicious intentional tort. One must ask, then, whether the dram shop may be held vicariously liable for an intentional tort? The answer to this question requires a review of the social policy underlying the Dram Shop Act. MCL 436.22 et seq; MSA 18.993 et seq.

Most recently, the Court of Appeals discussed "the social responsibility theory" which underlies the dram shop act in Vander Bossche v Valley Pub, 203 Mich App 632, 638-639; 513 NW2d 225 (1994). There, the principle was articulated as follows:

> In Guitar v Bieniek, 402 Mich 152, 166-168; 262 NW2d 9 (1978), our Supreme Court discussed the remedial purpose and scope of the dramshop act, stating that an entity that was "directly proprietorily motivated" to furnish alcohol to the public should be considered "implicitly charged" with responsibility under the statute.

The Guitar Court discussed application of dram shop liability to Defendant Alcamo's Holiday House, a rental hall.[6] The following text from the Guitar opinion provides the nexus between common-law tort liability and the penalties of the dram shop statute:

> It is evident from a reading of the narrow and restrictively drawn civil liability provisions of §22 that the Legislature intended to impose a special legal duty upon a group of retailers who the Legislature may have believed needed additional encouragement to subject their immediate pecuniary interests to the ultimate welfare of their patrons and society as a whole. That encouragement has been made to consist in part of the resultant vicarious liability.
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> In the case at hand, the role of Alcamo's does not fit logically within the manifest legislative purpose. Whereas the class of retailers specifically named in §22 may be directly proprietorily motivated to dispense "that additional drink" which is "one too many", such motivation is totally inapplicable to a social setting in which the alcohol is supplied as a mere social amenity.

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[6] In Guitar, the Supreme Court ruled that Alcamo's was neither a retailer of beer or wine, or spirits, for consumption on the premises, nor a Specially Designated Merchant. Id., at p 167.

> As such, the instant and similar situations lie outside of the purview of "dramshop" liability. The Legislature, in balancing social and financial interests, designated a specific group of 'persons" to whom the civil liability provisions would apply.

Id., at pp 167-168.

Finally, the following text from Dickerson v Heide, 69 Mich App 303, 309; 244 NW2d 459 (1976) concisely states the rule for construing a remedial statute such as the Dram Shop Act:

> The dramshop act was enacted to provide relief not obtainable at common law. Although in derogation of common law, our Courts have, stressing the remedial nature of the act, construed the statute liberally and eschewed "any strained or narrow construction" of its words. Eddy v Courtwright, 91 Mich 264, 267; 51 NW 887 (1892), Podbielski v Argyle Bowl, Inc, 392 Mich 380, 384; 220 NW2d 397 (1974).

It is this Court's opinion that Defendant/Passenger Martell's assault is not analogous to a drunken driver's negligent striking of a citizen or a police officer. Woods, supra. Her act was intentional. McAtee, supra. A substantial cause of Plaintiff/ Officer's injuries was his confrontation with an intoxicated driver and his drunken passenger, Barbara Martell, who responded in a malicious and intentionally assaultive manner which nearly cost the officer his life.

The "Fireman's Rule" is predicated on a policy to avoid public compensation to safety personnel for the injuries associated with the inherent dangers which they are hired and trained to handle. Woods, supra at pp 190-191. Those inherently dangerous and foreseeable risks routinely undertaken by police officers in fulfilling their duties cannot be a source of compensation so long as they were caused by ordinary negligence. Current law and public policy do not shield tortfeasors from liability for wilful, wanton or intentional acts. Woods, supra; McAtee, supra; Guitar, supra; Vander Bossche, supra.

While, there is no evidence and there are no allegations that Defendant Inn acted maliciously, the Defendant Inn may be held

vicariously liable for intentional injuries inflicted on Plaintiff by Defendant Barbara Martell (AIP) under these circumstances. McAtee, supra; Vander Bossche, supra. This Court has found no case with a parallel factual situation within Michigan.[7] However, this Court must conclude that the public policy underlying the "Fireman's Rule" should not extend to Defendant Inn's alleged violation of the Dram Shop Act on these facts. MCR 2.116(C)(8).

Dram shop liability is imposed on a limited class of retailers for serving a visibly intoxicated person, recognizing that the dram shop is not itself a party to the subsequent behavior but has contributed to the AIP's loss of sensibility and relaxed inhibitions which can be a cause of foreseeable injury to others. It is well known that a percentage of intoxicated persons will become violent. It would be an unfortunate application of the social policy which underlies the dram shop act to find the bar vicariously responsible only for the negligence of its AIP and not for those predictable intentional assaults where the consumption of

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[7] In Geocaris v Bangs, 91 Ill App2d 81; 234 NE2d 17; 31 ALR3d 431 (1968), the plaintiff sued "owners and operators of a dram shop to recover under the dramshop act, and against an individual who, while intoxicated, allegedly maliciously assaulted the plaintiff". The Geocaris Court reached a conclusion which this Court finds applicable to the instant matter,

> Under the allegations found in these pleadings, it may well be that the evidence will establish that the defendant's liability is by reason of the statute and that the action of the intoxicated person, being intentional and malicious, may have been the active and primary cause of the plaintiff's injury.

Id., at p 436. Regarding the imposition of vicarious liability, the following remark relates to the instant facts:

> The justification for imputing negligence to an innocent party is the social necessity to provide injured plaintiffs with financially responsible defendants. 2 Harper & James, Torts § 23.6, p 1274; Prosser, Torts (4th ed) §73.

Nowak v Nowak, 175 Conn 112, 123; 394 A2d 716 (1978).

alcohol at the bar has been a proximate cause of the assault. MCR 2.116(C)(10).

Defendant Inn's motion is hereby denied in its entirety. No costs are awarded.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/12/94