S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PAMELA S. ANDREW, Plaintiff–Appellant, Cross-Appellee,	UNPUBLISHED September 27, 1996
v	No. 181717 LC No. 92-7844 NO
BERNICE STEEB, Defendant–Appellee, Cross-Appellant.	

Before: Markey, P. J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Plaintiff appeals as of right from December 1, 1993, and February 2, 1994, orders granting partial summary disposition to defendant pursuant to MCR 2.116(C)(8), and the March 16, 1994, judgment entered against her following a jury trial. We affirm the judgment.

In a prior proceeding, defendant was ordered into custody to undergo a psychiatric examination. After the order was given, defendant attempted to leave the courtroom. Plaintiff, a transport officer with the Washtenaw County Sheriff's Department, was standing behind plaintiff and ready to take defendant into custody when the order was given. When plaintiff attempted to prevent defendant's exit from the courtroom, she was injured as she fell backwards onto a railing in the courtroom.

Plaintiff brought three causes of action against defendant: intentional battery, ordinary negligence, and gross negligence and willful and wanton behavior. Prior to trial, defendant brought a motion for summary disposition, claiming plaintiff's causes of action were barred by the fireman's rule. The trial court dismissed all but the intentional battery claim.

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*Circuit judge, sitting on the Court of Appeals by assignment.

I.

On appeal plaintiff argues that the trial court incorrectly applied the fireman's rule. The fireman's rule prevents a firefighter or police officer from recovering damages from a private party for negligence in the creation of the reason for the safety officer's presence. *Kreski v Modern Electric*, 429 Mich 347; 415 NW2d 178 (1987). It also precludes damages for injuries arising from risks inherent in fulfilling police or fire fighting duties. *Woods v City of Warren*, 439 Mich 186; 482 NW2d 696 (1992), *Stehlik v Johnson (On Reh)*, 206 Mich App 83; 520 NW2d 633 (1994). The focus is on whether the injury stems directly from an officer's police or fire functions. *Id.* 86. Plaintiff's claim regarding this issue is two-fold.

Plaintiff argues the rule does not apply to allegations of willful and wanton behavior. Although it is true this Court has previously held summary disposition on the basis of the fireman's rule improper where the defendant's conduct is alleged to have been willful and wanton, see *Wilde v Gilland*, 189 Mich App 553; 473 NW2d 718 (1991); and *McAtee v Guthrie*, 182 Mich App 215; 451 NW2d 551 (1989), our Supreme Court in *Woods, supra*, made clear no well defined exceptions to the rule exist. In addressing a party's claim that the Court in *Kreski, supra*, recognized several "exceptions" to the rule, the Court in *Woods* stated

> It did not. The *Kreski* Court did indicate that the rationale of the fireman's rule might not apply in every circumstance involving an injury to a safety officer. It suggested, for instance, that buildings open to the public might justify a different result and that injuries resulting from intentional torts might also justify disregarding the fireman's rule. The Court did not, however, establish that those circumstances prevented application of the fireman's rule. It merely used them to indicate its willingness to apply the rule flexibly as circumstances required. That the *Kreski* Court chose this language to avoid rigid and formalistic adjudication does not mean it intended to defeat application of the fireman's rule when otherwise justified.

Applying the rule to the circumstances of this case we find no error in the court's grant of summary disposition in favor of plaintiff with regard to plaintiff's claim of gross negligence and willful and wanton behavior. Plaintiff's allegations of willful behavior or intentional conduct were properly submitted to the jury on her battery claim. The fireman's rule is not meant to allow a person to act with impunity. *Mariin v Fleur*, 208 Mich App 631; 528 NW2d 218 (1995). However, plaintiff's remaining claims alleging "heightened" forms of negligence, i.e. gross negligence and wanton behavior, involve injuries that stem directly from plaintiff's transport officer's duties. See *Woods* and *Stehlik, supra*. Therefore, the policies underlying the rule support its application. Summary disposition was properly granted.

Plaintiff next argues that because she was not a police officer, the rule does not apply to her. We find no merit in plaintiff's contention. Plaintiff's complaint indicates that at the time of the incident plaintiff was a Washtenaw county sheriff's deputy assigned to the transport division of the department. Testimony at trial established it was plaintiff's job to transport inmates to district or circuit courts, transfer inmates from the jail to state prisons and even to handle the extradition of inmates from other

states to Michigan. Plaintiff was in uniform and armed with a firearm at the time of the incident. She also had received training on techniques to deal with uncooperative prisoners and carried handcuffs, "belly chains" and leg irons for use in transporting inmates and taking them into custody. Contrary to plaintiff's assertions, she was not merely a public employee in a position that only peripherally involved danger. *Kreski, supra*.

II.

Next, plaintiff argues the trial court erred by reading to the jury SJI2d 115.09, excessive force, when there was no evidence presented to support such a defense.

When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2). The determination whether a requested instruction is proper is in the sound discretion of the trial court. *Williams v Coleman*, 194 Mich App 606; 488 NW2d 464 (1992). It is error to instruct a jury on a matter not sustained by the evidence. *Mills v White Castle Systems Inc*, 199 Mich App 588; 502 NW2d 331 (1993).

In this case, a review of the record reveals no evidence plaintiff utilized excessive force. The trial court, therefore, erred by reading the instruction. However, the error does not require reversal because failure to vacate the verdict will not be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985). Because there was absolutely no evidence of excessive force presented at trial, it is unlikely the jury found in favor of defendant on the basis of the instruction and would have reached a different result had the instruction not been given. Reversal is not required. *Jernigan v General Motors Corp*, 180 Mich App 575; 447 NW2d 822 (1989).

III.

Last, plaintiff argues that the trial court erred in denying her motion for judgment notwithstanding the verdict (JNOV) or a new trial. Plaintiff claims the trial court reached its decision on the basis of its policy not to overturn jury verdicts, rather than on the evidence. We disagree. There was substantial evidence presented that indicated the touching may have been accidental rather than intentional. To make out a claim for battery a plaintiff must prove a willful or intentional touching, *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940). The trail court did not abuse its discretion in denying plaintiff's motion. *Michigan Microtech Inc v Federated Publications, Inc,* 187 Mich App 178; 466 NW2d 717 (1991).

IV.

Given our resolution of plaintiff's appeal, it is unnecessary to address defendant's cross-appeal.

Affirmed. Costs to neither party.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot