STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. HENDERSON and BEVERLY R. HENDERSON,

Plaintiffs-Appellants,

v

CITY OF TAYLOR, CITY OF TAYLOR POLICE CHIEF THOMAS BONNER, CITY OF TAYLOR POLICE COMMANDER GARY JARVI, CITY OF TAYLOR POLICE DETECTIVE FRANK CANNING, TAYLOR CIVILIAN PISTOL CLUB a/k/a TAYLOR PISTOL CLUB, and MICHAEL B. MCSHEA,

Defendants-Appellees.

UNPUBLISHED
November 3, 2000

No. 214429
Wayne Circuit Court
LC No. 96-640435-NI

Before: Owens, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of all defendants under the common-law firefighter's rule. We reverse.

Plaintiff[1] was on duty as a Wayne County Sheriff's Deputy acting as a gun range safety instructor certifying other county deputies when he was struck in the face by a bullet or bullet fragment that allegedly ricocheted back from the bullet trap at defendant City of Taylor's indoor shooting range. The bullet trap's manufacturer inspected the trap after the incident and concluded that it was so age-worn that it no longer met manufacturer's specifications. The worn condition allegedly allowed bullets to escape the trap at high velocity, striking the concrete floor of the range and ricocheting back toward the firing line. At least three other ricochet incidents were reported prior to plaintiff's injury.

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[1] Plaintiff Beverly R. Henderson is Deputy Henderson's wife. Hers is a derivative claim for loss of consortium. "Plaintiff" will refer to Deputy Henderson.

Plaintiff initially filed a premises liability action against Taylor only on September 16, 1996. Taylor answered the complaint and asserted no less than twenty-one affirmative defenses. Taylor also filed two motions for partial summary disposition and responded to plaintiff's various motions. Thereafter, the trial court allowed plaintiff to amend the complaint to add the other defendants named in this action. All defendants answered the amended complaint and asserted affirmative defenses. Subsequently, defendants filed responses to plaintiff's motion for partial summary disposition.

On March 27, 1998, Taylor and the individual officers filed a motion for summary disposition arguing, in part, that plaintiff's claims were barred by the common-law firefighter's rule because he was injured in the course of duty. This was the first time the firefighter's rule had been raised in a pleading. Plaintiff responded to the motion arguing that the firefighter's rule was an affirmative defense and that defendants had waived the defense by failing to raise it in a responsive pleading. The trial court held that the firefighter's rule applied, that plaintiff had not pleaded an exception to the rule, and that the defense had not been waived because, under MCR 2.116(D)(3), defendants could move for summary disposition under MCR 2.116(C)(8) at any time.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8) and (10). This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court's order stated that it was granting summary disposition under subrule (C)(8). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is reviewed de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). When reviewing a motion decided 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.*

Since the court went beyond the pleadings in reaching its conclusion, we treat the motion as having been granted under (C)(7) or (10). *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Spiek*, *supra*. Subrule (C)(7) allows summary disposition when the claim is barred by immunity granted by law, among other things. When reviewing a motion under subrule (C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Abbott v John E Green Co*, 233 Mich App 194, 198; 592 NW2d 96 (1998). This Court considers affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Employers Mutual Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). Based on the substance of the motion, we deem it granted under MCR 2.116(C)(7).

"Pursuant to MCR 2.111(F)(3), immunity granted by law (such as the fireman's rule) is an affirmative defense that must be pleaded in a party's responsive pleading." *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff. *Campbell v St John Hosp*, 434 Mich 608,616; 455 NW2d 695 (1990). "In other words, it is a matter that

accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).

The failure to raise an affirmative defense as required by MCR 2.111(F) constitutes a waiver of that affirmative defense. *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 494-495; 603 NW2d 317 (1999), citing *Stanke*, *supra*. Defendants failed to timely raise the firefighter's rule and, consequently, the affirmative defense was waived.

The trial court erred in allowing defendants to present the affirmative defense under the guise of a motion under subrule (C)(8). The court perpetuated the error by noting "in passing" that the time for raising the defense was governed by MCR 2.116(D)(3), which states that the ground listed under subrule (C)(8) may be raised at any time. In fact, the time for raising affirmative defenses such as the firefighter's rule are governed by MCR 2.116(D)(2), which states as follows:

> (2) The grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. Amendment of a responsive pleading is governed by MCR 2.118.

As noted, defendants did not comply with this rule. At no time did defendants seek leave to amend their responsive pleadings to add the affirmative defense of the firefighter's rule. Although leave to amend is to be freely given when justice so requires, the trial court did not treat the pleading as an amendment of their responsive pleadings. Rather, the court erroneously deemed the motion to be one asserting a failure to state a claim on which relief can be granted.

The Michigan Supreme Court adopted the common-law firefighter's rule as a matter of public policy in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347; 415 NW2d 178 (1987).[2] The firefighter's rule's basic formulation is that "a fire fighter or police officer may not recover damages from a private party for negligence in the creation of the reason for the safety officer's presence." *Id.* at 358. The rule "prevents police officers and fire fighters from recovering for injuries sustained in the course of duty." *Woods v City of Warren*, 439 Mich 186, 190; 482 NW2d 696 (1992). "The scope of the rule . . . includes negligence in causing the incident requiring a safety officer's presence *and* those risks inherent in fulfilling the police or fire fighting duties." *Woods*, *supra* at 195, quoting *Kreski* at 372 (emphasis added by the *Woods* Court).

The Supreme Court recently held that "where the allegedly negligent conduct of the defendant did not result in the officer's presence at the scene of the injury, the fireman's rule does not apply." *Harris-Fields v Syze*, 461 Mich 188, 199; 600 NW2d 611 (1999). Plaintiff was at the scene not

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[2] The common-law firefighter's rule was abolished by PA 1998, No 389, effective November 30, 1998. MCL 600.2965; MSA 27A.2965.

because of defendants' negligence, but, rather, as a result of a rental agreement between the county sheriff's department and Taylor for the use of the range. The negligent act was unconnected to the reason that brought plaintiff to the range. The firefighter's rule does not apply.

Moreover, "the risks inherent in [an officer's] fulfillment of his police duties [do] not include all possible risks that could arise in that situation. *Gibbons v Caraway*, 455 Mich 314, 325; 565 NW2d 663 (1997). "The fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being." *Id.*, quoting *Kreski*, *supra* at 372. In *Gibbons*, the injured officer was directing traffic around an accident scene when he was struck by the defendant's automobile. The Court held that application of the firefighter's rule was not justified under the circumstances. *Id.* at 326.

Witnesses testified in their depositions that ricochets do not occur at properly maintained ranges. Consequently, we cannot say that being struck by a ricocheted bullet while at a shooting range is an inherent risk of police work. The firefighter's rule does not apply to situations such as the one presented here. Moreover, as Justice Riley noted in her concurring opinion in *Gibbons*, the reason we deny police officers the right to recovery is because the purpose of their job is to confront danger and to protect the public. *Id.* at 228. Plaintiff was not at the range to confront danger or to protect the public.

Though reversal is warranted on the two grounds discussed, we will briefly address the trial court's ruling regarding the public building exception to governmental immunity. Following the Supreme Court's ruling in *Kerbersky v Northern Michigan Univ*, 458 Mich 525; 582 NW2d 828 (1998), the public building exception can apply to a building with limited access, and the building in question does not have to be open to the "general" public in order for the exception to apply. The evidence presented by plaintiff in response to defendants' motion for summary disposition, including deposition testimony, rental invoices, shooting match invitations and letters, showed that the range was open to the public, and the trial court's ruling to the contrary was erroneous.

We decline to address plaintiff's remaining issues because they have not been properly preserved for appeal in that they were not addressed by the trial court, or they have not been adequately briefed. A party may not leave it to this Court to search for authority to support its position. *Schadewald v Brule*, 225 Mich App 26, 34; 570 NW2d 788 (1997).

Reversed.

/s/ Donald S. Owens
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra