

OF MICHIGAN
COURT OF APPEALS

LORI BEAN,

Plaintiff-Appellant,

v

GERALD PATRICK DEENY, JR.,

Defendant-Appellee.

UNPUBLISHED

December 26, 2000

No. 217276

Oakland Circuit Court

LC No. 96-529343-NI

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's orders denying her motion to amend her complaint and granting defendant's motion for summary disposition. We reverse.

On February 16, 1995, while working as a Berkley public safety officer, plaintiff stopped her patrol car behind a parked vehicle in the right lane of northbound Woodward Avenue. The driver of the vehicle had been arrested, and plaintiff was waiting for the vehicle to be impounded. She activated her flashers and sat in her patrol car. Defendant drove his car into the back end of plaintiff's patrol car. Plaintiff was injured as a result.

Plaintiff brought this action against defendant, alleging negligence. Defendant moved for summary disposition, raising for the first time the fireman's rule. Plaintiff sought to amend her complaint to plead facts to escape application of the fireman's rule. The trial court denied plaintiff's motion, without specifically stating its reasons for doing so. It also granted defendant's motion, finding that plaintiff's allegations of ordinary negligence were insufficient to overcome application of the fireman's rule.

First, plaintiff argues that the trial court abused its discretion in denying her motion to amend her complaint in order to allow her to plead facts in avoidance of the fireman's rule.

This Court reviews a trial court's decision on a motion for leave to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend is to be freely given when justice requires. MCR 2.118(A)(2). The court may deny leave to amend for particularized reasons, such as undue delay, bad faith, dilatory motive of the moving party, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party or futility of the amendment. *Amburgey v Sauder*, 238 Mich

App 228, 246; 605 NW2d 84 (1999). A defendant is considered prejudiced by the amendment if the amendment would prevent the defendant from having a fair trial. *Id.* In addition, the prejudice must arise from the fact that the new allegations are offered late in the proceedings, not that they might cause the defendant to lose on the merits. *Id.*

Plaintiff moved to amend her complaint in response to defendant's motion for summary disposition, which raised the fireman's rule for the first time. Plaintiff sought to amend her complaint to allege an exception to the fireman's rule. There is no indication of undue delay, bad faith or dilatory motive. Additionally, considering defendant's motion for summary disposition and his assertion of the fireman's rule, we find that defendant would not suffer undue prejudice if the amendment were allowed. Under the circumstances, we find that the trial court abused its discretion in denying plaintiff's motion.

Nonetheless, we note that plaintiff's original complaint, which alleged ordinary negligence, is sufficient to state a claim under the fireman's rule. *Harris-Fields v Syze*, 461 Mich 188; 600 NW2d 611 (1999); *Gibbons v Caraway*, 461 Mich 960; 609 NW2d 185 (2000). For this reason, it is unnecessary to address defendant's argument that amendment of the complaint would have been futile because the facts would not have supported a finding of wilful and wanton or reckless behavior on his part.

Next, plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition when that motion was based on an affirmative defense that defendant did not properly plead. We disagree.

Pursuant to MCR 2.111(F)(3), a party asserting immunity granted by law (such as the fireman's rule) must plead the affirmative defense in a responsive pleading. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Under MCR 2.111(B)(1), the pleading party "must state specific allegations necessary to reasonably inform the adverse party of the nature of the claims that the adverse party is called on to defend." *Miller, supra*, 223 Mich App 168-169. To require a defendant to plead the fireman's rule defense in a responsive pleading, the complaint must allege sufficient facts to put the defendant on notice that the fireman's rule might be applicable to the case. *Id.* at 169.

In *Miller*, as here, the plaintiff failed to plead that she was a police officer, that the accident occurred while she was on duty, or that defendant acted wilfully and wantonly. The defendant did not learn that the fireman's rule was applicable until discovery was underway. *Id.* We follow *Miller* and conclude that the trial court did not abuse its discretion in allowing defendant to amend his pleadings to raise the affirmative defense of the fireman's rule.

Last, plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition pursuant to the fireman's rule. We agree.

After the trial court issued its decision in this case, our Supreme Court decided *Harris-Fields, supra*. In *Harris-Fields*, the Court 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, supra*, 461 Mich 198. It is irrelevant whether the plaintiff alleged ordinary or gross negligence. *Gibbons, supra*.

Under the reasoning of *Harris-Fields*, plaintiff properly pleaded a claim of ordinary negligence against defendant that was not subject to the defense of the fireman's rule. Therefore, the trial court's decision granting defendant's motion for summary disposition is reversed.

Defendant argues that the trial court's decision should be affirmed despite *Harris-Fields*, because the facts establish that plaintiff did not suffer a serious impairment of body function, as required under MCL 500.3135; MSA 24.13135. This issue was raised before, but not decided by, the trial court. This Court generally declines to address issues not decided by the trial court. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). Accordingly, we decline to address this issue because the trial court failed to consider the issue and make the requisite findings of fact before determining whether the question is one of law. *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Hilda R. Gage