

STATE OF MICHIGAN
COURT OF APPEALS

DANIELLE MADEJ,

Plaintiff-Appellant,

V

CHARLES EDWARD RUEHS, JR., CAROL L.
RUEHS, and CHARLES EDWARD RUEHS, III,

Defendants-Appellees.

UNPUBLISHED

June 13, 2013

No. 309737

Monroe Circuit Court

LC No. 09-028036-NI

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the order dismissing her complaint for failing to post a security bond for costs in the amount of \$10,000. We affirm.

Plaintiff contends that the trial court abused its discretion by ordering her to post security for costs. We disagree. The trial court's decision to order a bond for security for costs is reviewed for an abuse of discretion. *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 633; 502 NW2d 371 (1993). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The lower court's factual findings are review for clear error, but questions of law are subject to de novo review. *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009). "The proper interpretation and application of a court rule is a question of law, which [the appellate court] reviews de novo." *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the rule. *Id.* at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id.* at 706. The Legislature's use of the term "shall" denotes mandatory action or direction, *Mich Educ Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011), and the term "may" denotes permissive action, *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008).

MCR 2.109 governs "Security for Costs" and provides:

(A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order

the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. MCR 3.604(E) and (F) govern objections to the surety.

(B) Exceptions. Subrule (A) does not apply in the following circumstances:

(1) The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

(2) Security shall not be required of:

(a) the United States or an agency or instrumentality of the United States;

(b) the State of Michigan or a governmental unit of the state, including but not limited to a public, municipal, quasi-municipal or governmental corporation, unincorporated board, public body, or political subdivision; or

(c) an officer of a governmental unit or agency exempt from security who brings an action in his or her official capacity.

(C) Modification of Order. The court may order new or additional security at any time on just terms,

(1) if the party or the surety moves out of Michigan, or

(2) if the original amount of the bond proves insufficient.

A person who becomes a new or additional surety is liable for all costs from the commencement of the action, as if he or she had been the original surety.

Case law addresses the rationale for requiring a bond as security for costs:

This Court has held that security should not be required unless there is a substantial reason for doing so. While a plaintiff's poverty alone is not a substantial reason to order security, the assertion of a tenuous legal theory of liability may constitute a substantial reason. [*Farleigh*, 199 Mich App at 634.]

"A 'substantial reason' for requiring security may exist where there is a 'tenuous legal theory of liability,' or where there is good reason to believe that a party's allegations are 'groundless and unwarranted.'" *In re Surety Bond for Costs*, 226 Mich App 321, 331-332; 573 NW2d 300 (1997). "If a party does not file a security bond as ordered, a court properly may dismiss that party's claims." *Id.* at 332. "An order to post security for costs can also be appropriate where there is good reason to believe that a party's allegations, although they cannot be summarily

dismissed under MCR 2.116, are nonetheless groundless and unwarranted.” *Wells v Fruehauf Corp*, 170 Mich App 326, 335; 428 NW2d 1 (1988).

If the trial court believes that a Rule 109 [MCR 2.109] bond would be proper absent plaintiff’s poverty, he must then assess the indigent plaintiff’s financial ability to post bond. In this regard, the rule attempts to balance the right of a poor plaintiff to seek justice with the need of a defendant to have an opportunity for security. In our view, the rule establishes a strong preference for waiver of the bond where the indigent plaintiff’s pleadings show a “meritorious claim” – *i.e.*, a legitimate cause of action. In cases where the indigent plaintiff’s pleadings show a tenuous legal theory, the plaintiff’s interest in free access to the courts becomes less significant when weighed against the defendant’s greater need for security. In short, the fulcrum of the rule’s balance is the legitimacy of the indigent plaintiff’s theory of liability

This is not to say that legitimacy of the claim will always be determinative. The rule clearly allows for sound trial court discretion. We can imagine few cases, however, where a discreet trial court will require an indigent plaintiff, pleading a valid theory of liability, to post security. [*Gaffier v St Johns Hosp*, 68 Mich App 474, 478; 243 NW2d 20 (1976).]

The type of legal theory is not dispositive:

In determining the legitimacy of a claim, a trial court is not strictly limited to considering the plaintiff’s legal theory, but may also consider the likelihood of success on that theory. A trial court’s determinations regarding the legitimacy of the claims and a party’s financial ability to post a bond are findings of fact that are reviewed only for clear error. [*In re Surety Bond for Costs*, 226 Mich App at 333 (citations omitted).]

“As with the threshold determination of a reasonable and proper basis for imposition of a requirement of the posting of security, the decision to waive security under MCR 2.109(B)(1) is a matter addressed to the sound discretion of the lower court.” *Wells*, 170 Mich App at 336.

In the present case, plaintiff was injured in an automobile accident. In her deposition, plaintiff testified that she merely lay around reading and watching television during the day and took pain medication. Although she presented documentary medical evidence to support her claim of injury, there was also evidence that questioned the validity and extent of her injuries. An independent medical exam found that plaintiff was engaged in abnormal pain behaviors.

Defendants also presented surveillance video taken of plaintiff. Plaintiff contends that the video merely shows a depressed individual walking slowly. The trial court’s factual findings found the contrary, and our review of the surveillance video comports with the assessment by the trial court. Plaintiff was observed sitting in a vehicle with a visitor to her home. Plaintiff bent over in the vehicle, an activity that purportedly was restricted. She exited the vehicle without difficulty and kneeled before proceeding into her home. On another day, plaintiff was seen entering a building, apparently for an appointment. After her appointment, plaintiff crossed a

gas station lot where she met her transportation. Plaintiff entered the vehicle, a Jeep Grand Cherokee, without incident. She accompanied the driver on errands to a dollar store and a liquor store. Plaintiff did not remain in the vehicle, but entered both stores. She did not appear to have any difficulty and did not express any pain or discomfort. Plaintiff left the liquor store and entered a Kia vehicle. When she exited this vehicle, she either jogged or ran briefly from this vehicle back into the liquor store. There, plaintiff could be observed removing her hair from a ponytail, lean back, run her fingers through her hair, and then place her hair back in a ponytail with her hands raised above her head. Again, she displayed no signs of pain or restriction of movement. In fact, she exits the store using one arm for the door while continuing to fix her hair with the other hand. She then re-entered the Jeep Grand Cherokee without difficulty. Simply put, the surveillance video does not demonstrate an individual walking in a guarded fashion because of back pain and does not comport with the claims of pain made during the independent medical exam.

Although plaintiff contends that only innocent activity, a depressed individual walking slowly on a video, was captured, the trial court found that the video footage contradicted plaintiff's claim of debilitating injury. In addition to the surveillance video, the trial court found that plaintiff did not demonstrate mobility issues when she appeared in court at the renewed hearing for dismissal for failing to post the bond. There, plaintiff's counsel asked plaintiff to stand before the court to demonstrate that she was no longer active and had gained 75 pounds since the accident occurred. The trial court found that during this court appearance, plaintiff "was able to sit, ambulate, and to turn at the command of her attorney in order to demonstrate her weight gain as compared to an earlier photograph shown in court during oral argument on the instant issue." The trial court's determination regarding the legitimacy of the plaintiff's claims present findings of fact that are reviewed only for clear error. *In re Surety Bond for Costs*, 226 Mich App at 333. "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotations and brackets omitted). Having viewed the surveillance video, it cannot be concluded that the trial court clearly erred in its factual findings regarding its import. *Id.* Additionally, we cannot conclude that the factual finding regarding plaintiff's ambulatory abilities in court was clearly erroneous. *Id.*

Plaintiff further contends that there is an exception to the surety requirement when a plaintiff lacks the financial resources to pursue her claim. Indeed, MCR 2.109(B)(1) provides that the court "may" allow a party to proceed without furnishing security for costs "if the party's pleadings state a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond." However, the trial court questioned the legitimacy of plaintiff's claim in light of the video. Secondly, the term "may" denotes permissive action. *Manuel*, 481 Mich at 647. Accordingly, the filing of an affidavit claiming poverty did not require the continuation of the action. Rather, the trial court continues to have the discretion to waive the security provision, and the determination is reviewed for an abuse of discretion. *Wells*, 170 Mich App at 336. The surveillance video contradicts plaintiff's claim that she lays around reading and watching television while consuming pain pills. Under the circumstances, the trial court's denial of the waiver of the security provision did not constitute an abuse of discretion.

In *Farleigh*, the plaintiff filed suit against the defendant union and others alleging retaliation. The parties proceeded to a summary jury trial in accordance with an administrative rule, and the jury returned an advisory verdict of no cause of action. The defendants moved pursuant to MCR 2.109 for \$45,000 for security for costs if plaintiff proceeded before a full-scale jury trial and did not obtain a more favorable verdict than that rendered at mediation. The court ordered \$15,000 security for costs and dismissed the case when the plaintiff did not post it. *Farleigh*, 199 Mich App 632-633. This Court held that the trial court did not abuse its discretion, noting that the court considered the lack of merit in the plaintiff's claims. *Id.* at 635. A claim may appear legally sound on its face, but a summary jury trial or motion for summary disposition based on MCR 2.116(C)(10) educates the court about the lack of merit justifying a motion for security pursuant to MCR 2.109. *Id.* at 636-637. Similarly, in this case, plaintiff may have pleaded a claim of injury and presented documentary evidence to support her injury, but the validity and extent of her injuries was critically examined through the independent medical examination, the surveillance video, and plaintiff's ambulatory ability when appearing in court. Accordingly, the trial court did not abuse its discretion by dismissing the action for failing to file the court ordered security. *Farleigh*, 199 Mich App at 633, 636-637.

Affirmed. Defendants, having prevailed, may tax costs. MCR 7.219.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood