STATE OF MICHIGAN

COURT OF APPEALS

RACHAEL LYNN VENZUCH, Plaintiff-Appellant,	UNPUBLISHED July 14, 2009
v	No. 285980 Oakland Circuit Court
MICHAEL EARL LACROSSE and E. F. LACROSSE SALES, Defendants-Appellees.	LC No. 2007-084890-NI

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, plaintiff appeals as of right from a circuit court order dismissing the action without prejudice for failure to post a $10,000 security bond. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court abused its discretion in ordering her to post a security bond because her legal theory was not tenuous and there was no good reason to believe that her allegations were groundless and unwarranted. Plaintiff also argues that the trial court erred in refusing to waive the bond because she pleaded a legitimate claim and showed an inability to pay.

MCR 2.109(A) provides, in pertinent part,

> 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.

As this Court explained in *In re Surety Bond for Costs*, 226 Mich App 321, 331-332; 573 NW2d 300 (1997):

> Security should not be required unless there is a substantial reason for doing so. 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." [Citations omitted.]

Even if a security bond is appropriate under these standards, "[t]he 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." MCR 2.109(B)(1). "In determining the legitimacy of a claim, a trial court is not strictly limited to considering the plaintiff's legal theory, but also may consider the likelihood of success on that theory." *In re Surety Bond for Costs*, *supra* at 333. The legitimacy of the claim is assessed from the plaintiff's pleadings, unless the merits of the case have been tested by summary disposition or by another merit-based proceeding, such as summary jury trial proceedings. *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 635-636 & n 4; 502 NW2d 371 (1993), distinguishing *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 271; 463 NW2d 254 (1990). "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*, *supra* at 333. "We review the trial court's decision to require a security bond for an abuse of discretion." *Id*. at 331.

The trial court did not make any findings,[1] but explained its decision by stating that it agreed with defendants' arguments. Defendants had argued that a security bond was appropriate because plaintiff claimed in her deposition that she did not know the surnames of several friends and boyfriends with whom she appeared in photographs. Defendants also argued that plaintiff obstructed their efforts to locate and depose the witnesses and prejudiced their ability to defend against the case.

Defendants have not cited, nor are we aware, of any authority where a security bond for costs was ordered on the basis of a party's failure to provide information during discovery, whether due to an inability to recall or an unwillingness to cooperate. MCR 2.313 sets forth a procedure for handling evasive or incomplete answers, including appropriate sanctions. Defendants did not avail themselves of that process. In light of the procedure available under MCR 2.313, the purported evasiveness of plaintiff's answers is not a "reasonable and proper" basis and does not provide a "substantial reason" for ordering a security bond pursuant to MCR 2.109(A).

On appeal, defendants attempt to link plaintiff's failure to identify the individuals in the photographs to the requirements of MCR 2.109 by asserting that her failure to cooperate amounts to a "failure to offer evidence" in support of her allegations, which defendants claim is a determinative factor in assessing the legitimacy of a claim. Defendants rely on *In re Surety Bond for Costs*, *supra* at 333-334, in which this Court stated:

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[1] Although findings of fact are not mandatory under MCR 2.109, see MCR 2.517(A)(4), in *Belfiori v Allis-Chalmers, Inc*, 107 Mich App 595, 601; 309 NW2d 682 (1981), this Court encouraged trial courts to "articulate the basis for their decision to set bond and, if possible, the basis for the amount set."

> Here, the trial court expressly found that third-party plaintiffs failed to demonstrate the legitimacy of their claims. On the basis of the record before us, we cannot conclude that this finding was clearly erroneous. Third-party plaintiffs did not offer any specific evidence to support their allegation that any particular third-party defendants contributed hazardous waste to the [Waterford Hills Sanitary Landfill]. Instead, they argued that they did not need such evidence. They argued that an expert could testify regarding the type of waste usually generated by certain types of businesses and the hazardous substances usually contained therein. They claim that this testimony could serve as proof that a party actually contributed hazardous waste to the landfill. We find this logic unpersuasive. Accepting such a rule would effectively allow third-party plaintiffs, through the use of expert testimony and speculation, to shift the burden of proof, forcing third-party defendants to prove that they did not contribute any hazardous waste to the landfill.

In *In re Surety Bond for Costs*, the third-party plaintiffs' failure to offer evidence that the third-party defendants were responsible for the hazardous waste that was the crux of the litigation was reflective of the "legitimacy" of the claim. *Id.* Contrary to defendants' argument here, plaintiff's claimed inability to remember the surnames of individuals with whom she took candid photographs is not a comparable "failure to offer evidence."

Defendants also contended that plaintiff's action was groundless and unwarranted. They argued that a jury award for plaintiff was highly unlikely because she was able to live her normal life, thereby precluding recovery under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

Plaintiff alleged that defendants were liable for the injuries she incurred when the vehicle driven by defendant Michael Lacrosse and owned by his business struck another vehicle that in turn struck the vehicle in which plaintiff was a passenger. Plaintiff's legal theory is not tenuous, nor is there good reason to believe that her allegations are "groundless and unwarranted."

The records submitted in conjunction with defendants' motion for security for costs indicate that plaintiff, who was 16 years old at the time of the accident, underwent multiple surgeries on her spine following the accident. Defendants presented photographs of plaintiff sleeping in an inner tube, standing with friends, raising her arm, sitting on a stair, tipping her head back, kneeling, and lying on a Slip N' Slide.[2] They also presented excerpts of her deposition in which she admitted riding a rollercoaster, water-tubing for 20 seconds, waterskiing for 30 seconds, using a Slip N' Slide three times, and tumbling out of a wheelchair. However, the excerpts also indicate that plaintiff's doctor highly recommended that she avoid jet skiing, knee-boarding, and tubing, and the medical records from 22 months after the accident note that plaintiff was unable to perform any heavy lifting, reaching, or stretching. Defendants did not move for summary disposition, so the record is not sufficiently developed to enable a complete

[2] Although defendants have submitted numerous photographs with their brief on appeal, we consider only the photographs and materials that were presented to the trial court. See MCR 7.210(A).

evaluation whether plaintiff would likely be able to meet the *Kreiner* threshold for recovery of noneconomic damages. However, defendants have failed to show that there was good reason to believe that plaintiff's allegations were "groundless and unwarranted."

Because the standards applicable to ordering a security bond pursuant to MCR 2.109 were not met, the trial court's decision to order plaintiff to post a $10,000 bond with surety was an abuse of discretion. In light of our decision, we need not address whether the trial court abused its discretion by denying a waiver pursuant to MCR 2.109(B)(1).

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

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio