

STATE OF MICHIGAN
COURT OF APPEALS

LORI DUFFY and DAN DUFFY,

Plaintiffs-Appellants,

v

PHILIP E. CHAFFEE, MARK A. ALEXANDER,
and FISCHER, FRANKLIN, FORD, SIMON &
HOGG,

Defendants-Appellees.

UNPUBLISHED
July 30, 1996

No. 182663
LC No. 94-427301

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's dismissal of their complaint, alleging legal malpractice, for failure to comply with the trial court's order requiring plaintiffs to file a security bond pursuant to MCR 2.109(A).

MCR 2.109(A) provides that, on motion of a defendant, if it appears reasonable and proper, the court may order a plaintiff to post a security bond in an amount sufficient to cover costs and expenses that may be awarded by the trial court. Before a motion for security pursuant to MCR 2.109(A) may be granted, the moving party must show a substantial reason for requiring the opposing party to file a security bond. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990). Assertion of a tenuous legal theory of liability can provide a substantial reason for requiring the security bond. *Id.* A substantial reason also exists if there is good reason to believe that a party's allegations are groundless and unwarranted, even if the allegations can not be summarily dismissed. *Id.* However, a plaintiff's poverty, alone, is not a substantial reason for granting a motion for security. *Id.* at 270-271. Plaintiffs first argue that the trial court abused its discretion by failing to make findings of fact to support its conclusion that a substantial reason existed for granting defendants' motion for security. We disagree. A court is not required to make findings of fact in decisions on motions unless the findings are required by a particular rule. MCR 2.517(A)(4). There is no provision in MCR 2.109(A) requiring the court to make findings of fact when deciding a motion for security. Furthermore, the trial court did not abuse its discretion in determining that a substantial reason existed for

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

requiring the security bond where it appears that plaintiffs' claim of legal malpractice is unwarranted. *Hall, supra* at 270.

To establish a case of legal malpractice, plaintiffs must prove 1) the existence of an attorney-client relationship, 2) negligent representation, 3) that the negligence was a proximate cause of an injury, and 4) the fact and extent of the injury alleged. *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Hence, plaintiffs must prove that but for the alleged malpractice, plaintiffs would have been successful in the underlying suit. *Id.*

Plaintiffs assert that defendants failed to present any evidence at trial to establish the duty and breach of duty of Boyne Mountain Lodge. However, the deposition testimony of Alex Campbell, the Area Ski Manager, which was read into evidence at trial, established that the ski lift operator had a duty to slow and steady the ski lift when a passenger was boarding. Furthermore, defendants' decision not to call the ski lift operator as a witness was a tactical decision and does not constitute grounds for a legal malpractice action. *Simko v Blake*, 448 Mich 648, 660-661; 532 NW2d 842 (1995). Because it does not appear that plaintiffs will be able to prove defendants were negligent or, assuming plaintiffs do prove negligence, that plaintiff would have been successful in the underlying suit, the trial court's conclusion that a substantial reason existed to require a security bond was not an abuse of discretion.

Plaintiffs also argue that the trial court abused its discretion by requiring them to post a security bond without examining their financial status. We disagree. The trial court's determinations under MCR 2.109(C)(1) regarding the legitimacy of the claim and the financial ability of the party required to post security are findings of fact and will not be reversed by this Court unless they are clearly erroneous. *Hall, supra* at 271. However, the decision to waive security under MCR 2.109(C)(1) is in the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Id.* MCR 2.109(C)(1) provides that MCR 2.109(A) does not apply, and the court may allow a party to proceed without furnishing security for costs, if 1) the party's pleading states a legitimate claim, and 2) the party shows by affidavit that he or she is financially unable to furnish a security bond.

In the present case, the trial judge stated on the record that he considered plaintiff Lori Duffy's affidavit. Furthermore, plaintiffs failed to satisfy the second requirement of MCR 2.109(C)(1) because the affidavit did not state that Dan Duffy's wages were plaintiffs' sole income or that plaintiffs had no assets other than those listed on the affidavit. *Wells v Fruehauf Corporation*, 170 Mich App 326, 338; 428 NW2d 1 (1988). In addition, plaintiffs failed to inform the court of the cost of the security bond. *Id.* Therefore, the trial court's decision not to waive the security bond pursuant to MCR 2.109(C)(1) was not an abuse of discretion.

We affirm.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky