

STATE OF MICHIGAN
COURT OF APPEALS

FELTON H. GORDON, as administrator for Estate of
LESLIE H. GORDON,

UNPUBLISHED
May 2, 1997

Plaintiff-Appellant,

v

No. 183940
Oakland Circuit Court
LC No. 79-190797

DR. SUNIL DISSANAYAKA and BIRWOOD
MEDICAL CENTER, P.C.,

Defendants-Appellees.

Before: Young, P.J, and Markey and D.A. Teeple,* JJ.

PER CURIAM.

In this wrongful death suit, plaintiff appeals as of right from an order dismissing his case for failure to post bond as security for costs. We affirm.

In 1978, Leslie Gordon injured his foot at work and was taken to Birwood Medical Center, which was owned by Dr. Sunil Dissanayaka (defendants). Defendants diagnosed Gordon's condition as a fracture of his left foot, placed him in a short leg, nonwalking, plaster cast, and instructed him not to put his weight on his injured foot and do a minimal amount of walking with the crutches provided to him. On August 5, 1978, Leslie Gordon died as a result of a blood clot blocking his main pulmonary artery, which originated in his lower left leg.

In 1979, plaintiff filed his complaint seeking damages for medical malpractice. Plaintiff claims that defendants were negligent for placing a nonwalking cast on Leslie Gordon's left leg and encouraging him to stay off his feet, and alleges that defendants' negligence proximately caused a fatal blood clot to develop in his leg. On January 27, 1984, after the first trial, the jury returned a verdict of no cause of action in favor of defendants. The case was appealed to this Court and to the Michigan Supreme Court. The Michigan Supreme Court remanded the matter to the trial court for a new trial due to an error resulting from the trial court's failure to allow plaintiff to elicit a defense expert's bias toward the defense. *Gordon v Dissanayaka and Birwood Medical Center*, 424 Mich 862; 377 NW2d 821

(1985). The second trial resulted in a mistrial. After the third trial in 1987, the jury returned a verdict of no cause of action in favor of defendants. On appeal, this Court remanded the matter for new trial based upon an erroneous jury instruction.

Before the fourth trial in the instant matter, defendants filed a motion to require plaintiffs to post bond as security for costs pursuant to MCR 2.109(A). Plaintiff responded to defendants' motion indicating that bond should be waived because the estate was indigent. After a hearing, the trial court required plaintiff to post bond as security for costs and allotted plaintiff two weeks to comply. Plaintiff failed to post bond and the trial court dismissed plaintiff's case.

Plaintiff first argues that the trial court erred in requiring that he post a bond as security for costs and then, dismissing his case for failure to post the bond. We disagree. Resolution of a motion for security for costs is a matter addressed to the court's discretion and will not be disturbed absent an abuse of that discretion. *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 634; 502 NW2d 371 (1993).

Pursuant to MCR 2.109(A), the court may order a plaintiff to file a bond as security to cover all costs and other recoverable expenses that may be awarded by the trial court, if the court deems it reasonable and proper. *Id.* The amount required is within the court's discretion. *Id.* However, the court may allow a party to proceed without posting a security bond, if the party's pleading states a legitimate claim, and the party has established by affidavit that he or she is financially unable to furnish the bond. MCR 2.109(C)(1).

The party seeking security from the opposing party is required to show that there is a substantial reason for doing so. *Hall v Harmony Hills Recreation, Inc.*, 186 Mich App 265, 270; 463 NW2d 254 (1990). Although 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. *Id.*; *Wells v Fruehauf Corp.*, 170 Mich App 326, 336; 428 NW2d 1 (1988). "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 nevertheless groundless and unwarranted." *Wells, supra* at 335.

We conclude that there was a substantial reason for requiring plaintiff to file a bond as security for costs. Plaintiff's case had had been tried three times and was scheduled to be tried a fourth. In the first and the third trial, juries returned a no cause verdict. As such, the court had a basis from which to conclude that plaintiff's chances at prevailing in the fourth trial were slim. Compare *Farleigh, supra* at 634-635 (no cause verdict from advisory jury supported trial court's finding of substantial reason for requiring security bond). Moreover, the court also properly considered that defendants were entitled to security for the expenses incurred in defending this ongoing case. Therefore, the court did not abuse its discretion in requiring that plaintiff post a security bond.

Plaintiff next argues that the trial court should have waived security under MCR 2.109(C)(1), which provides that security for costs would not be required 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. *Id.* The court's decision to waive the requirement to post a security bond is reviewed for an abuse of discretion. *Wells, supra* at 338. Plaintiff essentially contends that the court's refusal to was erroneous because plaintiff had established that the estate was indigent. We disagree. In *Wells, supra*, this Court affirmed a trial court's dismissal of a case after the personal representative failed to establish that she was financially unable to post a security bond. *Id.* at 338. Since plaintiff did not establish to the trial court that he was financially unable to post bond, he has not established that he is entitled to waiver of the bond requirement.

Lastly, plaintiff argues that his constitutional rights to a jury trial, due process and equal protection were violated by the trial court's decision requiring him to post bond as security for costs. These arguments were not raised below. Constitutional challenges may not be raised for the first time on appeal. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 N.W.2d 710 (1983). This rule applies even if the constitutional claims may be of merit. *Id.* (citing *Penner v Seaway Hosp*, 102 Mich App 697; 302 NW2d 285 (1981)).¹

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Jane E. Markey

/s/ Donald A. Teeple

¹ Nevertheless we note that in *Wells v Dep't of Corrections*, 447 Mich 415, 420; 523 NW2d 217 (1994), the Supreme Court stated that an indigent party, like any other party, may be liable for costs to the prevailing party, and the liability for those costs are not governed by the rules, constitutional or procedural, which assure an indigent person access to the courts. *Id.* at 419-420.