

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1220

Cir. Ct. No. 2009CV88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VERONIKA MCCARTHY,

PLAINTIFF-APPELLANT,

V.

PHYLLIS C. MCCARTHY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Veronika McCarthy appeals a judgment that dismissed her action to enforce an Affidavit of Support filed in conjunction with her immigration to the United States. For the reasons discussed below, we affirm the decision of the circuit court.

BACKGROUND

¶2 Phyllis McCarthy signed a federal Affidavit of Support form in which she agreed to sponsor the immigration of her sister-in-law, Veronika McCarthy, to the United States with “whatever support is necessary to maintain the sponsored immigrant[] at an income that is at least 125 percent of the Federal poverty guideline.” The affidavit provided that the sponsor’s obligation would remain in effect until the sponsor died, the immigrant became a United States citizen, the immigrant could be credited with forty quarters of work, the immigrant departed the United States permanently, or the immigrant died. After the death of Timothy McCarthy (the husband of Veronika and brother of Phyllis), Veronika sued to enforce the support obligation.

¶3 The circuit court initially granted summary judgment in Veronika’s favor when Phyllis failed to raise any defenses. However, after Phyllis hired a new attorney, the circuit court granted her relief from judgment, permitted her to file a counterclaim alleging that her signing of the affidavit had been induced by fraud, and allowed the matter to proceed to trial. A jury ultimately returned verdicts in favor of Phyllis on liability as to both the claim and counterclaim, and the circuit court decided the amount of damages on Phyllis’s counterclaim.

¶4 Veronika makes the following arguments on appeal: (1) there was an insufficient factual basis for the circuit court to reverse a decision on whether Veronika was entitled to an interpreter; (2) the circuit court erred in granting Phyllis relief from the initial summary judgment against her; (3) the circuit court erred in allowing the case to be heard by a jury; (4) Phyllis’s counterclaim should have been barred by the statute of limitations; (5) Veronika was entitled to a new trial because the bifurcation of the trial into separate phases on liability and

damages resulted in insufficient evidence to support the jury's verdict on the counterclaim; (6) the circuit court erred in denying Veronika's requests for a continuance; and (7) the circuit court erred in awarding costs and attorney fees to Phyllis.¹ We will set forth additional facts below as necessary in our discussion of these issues.

STANDARD OF REVIEW

¶5 A determination as to a party's English proficiency is a factual one, which we will not set aside unless clearly erroneous. *See Strook v. Kedinger*, 2009 WI App 31, ¶24, 316 Wis. 2d 548, 766 N.W.2d 219 (citation omitted).

¶6 We review a circuit court's discretionary decision to reopen a judgment under WIS. STAT. § 806.07 (2009-10)² with great deference, and will uphold it so long as it was supported by a reasonable basis. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

¶7 Whether there is a right to a jury trial in a particular category of case is a legal question that we review de novo. *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶¶31-32, 320 Wis.2d 1, 768 N.W.2d 176.

¹ Veronika also makes repeated derogatory comments about opposing counsel. We note that such ad hominem attacks are strongly disfavored and do nothing to persuade this court about the merits of the appeal. *See Strook v. Kedinger*, 316 Wis. 2d 548, 766 N.W.2d. 219 ("Venom, arrogance, and ad hominem attacks are not to be condoned, whether they are by a member of the practicing bar or a person acting pro se.").

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 We will independently determine whether a claim is time-barred under a given set of facts. *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶19, 331 Wis. 2d 740, 796 N.W.2d 806.

¶9 We review circuit court decisions regarding whether to grant a new trial, whether to grant a continuance, and whether to award attorney fees under the erroneous exercise of discretion standard. *Rechsteiner v. Hazelden*, 2008 WI 97, ¶28, 313 Wis. 2d 542, 753 N.W.2d 496 (citation omitted); *Manke v. Physician Ins. Co. of Wisconsin, Inc.*, 2006 WI App 50, ¶17, 289 Wis. 2d 750, 712 N.W.2d 40; *Lellman v. Mott*, 204 Wis. 2d 166, 175-76, 554 N.W.2d 525 (Ct. App. 1996).

DISCUSSION

Interpreter

¶10 A court shall advise a party of the right to an interpreter at public expense “[i]f the court determines that the person has limited English proficiency and that an interpreter is necessary.” WIS. STAT. § 885.38(3)(a). Limited English proficiency is defined to include “[t]he inability, because of the use of a language other than English, to adequately understand or communicate effectively in English in a court proceeding.” § 885.38(1)(b)1. This is a statutory right with regard to civil cases, and does not implicate either the confrontation clause or the right to counsel. Limited English proficiency that is based upon a person having a different primary language does not fall within the definition of a disability for purposes of the Americans with Disabilities Act. *See* 29 U.S.C. § 705(9) (2010); 28 C.F.R. § 35.104 (2010).

¶11 We are satisfied that the circuit court’s determination that Veronika was proficient in English was supported by the record before it and not clearly erroneous. Veronika’s résumé emphasized her language skills, noting that she spoke Slovak, Czech, Russian, Polish, and Hungarian. In a deposition for another case, Veronika indicated that she was “very comfortable” communicating in English. And most importantly, the court’s own observations of Veronika in the four civil cases she had pending demonstrated that she had an impressive understanding of the English language that allowed her to correct counsel at times and go beyond the scope of questions. In this regard, the circuit court properly differentiated between the ability to understand English, and the need to have certain questions rephrased, which the court described as “standard practice” in legal proceedings.

Relief from Judgment

¶12 WISCONSIN STAT. § 806.07(1) permits a circuit court to reopen an order or judgment based upon:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released or discharged;
- (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
- (g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

The catchall provision, subsec. (h), should be employed only when extraordinary circumstances are present, taking into account: (1) whether the judgment was the result of the conscientious, deliberate, and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether there had been any judicial consideration of the merits, and the interest of deciding the case on the merits outweighs the finality of judgments; (4) whether there was a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493.

¶13 Here, the trial court cited both excusable neglect, WIS. STAT. 806.07(1)(a), and the catchall provision in deciding to grant relief. With respect to the catchall provision, the court explicitly addressed each of the standard factors, finding that: (1 and 2) the judgment was not the result of a conscious choice by Phyllis, but rather the result of ineffective assistance by trial counsel; (3) although the court engaged in some consideration of the merits on summary judgment, the court had before it only Veronika's information with "virtually no defense presented;" (4) Phyllis did have arguably meritorious defenses that could be presented on her behalf; and (5) and there were no intervening circumstances that would make it inequitable to vacate the judgment. The court's discussion demonstrates a reasonable exercise of discretion based upon the evidence presented at the hearing.

Request for Jury

¶14 Article I, section 5 of the Wisconsin Constitution guarantees the right to a jury trial for any cause of action recognized at the time of the constitution's passage. *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, ¶10, 254 Wis. 2d 478, 647 N.W.2d 177. Veronika argues that the federal immigration sponsorship provisions were not in effect at that time. Phyllis counters that the sponsorship affidavit is a variety of contract, and breach of contract actions were certainly recognized. Since Veronika has not filed a reply brief responding to the contention that the affidavit is in essence a contract—and, furthermore, seems to categorize the affidavit as a contract in other portions of her brief—we deem the jury trial issue to have been conceded.

Statute of Limitations

¶15 Veronika contends that the six-year statute of limitations applicable to contracts under WIS. STAT. § 893.93(1)(b) should have barred Phyllis's counterclaim for fraud in the inducement of the contract. Phyllis responds that the circuit court appropriately applied the discovery rule applicable to fraud claims, under which the counterclaim would not have accrued until Phyllis became aware of the facts constituting fraud. The court reasoned that, since there was a dispute over whether Veronika and her husband had misrepresented to Phyllis the nature of the obligations she was undertaking, the court could not conclude that the statute had begun to run when the affidavit was signed. Again, Veronika has not filed a reply brief explaining why the discovery rule would not apply here if Phyllis were able to convince a jury as to her version of events, and we deem the issue to have been conceded.

Bifurcation

¶16 The parties stipulated to a bifurcated trial in which liability would be tried by the jury and damages would be tried to the circuit court. However, after the jury had returned a verdict against Veronika, and the parties had reiterated their waivers to a jury trial on the questions of damages, Veronika moved to set aside the verdict and obtain a new trial on the grounds that the bifurcation was improper under *Waters v. Pertzborn*, 2001 WI 62, 243 Wis. 2d 703, 627 N.W.2d 497, because it relieved the jury of finding an essential element of the counterclaim. We agree with Phyllis that *Waters* is distinguishable because it did not involve a stipulation, and conclude that the circuit court did not erroneously exercise its discretion by relying on the parties' stipulation and waivers in denying the motion for a new trial.

Continuance

¶17 When her attorney asked to withdraw based upon a conflict of interest with potential witnesses, Veronika made a pro se request for a postponement of the trial date. The trial court denied the postponement request based upon the fact that potential successor counsel had already been identified, and counsel would not be allowed to withdraw until a substitution could be made. Successor counsel informed the court that she would be prepared for trial by February, which is when the trial took place. In short, Veronika has not identified how she was harmed by the lack of a continuance that was never requested by counsel.

Attorney Fees

¶18 The circuit court awarded Phyllis a \$500 contribution toward her attorney fees under WIS. STAT. § 814.04(1). Veronika argues that the award was improper because the affidavit itself authorizes the immigrant to recover attorney fees expended in enforcing the support affidavit. However, the fact that Veronika may have been entitled to recover attorney fees if she had prevailed on her contract action in no way precludes her from being required to pay attorney fees after having a fraud judgment entered against her on the counterclaim. The trial court properly granted Phyllis the nominal attorney fees to which she was statutorily entitled.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

