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DISTRICT I

September 29, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP580

Kathleen McCaigue v. Marc A. Messinger
(L.C. # 2018CV2411)

Before Blanchard, Dugan and Donald, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kathleen McCaigue, *pro se*, appeals the order denying her petition for a waiver of fees and costs under WIS. STAT. § 814.29 (2017-18).¹ Based upon our review of the briefs and

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm albeit on different grounds than those relied upon by the circuit court. *See State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010) (explaining that this court can affirm a circuit court’s decision on different grounds).

McCaigue sued numerous defendants, including Marc A. Messinger, Realty 100, Inc. d/b/a RE/MAX Realty 100, Alan H. Deutch, and Deutch Law Offices SC (collectively “Messinger”) based on a multitude of legal claims stemming from a real estate transaction that never came to fruition.² Messinger moved to dismiss McCaigue’s complaint and his motion was granted.

McCaigue subsequently filed a notice of appeal from the circuit court’s dismissal orders.³ She also filed motions to waive the transcript fees for her appellate case. Despite the fact that McCaigue averred that she receives means-tested public assistance in the form of “Food stamps/FoodShare,” the circuit court denied the motion based on its finding that McCaigue was not indigent. The circuit court explained that it could not find McCaigue indigent given that she owned a home and because she had not attempted to obtain a home equity line of credit to

² The response brief in this matter was submitted on behalf of Marc A. Messinger, Realty 100, Inc. d/b/a RE/MAX Realty 100, Alan H. Deutch, and Deutch Law Offices SC. The other two named respondents to this appeal, Christine Seeber and Bruce G. Barndt, did not join in the brief and did not submit separate briefs. By prior order of this court, we concluded that the appeal would proceed based on the respondents’ brief filed by Messinger.

³ The appeal of the dismissal orders has been stayed pending resolution of this appeal. *See McCaigue v. Messinger*, No. 2018AP1888.

finance her appeal. The trial court also commented on McCaigue's expenses, which it said precluded it from finding her indigent. McCaigue appeals.

WISCONSIN STAT. § 814.29 governs the circumstances under which a person may be entitled to a taxpayer-funded cost or fee on appeal. Section 814.29(1)(d)1. provides that the receipt of means-tested public assistance is sufficient, by itself, to prove poverty. That provision also states that food stamps qualify as means-tested public assistance. *Id.*

Poverty, however, is not the only issue involved in a decision on whether to grant a waiver of fees and costs. There is a two-prong test: The individual must be found to be indigent *and* present a claim upon which relief can be granted. *See State ex rel. Girouard v. Circuit Court for Jackson Cnty.*, 155 Wis. 2d 148, 159, 454 N.W.2d 792 (1990); *see also* WIS. STAT. § 814.29(1)(c) (providing that the circuit court can deny the fee-waiver petition if it finds that the “affidavit states no ... appeal upon which the court may grant relief”). Even if McCaigue should have been deemed indigent because she receives means-tested public assistance in the form of food stamps,⁴ we nevertheless conclude that she is not entitled to a waiver of transcript fees because she has not presented a claim upon which relief may be granted.

Case law holds that the test for this determination is whether the case is “arguably meritorious.” *State ex rel. Girouard*, 155 Wis. 2d at 159 (citation omitted). Whether a claim has arguable merit is a question of law that this court reviews *de novo*. *See State ex rel. Hansen v. Circuit Court for Dane Cnty*, 181 Wis. 2d 993, 998, 513 N.W.2d 139 (Ct. App. 1994). “[A]

⁴ Messenger does not dispute the fact that McCaigue receives FoodShare assistance.

meritless assertion by a putative appellant will not furnish a foundation for a judicially ordered waiver of fees.” *State ex rel. Girouard*, 155 Wis. 2d at 159.

McCaigue did not set forth the potential grounds for appeal in her motion for a waiver of the transcript fees, and the circuit court never expressly analyzed whether McCaigue’s case was arguably meritorious. Now, for the first time on appeal, McCaigue asserts that her case had arguable merit. However, we do not consider arguments raised for the first time on appeal. *See State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (“Arguments raised for the first time on appeal are generally deemed forfeited.” (citation omitted)). We conclude that McCaigue failed to satisfy the second prong of the *Girouard* test and affirm on that basis.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals