

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2007

A. John Voelker
Acting 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. 2005AP87

Cir. Ct. No. 2004CV1499

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. SCOTT A. HEIMERMANN,

PLAINTIFF-APPELLANT,

V.

**GARY R. MCCAUGHTRY, MARK W. CLEMENTS,
JOHN O'DONOVAN, JOHN DEHAAN, JOANNE SWYERS,
MICHAEL J. SULLIVAN, CINDY O'DONNELL,
STEVEN B. CASPERSON, STEPHEN M. PUCKETT,
SAM SCHNEITER, TIMOTHY DOUMA AND LYNDA
J. SCHWANDT, JOHN DOE AND JOHN DOE 2,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Scott Heimermann appeals the circuit court’s order dismissing his action. We reverse and remand for further proceedings.

¶2 Scott Heimermann, an inmate at Waupun Correctional Institution, commenced an action pursuant to 42 U.S.C. § 1983 in the circuit court. The State removed the case to federal court. The federal court dismissed the case without considering the merits because it had previously barred Heimermann from filing suit in the federal court until he paid sanctions imposed on him for filing frivolous cases. Heimermann attempted to refile the case in the circuit court. The circuit court refused to consider the merits of the case on two grounds. The court decided to accord comity to a federal decision dismissing the case. The court also concluded the case should be dismissed because Heimermann was attempting once again to litigate his underlying criminal conviction.

¶3 Heimermann filed this appeal. After he had filed his brief, the State moved to strike the brief and dismiss the appeal and for an order prohibiting any state court from accepting filings from Heimermann until he paid the \$13,250 in sanctions imposed on him in federal and state courts,¹ with an exception for cases in which the court determines Heimermann is in “imminent danger of serious

¹ Heimermann was ordered to pay \$7,500 in sanctions by the circuit court under WIS. STAT. § 802.05 (2003-04), for failing to make a good faith inquiry into the facts and law before filing his case. *See Heimermann v. Kohler*, No. 1998AP3292, 2000 WL 1114567 (WI App Aug. 1, 2000), a District I per curiam decision. On appeal, we upheld the order and imposed sanctions for filing a frivolous appeal. *Id.* Heimermann has also been subjected to a series of fines and filing restrictions in the federal courts. *See Heimermann v. Litscher*, 337 F.3d 781 n.1 (7th Cir. 2003) (citing *Heimermann v. McCaughtry*, No. 2002AP4033 (7th Cir. Feb. 4, 2003), as an example where a \$5,000 sanction was imposed on Heimermann for repeated frivolous filings).

physical injury.” See WIS. STAT. § 801.02(7)(d) (2003-04).² We certified the case to the supreme court to address the following questions:

Simply put, the question is whether we have the authority to do what the State asks: does this court have the power to restrict future filings *in the circuit court*? May this court (or the circuit court) refuse to accept for filing a case because of unpaid sanctions in a different case in any state court? May this court or the circuit court refuse to accept for filing a case because of unpaid sanctions in federal court?

State ex rel. Heimermann v. McCaughtry, No. 05AP87, 2005 WL 3434744 (WI App Dec. 15, 2005). The supreme court granted certification, but subsequently vacated the certification as improvidently granted because Heimermann was unwilling to limit his argument to the issues properly before the supreme court.

¶4 After the case was returned to this court, we denied the State’s motion to strike the brief and/or dismiss the appeal, and ordered the parties to continue briefing the case. Briefing is now complete.

¶5 We conclude that the circuit court erred in relying on the doctrine of comity in refusing to reinstate Heimermann’s case and in dismissing his complaint. Under the doctrine of comity, “courts will, as a matter of discretion, rather than obligation, defer to the assertion of jurisdiction or give effect to the judgments of other states or sovereigns out of mutual respect and for the purpose of furthering the orderly administration of justice.” *Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶19, 261 Wis. 2d 598, 660 N.W.2d 705, citing *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2000

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WI 79, ¶35, 236 Wis. 2d 384, 612 N.W.2d 709. Whether to apply the doctrine of comity is committed to the circuit court's discretion. *Teague*, 236 Wis. 2d 384, ¶35.

¶6 Here, the concurrent assertion of jurisdiction is not at issue. Instead, the issue is whether the circuit court properly gave effect to the federal court's judgment: that is, did the circuit court properly exercise its discretion when it refused to allow Heimermann to proceed *in a Wisconsin circuit court* based on a federal court sanction restricting his filing *in federal court*? We conclude that it did not. The circuit court did more than simply give effect to the federal court order barring Heimermann from federal court, it extended the scope of the federal court's order to encompass *future filings in the Wisconsin courts*. The parties do not provide us with any authority for using comity in this context.³ We conclude that the circuit court erroneously exercised its discretion in applying the doctrine of comity to bar Heimermann's filing.

¶7 We next address whether the circuit court's decision should be affirmed because Heimermann has failed to state a claim or because he is improperly attempting to relitigate a conviction that he has already challenged in several prior actions. We cannot resolve these questions based on the briefing before us. However, we note that Heimermann's complaint alleges conduct that relates to incidents that have occurred since he has been imprisoned and thus does

³ There have been a number of cases in which we have limited future filings as a sanction, or affirmed the circuit court's decision to do so, based on the inherent authority of the courts to efficiently and effectively provide for the fair administration of justice. *See, e.g., State v. Casteel*, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338; *Puchner v. Hepperla*, 2001 WI App 50, 241 Wis. 2d 545, 625 N.W.2d 609 (published per curiam). However these cases are not based on comity for a court of another jurisdiction.

not relate to his conviction. We also note that he has presented an argument in his briefs on appeal that his claim is cognizable under *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). The circuit court may take up these questions on remand. If the circuit court determines that Heimermann has failed to state a claim or that his complaint is frivolous, the circuit court may impose appropriate sanctions.

¶8 The State next contends that Heimermann's appeal is frivolous because he knew or should have known that the appeal was without any basis in law or equity. The State also contends that Heimermann's appeal is frivolous because his brief does not address the circuit court's decision, instead focusing on his underlying conviction. Because we conclude that we must reverse and remand, we conclude the appeal is not frivolous.

By the Court.—Order reversed and cause remanded with directions.

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

