

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2008

David R. Schanker
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. 2007AP2961

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, MICHAEL J. SULLIVAN, CINDY O'DONNELL, STEVEN B. CASPERSON, STEPHEN M. PUCKETT, SAM SCHNEITER, TIMOTHY DOUMA, LYNDIA J. SCHWANDT, JOHN DOE AND JOHN DOE 2,

DEFENDANTS,

JOANNE SWYERS,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Scott A. Heimermann appeals from the orders that dismissed all of his claims against Joanne Swyers and denied his motion for reconsideration. Heimermann argues that the circuit court erred when it dismissed his claims, when it denied his motion for reconsideration, and when it granted costs to Swyers, and asks this court to order the circuit court to allow him to amend his complaint. Because we conclude that the circuit court did not err, we affirm.

BACKGROUND

¶2 Heimermann was convicted in 1992, after a jury trial, of two counts of first-degree intentional homicide as a party to a crime. He was charged with two other men, Edward Piscitello and Joseph Isajiw, for the execution-style killing of an apparent drug dealer and his body guard. The three men shot the victims and buried their bodies in the basement of a Milwaukee residence where Heimermann and Piscitello lived. The victims' remains were not discovered until two years after they were killed.

¶3 We affirmed Heimermann's conviction, *see State v. Heimermann*, No. 1995AP225, unpublished slip op. (Ct. App. Aug. 8, 1995), and the supreme court denied his petition for review. Since then, he has repeatedly attempted to challenge his conviction, both directly and indirectly.¹

¶4 In the case before us now, Heimermann, who is still in prison, sued various State officials and Swyers. All of the State officials were employees of

¹ Heimermann has filed approximately thirty-nine appeals and writs in this court since 1991.

the Department of Corrections except Swyers who was an employee of the Dodge County Sheriff's Office.² He alleges that the defendants violated his constitutional rights and committed breach of contract. His complaint states that: "This is one of those rare cases in [sic] which provides a significant, albeit isolated, example of a model inmate such as plaintiff whose protected activities account for the treatment he received in prison from malicious, sadistic and indifferent officials." Heimermann alleged that the defendants breached promises he claimed they made to him in exchange for his help in an undercover investigation. Heimermann also alleged that the actions of some of the defendants caused a circuit court judge to deny his petition for a writ of habeas corpus.

¶5 The circuit court identified five causes of action against Swyers: (1) breach of contract; (2) a claim under *Heck v. Humphrey*, 512 U.S. 477 (1994); (3) access to courts; (4) failure to protect; and (5) a concerted action claim. Heimermann demanded both temporary and permanent injunctions, a declaratory judgment, and more than four million dollars in compensatory damages. The court dismissed all of the claims against Swyers, for the reasons discussed later in this opinion, and also denied Heimermann's motion to reconsider.

² Heimermann originally filed this case in June 2004. The defendants then had the case removed to the United States District Court for the Eastern District of Wisconsin. That court dismissed this case because an order of the United States Court of Appeals for the Seventh Circuit prohibited Heimermann from filing any action until he paid all outstanding sanctions against him. Heimermann then filed a motion for reinstatement in Dane County Circuit Court. The circuit court denied the motion. Heimermann appealed to this court. The State moved to strike the brief and dismiss the appeal until Heimermann paid the fines outstanding against him in state and federal courts. We certified the matter to the supreme court, which then decertified it and returned it here. We then denied the State's motion, and addressed the appeal on the merits. We concluded that the circuit court erred when it barred Heimermann from filing this action. We also concluded that, on the record before us, we could not resolve the question of whether the circuit court had properly dismissed Heimermann's complaint. We noted that the circuit court could take up these issues on remand, and, if appropriate, impose appropriate sanctions. *State ex rel. Heimermann v. McCaughtry*, No. 2005AP87, unpublished slip op. (Ct. App. Jan. 25, 2007).

STANDARD OF REVIEW

¶6 “Whether a complaint states a claim for relief is a question of law which this court reviews de novo.” *Meyer v. Laser Vision Inst., LLC*, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. “A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint.” *Id.* “The reviewing court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim.” *Id.* The complaint should be dismissed “only if it appears certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations.” *Id.*

DISCUSSION

¶7 Heimermann argues on appeal that the circuit court improperly dismissed the claims against Swyers and others.³ Heimermann’s first claim is that Swyers and other defendants breached a contract they made with him to get him to help in the investigation of a former prison guard, Robert Fecke. Specifically, Heimermann alleged that Swyers and the others induced him to help with the Fecke investigation by offering him immunity from further discipline on a conduct report; immunity from prosecution on any evidence obtained as a result of the investigation of Fecke; help with obtaining exculpatory evidence from his co-actor Piscitello; and having Heimermann transferred to a minimum security prison until he was released from prison. The circuit court dismissed Heimermann’s breach of

³ Because the order from which Heimermann appeals dismissed only the claims against Swyers, we address only those claims in this opinion.

contract claims against Swyers on the ground that such a contract would violate public policy.

¶8 Parties are free to enter into contracts, and the courts will protect that right “by ensuring that promises will be performed.” *Sunday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶53, 293 Wis. 2d 458, 718 N.W.2d 631. Contractual rights, however, “are not absolute and a contract that is deemed contrary to public policy is void and unenforceable.” *Id.*

¶9 We agree with the circuit court that the contract as alleged by Heimermann is contrary to public policy. The terms of the alleged contract provide that Swyers would aid him in overturning his criminal conviction, have him transferred to a minimum security prison, and obtain exculpatory evidence from Piscitello. As the complaint acknowledges, Swyers is an employee of Dodge County and not of the Department of Corrections. Because Swyers is not an employee of the Department of Corrections, she had no authority to affect the terms or conditions of Heimermann’s confinement.

¶10 Further, to the extent Heimermann is attempting to have himself exonerated from the underlying criminal conviction by information he claims Piscitello will provide, Swyers would not be able to obtain this result for him. As the State points out, achieving that result would require the acquiescence of the entire judicial system. We conclude that such a contract, if one existed, violates public policy, and the benefit allegedly bargained for was impossible for Swyers to obtain. We conclude that the circuit court properly dismissed Heimermann’s claims for breach of contract.

¶11 The circuit court also dismissed Heimermann’s claim that Swyers and the others denied him substantive due process by denying him access to the

alleged testimony of Piscitello.⁴ When a plaintiff seeks to recover damages under 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment or other action that would render a conviction invalid, the “plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. Consequently, when a prisoner seeks damages under § 1983, the court must consider whether judgment for the plaintiff “would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.* at 487.

¶12 In his complaint, Heimermann refers to Piscitello’s testimony as “the missing ingredient to plaintiff’s release from prison recipe.” The circuit court concluded that he was seeking exculpatory testimony from Piscitello that would call into question the validity of his underlying conviction. We conclude that, based on the allegations of the complaint, Heimermann is challenging his conviction and imprisonment, and consequently, his claim is barred by *Heck*.

¶13 Heimermann also alleges that Swyers violated his right to access to the courts by withholding certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the “true focus” of Fecke’s investigation, the circuit court hearing the habeas petition was prevented

⁴ Heimermann does not explain in his brief what the exculpatory testimony would be.

from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by *Heck*.

¶14 Heimermann's next claim is that, because of his undercover work in the investigation of former prison guard Fecke, he is now known as a "snitch" in prison, and his "vulnerability to violence" in prison has increased. "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate" violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (citation omitted). Not every injury suffered by an inmate constitutes an Eighth Amendment violation. *Id.* at 833. A prison official violates the Eighth Amendment when two conditions are met: (1) the deprivation must be "sufficiently serious," in other words "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm"; and (2) the prison official must demonstrate "deliberate indifference" to the inmate's health or safety. *Id.* at 834 (citation omitted).

¶15 The circuit court dismissed this claim, finding that Swyers was not a prison official. The court further rejected Heimermann's argument that Swyers conspired with the State defendants to deprive him of a safe environment.

¶16 In his brief to this court, Heimermann argues that the allegations of the complaint are sufficient to establish that Swyers conspired with the State officials to deprive him of his Eighth Amendment rights. Heimermann argues that the complaint alleges that Swyers and the other defendants threatened him to get him to be part of the Fecke investigation, and then the defendants "expos[ed]

Heimermann to live in [a] maximum security prison environment that is prevalent with violence.” He further argues that the complaint alleges that he is a “model prisoner,” yet he was still transferred to a maximum security prison, and that he is “actually innocent and wrongfully incarcerated.”

¶17 There are several problems with this argument. First, Heimermann’s complaint does not contain any allegations that Swyers in any way was a part of the decisions that led to the deprivation of his Eighth Amendment rights. Specifically, Heimermann does not allege that Swyers participated in the decisions about where he would be confined. And, second, as the State points out, Heimermann has not alleged that he has suffered any harm. Further, we note that at least a part of this claim is based on Heimermann’s allegation that he was wrongfully convicted and confined. Consequently, the claim is also barred by *Heck*. We again conclude that the circuit court properly dismissed Heimermann’s claim for failure to protect.

¶18 Heimermann’s last claim against Swyers is a claim for common-law conspiracy. The circuit court dismissed this claim, finding that Heimermann had not alleged liability under WIS. STAT. § 895.045(2) (2005-06).⁵ In his brief to this court, Heimermann argues that Swyers and the other defendants engaged in a common-law conspiracy to deprive him of his constitutional right to adequate access to postconviction remedies and safe environment.

¶19 In Wisconsin, “there is no such thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy but none

⁵ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

for the conspiracy alone.” *Onderdonk v. Lamb*, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977) (citations omitted).

The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful.

Id. at 246-47. The wrongful acts “must be set out with the same certainty and particularity as in an ordinary civil action ... so that the opposite party or parties will be apprised of what they will be called on to answer.” *Id.* at 247(citation omitted).

Facts should also be alleged which show that the acts done in pursuance of the conspiracy were illegal or wrongful, or that they were done for an unlawful purpose or by an unlawful means, unless the alleged conspiracy itself has for its purpose the doing of an unlawful act. An averment that a party has acted unlawfully without showing what he did is not sufficient as an averment of issuable facts, and, on the other hand, an allegation of a lawful act is not sufficient to support a charge of conspiracy.

Id. at 248 (citation omitted).

¶20 Heimermann does not specifically allege in the complaint a cause of action for civil conspiracy. In his brief to this court, Heimermann argues that his claim consists of “various combined paragraphs in the complaint.” Heimermann argues that Swyers acted with the other defendants to breach a contract and to keep him wrongfully imprisoned. We have concluded, however, that the alleged acts were not “wrongful acts.” Further, we have already decided that Heimermann is not wrongfully imprisoned. Since neither the acts nor the purpose of the alleged conspiracy were wrongful, the claim must be dismissed. Because we have

concluded that the circuit properly dismissed the claims against Swyers, we also conclude that the circuit court properly denied Heimermann's motion for reconsideration.

¶21 Heimermann also argues that the circuit court erred when it granted costs to the defendants. Heimermann bases his objections on the substantive grounds argued in his brief. Because we have rejected those arguments, we also reject his challenge to the award of costs.

¶22 Heimermann's final argument is that we should remand the matter with directions to the circuit court to allow him to amend his complaint. Heimermann asserts that he filed a motion in the circuit court asking to be allowed to amend the complaint. Heimermann filed the motion to amend, however, after the court entered the order from which he appeals. The motion to amend is part of the on-going proceedings before the circuit court and is not before us in this appeal. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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

