

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DARREN M. MUELLER,

PLAINTIFF-APPELLANT,

V.

SGT. REAMER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ Darren Mueller appeals from a trial court order denying his motion for relief from a decision by a Dane County court commissioner. We conclude that although relief from a court commissioner's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98).

decision or order is available through WIS. STAT. § 806.07 (1997-98),² the reason Mueller gives in his request for relief is not adequate for relief under that statute. We therefore affirm.

¶2 Mueller, an inmate in the Wisconsin prison system, sued Sgt. Reamer, a prison guard, in small claims court, alleging damages arising from Reamer's treatment of Mueller. The case was tried before a Dane County court commissioner, who, on April 5, 1999, dismissed Mueller's complaint because Mueller had failed to meet the burden of proof necessary for him to recover.

¶3 On August 26, 1999, the Dane County Small Claims Court received a document from Mueller entitled, "Petition to Answer or to Reopen Small Claims Judgment and Order." In an affidavit attached to the petition, Mueller explained that on August 6, 1999, he was transferred to the Green Bay Correctional Institution, where he again came in contact with Sgt. Reamer, who had also been transferred there. Mueller alleges that Reamer said: "Mr. Mueller, welcome to Green Bay, [you're] now in my cell hall, [you're] in F. 15, have a nice stay, I'll make your stay a pleasant one."

¶4 In Green Bay, Mueller was assigned to a cell with an inmate who smoked, though Mueller did not smoke. In his affidavit in support of his petition, Mueller alleges that Reamer could have moved him to a non-smoking cell, but did not; instead moving inmates who only wanted to move to "cell up with a friend." Mueller alleges that this shows indifference on the part of Reamer.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 The trial court denied Mueller’s petition. The court noted that, under *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983), it was to liberally construe pro se prisoner complaints. It construed Mueller’s petition as a request for a de novo review of the court commissioner’s decision, as authorized under WIS. STAT. § 799.207. Because that statute requires that a request for a de novo trial be made no later than fifteen days after the court commissioner’s written decision, and that time had long passed, the court denied Mueller’s request for a de novo hearing.

¶6 Mueller expresses confusion as to why the trial court would construe his petition as a request for a de novo hearing, when, as he asserts, his petition was properly filed under WIS. STAT. § 806.07(2). The problem, however, is that Mueller’s first mention of § 806.07 is in his brief to this court. While a pro se prisoner is held to a lesser standard, Mueller’s document, entitled in part a “Petition to Answer” is not a model of clarity. Had Mueller told the trial court that he was relying upon § 806.07, it is very likely that the trial court would have treated his petition under the law governing that statute.

¶7 We conclude that relief from a court commissioner’s judgment or order is available through WIS. STAT. § 806.07. WISCONSIN STAT. § 799.04(1) provides that: “Except as otherwise provided in this chapter, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under this chapter.” WISCONSIN STAT. § 799.28(2) provides that: “A motion to set aside a verdict or to open up a judgment and for a new trial founded upon newly discovered evidence may be heard upon affidavits and the proceedings in the action.”

¶8 WISCONSIN STAT. § 806.07(1)(b) permits relief from a judgment or order based on newly discovered evidence, with a time limit of one year. *See* WIS. STAT. § 805.16(4). The same is true of WIS. STAT. § 799.28(2). Under either statute, and WIS. STAT. § 799.04(1) would make § 799.28(2) predominate, Mueller’s motion was timely. Thus, the trial court erred in not addressing Mueller’s claim on the merits.

¶9 We review a decision on a WIS. STAT. § 806.07 motion for an erroneous exercise of discretion. *See Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 535, 569 N.W.2d 472 (Ct. App. 1997). Ordinarily, we would remand to permit the trial court to exercise its discretion as to whether the order dismissing Mueller’s complaint should be re-opened. Here, however, Mueller has given the reason why he believes the court commissioner’s judgment should be re-opened: Reamer’s alleged acts which occurred after the judgment in this case. The alleged acts have no bearing on the merits of Mueller’s case before the court commissioner. What Mueller is requesting is akin to a never-ending lawsuit, which is heard anew whenever Mueller believes that Reamer’s actions have harmed him.

¶10 WISCONSIN STAT. § 806.07 “is to be used ‘to achieve a balance between the competing values of finality and fairness in the resolution of disputes.’” *Id.* (quoting *Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412 (1990)). It would be an error of law to permit a final judgment or order to be re-opened on Mueller’s affidavit. An error of law constitutes an erroneous exercise of discretion. *See King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

¶11 Although we do so for reasons other than those given by the trial court, we conclude that Mueller's petition was properly denied. We therefore affirm the trial court's order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

