STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant-Respondent-Cross-Petitioner.

COMBINED RESPONSE AND PETITION FOR CROSS-REVIEW OF DEFENDANT-APPELLANT-RESPONDENT-CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

RESPONSE TO THE STATE'S PETITION FOR REVIEW

Ryan A. Muth, the defendant-appellant-respondent (to the state's petition for review) and cross-petitioner for review, hereby respectfully submits this reply to the state's petition for review and submits this cross-petition for review.

The Supreme Court Should Deny the State's Petition for Review; as the Court of Appeals' Decision was Based on a Correct Understanding of Legislative Intent and Precedent

The state has petitioned the Supreme Court to review the decision of the court of appeals which held that Wis. Stat. §973.20 (hereinafter, the restitution statute) does not apply to wage loss of the spouses of victims under Wis. Stat. §766.31 (hereinafter, the marital property statute). While the court of appeals followed precedent in determining that the legislature did not intend to extend the restitution statute to victims' spouses, the state argues that the precedent should be reversed. The state cites three reasons. First, the state repeats its argument that the controlling precedent, *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284, should be reversed because it rejected an "undeveloped" argument by the state. Second, the state argues that the marital property statute requires an extension of the meaning

of the restitution statute. Finally, the state argues that public policy favors extending the restitution statute.

These arguments were considered and rejected by the court of appeals and should be rejected by the Supreme Court. The issue does not merit review.

The state argued to the court of appeals that it should reject *Johnson*, *supra*, because *Johnson* rejected a state's argument that was "undeveloped," implying that it was akin to *dicta*. The court of appeals, in rejecting that assertion, noted that *Johnson* addressed the issue on its merits, correctly finding that the intent of the legislature was to limit the restitution statute to the parties specifically named within, and not extend restitution to marital property interests. The state refers to the *Johnson* decision as cursory, but it is more appropriately referred to as terse:

> However, Johnson's contest over the $555 that W.L. lost in wages for the days he took off from work to accompany J.M.K. to court appearances stands on different footing than does the security system due to the statutory provisions that specifically identify who may collect lost wages as restitution. WISCONSIN STAT. § 973.20(5)(b) allows a "person against whom a crime ... was committed" to recover such lost wages as restitution. W.L. is not such a person, and there is no comparable provision that applies to a child-victim's stepparent. Further, because *887 J.M.K.'s stepfather's lost wages were his own, we agree with Johnson that J.M.K.'s

> stepfather has not compensated any victim for those lost wages within the meaning of § 973.20(5)(d).
>
> 12 ¶ 23 The circuit court held that W.L.'s lost wages were tantamount to a victim's lost wages or property due to the operation of Wisconsin's marital property laws. The State mentions, but does not develop this argument on appeal. Additionally, because there is no language in the restitution statute or in WIS. STAT. § 950.02(4)(a) suggesting that restitution be permitted through such an indirect route, we conclude that the restitution statute intended to limit the recovery of lost wages for attending court proceedings to the persons identified in WIS. STAT. § 973.20(5)(b).
>
> *Johnson*, 256 Wis.2d at paragraphs 22, 23.

While the state laments its prior "undeveloped" argument in Johnson, it offered neither the court of appeals nor this court any argument refuting *Johnson's* analysis of the legislative intent of the restitution statute.

The state asserts that there is a conflict between the restitution statute and the marital property statute as interpreted by *Johnson*, that merits review. There is, however, no such conflict. The marital property statute broadly outlines the basis of property rights; whereas the restitution statute specifically names the parties who are entitled to compensation. The court of appeals correctly noted that in those instances where the legislature intended to extend rights of action by virtue of the marital property statute, it has done so specifically. It does not do so in the restitution statute. Moreover, accepted canons of statutory interpretation require application of

a specific statute over a general statute, *generalia specialibus non derogant*. See, e.g. *Green v. Bock Laundry Mach. Co*., 490 U.S. 504, 524-26 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc*., 482 U.S. 437, 444-45 (1987). The court of appeals correctly discerned the intent of the legislature to limit criminal restitution to the persons specifically enumerated in the restitution statute.

Finally, the state relies on public policy arguments favoring broad application of restitution in criminal cases. The court of appeals agreed with Muth's argument that this is a matter for the legislature. Muth acknowledges and honors the Supreme Court's role in making policy decisions concerning the application of the law. When, however, the legislative intent is clear, this court should defer to the policy choices inherent in the legislation.

Hence, the state's petition for review should be denied.

PETITION FOR CROSS-REVIEW

STATEMENT OF THE ISSUE PRESENTED

In a criminal restitution proceeding where the crime victims have accepted and received a prior civil settlement for damages including "lost wages, expenses…" and the defendant is asserting an accord and satisfaction of the subsequent restitution claim for lost wages and expenses, must the defendant produce extrinsic evidence of the nature of the unambiguous civil settlement agreement to show that the victims are seeking a double recovery?

CRITERIA FOR GRANTING REVIEW

The Supreme Court should grant review because a significant question of state law is presented, and there is a need for the Supreme Court to consider changing a policy within its authority. Wis. Stats. §809.62(1r)(a) and (b).

STATEMENT OF THE CASE

On March 6, 2016 the defendant-appellant-respondent-cross-petitioner, Ryan Muth, committed the offense of homicide by intoxicated use of a motor vehicle, causing the tragic death of Tammy Kempf. Ms. Kempf was survived by her three children, Holly Marquardt, Katie Mortenson, and Rodney Kempf, their spouses and their children. (R:1, criminal complaint).

On October 10, 2016 Muth entered a plea of guilty to the offense of homicide by intoxicated use of a motor vehicle. Sentencing occurred on December 22, 2016. Muth was sentenced to 13 years of prison and 13 years of extended supervision. (R: 33, judgment of conviction).

This case concerns the restitution order made at that sentencing hearing, and reaffirmed in post-conviction proceedings on February 9, 2017, and July 28, 2017, where the court denied Muth's defenses of setoff and accord and satisfaction, and also ordered restitution to the spouses of Ms. Kempf's children.

On February 9, 2017, the Court ordered the defendant pay restitution in the amount of $43,270.42, the full amount claimed by the four victims, and their spouses, as follows (R: 61, restitution summary; R:63, restitution order; R:77 transcript) :

a. $8,401.00 to be paid to Scott Fahser, Ms. Kempf's brother. Muth subsequently agreed to this payment.

b. $12,480.41 to be paid to Holly Marquardt, Ms. Kempf's daughter. This sum included the amount of $1,600.00 for lost wages for Ms. Marquardt, and an additional $2,600.00 for lost wages of her husband, Ryan

Marquardt. It also included $5,820.00 in funeral expenses, plus costs for mileage, thank you cards, and other expenses. (R:77, pp.24-28).

c. $13,689.00 to be paid to Katie Mortenson, Ms. Kempf's daughter. This sum included the amount of $6,480.00 for lost wages for Andrew Mortenson, Ms. Mortenson's husband. It also included $5,820.00 in funeral expenses, plus costs for school expenses for Mortenson's daughter, etc. (R:77, pp. 28-31)

d. $8,700.01 to be paid to Rodney Kempf, Ms. Kempf's son. This amount included $1,209.60 for lost wages. It also included $5,820.00 in funeral expenses, plus costs for a cell phone, attorney, postage, storage, and mileage. (R:77, pp.31-33).

Prior to the sentencing hearing, Ms. Kempf's three surviving children executed a settlement agreement in the amount of $100,000.00 with Muth and his insurer, Progressive Insurance Company. The agreement was signed by Rodney Kempf on April 19, 2016 and by Holly Marquardt and Katie Mortenson on April 21, 2016. Each received a $33,333.33 payment. Ms.

Kempf's brother, Scott Fahser, was not a party to the settlement; hence, Muth did not object to the restitution order for Mr. Fahser, in the amount of $8,401.00. (R49: Exh. 1, and par. 7; R: 77 throughout.)

In consideration of a payment to Ms. Kempf's three surviving children in the amount of $100,000.00, each of them executed "FULL RELEASE OF ALL CLAIMS WITH INDEMNITY" (R:49, exh. 1 and par. 7).

The pertinent language of the Release states that the settlement recipients:

> ***"acquit and forever discharge Ryan Muth*** and Progressive Artisan & Truckers Casualty Insurance Company, of and ***from any and all claims, actions, causes of actions, demands, rights damages, costs, loss of wages, expenses,*** hospital and medical expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship on account of or in any way growing out of…an automobile accident which occurred on or about March 6, 2016…."
> (emphasis added).

Based on the prior settlement payment and release, Muth objected to the restitution order, and asserted a defense to the restitution claims of setoff, and accord and satisfaction, as to the claims of Ms. Kempf's three surviving children. Thus, Muth argued that he should be ordered to pay only the outstanding restitution claim of Scott Fahser, as the other claims were either

satisfied, or were not allowable under the restitution statute. (R:77). Muth agreed that Ms. Kempf's children and her brother were victims within the meaning of Wis. Stat. §973.20. The claims of Ms. Kempf's daughters, however, include amounts for lost wages of their spouses. Muth also asserted that Ms. Kempf's sons-in-law were not victims within the meaning of Wis. Stat. §973.20, and objected to their claims.

The trial court invited written argument; hence Muth formalized his objection by motion. (R:49). On July 28, 2017, the trial court rendered a decision denying Muth's motion on (R: 77) and entered an order on August 9, 2017 (R:63).

Muth appealed to the court of appeals. The court of appeals agreed with Muth regarding the claims of Ms. Kempf's sons-in-law, and the state has petitioned the Supreme Court to review that decision. The court of appeals also held that Muth failed to satisfy his burden of proof as to what portion of the civil settlement that may have satisfied the claim of damages in the criminal restitution proceeding. Muth now cross-petitions the Supreme Court to review that decision

ARGUMENT

The Supreme Court Should Review the Decision to Allow a Restitution Award After a Civil Settlement Agreement Discharges the Same Damage Claims, as it is a Significant Question of State Law and There is a Need for the Supreme Court to Consider Changing a Policy Within its Authority

The Court of Appeals Decision Derogates the Longstanding Rule Excluding Extrinsic Evidence as to the Meaning of Unambiguous Contracts

Muth cross-petitions for review the portion of the court of appeals decision that rejected Muth's argument that prior civil settlement for specific items of special damages set off the claim for restitution.

The victims accepted a civil settlement for their claims, but then later claimed the same items in the criminal restitution proceeding. The victims agreed to the following (emphasis added):

> … acquit and forever discharge Ryan Muth and Progressive Artisan & Truckers Casualty Insurance Company, of and from *any and all claims*, actions, causes of actions, demands, rights damages, costs, *loss of wages, expenses*, hospital and medical expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship on account of or in any way growing out of…an automobile accident which occurred on or about March 6, 2016….

The agreement, for example, specifically releases Muth from claims for "lost wages," and expenses, and yet the same victims later made claims and were awarded restitution for lost wages and funeral expenses.

Muth relied on the plain meaning of the civil settlement agreement in asserting the defenses of setoff and accord and satisfaction. The court of appeals, however, framed the issue as whether Muth proved the portion of the payment of $100,000.00 received by the victims was for the special damages (e.g. lost wages and funeral expenses) subsequently ordered as criminal restitution, as opposed to general damages. This is a mistaken view of the issue and ignores the law prohibiting extrinsic evidence as to the construction of unambiguous contracts. It will, moreover, also have a number of serious negative consequences: it will have a negative impact on the ability of crime victims to reach civil settlements with tortfeasors who are also criminal defendants, as such settlements will be best delayed until all criminal proceedings have concluded; it will lead to a requirement of far-reaching evidentiary restitution hearings, as to the itemization of civil settlements; and it is contrary to the policy of the finality of settlements.

The court of appeals held that Muth was required to prove the specific portion, that is to itemize the special damages that the victims received in the

civil settlement, even though the settlement agreement executed by the victims specified distinct items of damages later claimed as restitution. That view of the law was mistaken. The court of appeals failed to substantially distinguish the holding of *Huml v. Vlazny*, 716, N.W.2d 807, 813 (2006); and, the court of appeals ignored the law of evidence in a contract dispute.

The court of appeals held that Muth was required to elicit extrinsic evidence, to show the intended apportionment of the civil damages. Yet, *Huml* held that the language of the release itself is the only allowable proof. The lodestar of contract interpretation is the intent of the parties. In ascertaining the intent of the parties, courts should give to contract terms their plain or ordinary meaning. If the contract is unambiguous, a court's attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence. *Huml, supra* at paragraphs 51-52. In *Huml*, the court considered the issue of a very general global settlement agreement, as follows:

> This Settlement Agreement and Release shall apply to all claims, whether known or unknown, on the part of all parties to this Agreement. In consideration of the payments called for herein, Plaintiff completely releases and forever discharges Defendants, Insurer, and their agents ... from any or all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, including court costs, legal expenses and attorneys' fees which

> the undersigned now has or had or which may hereafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries ... resulting from the accident, casualty or event listed in Plaintiff's Amended Complaint.
>
> *Huml*, at paragraph 9 (emphasis added by court).

Despite the general nature of the release (far less specific as to, e.g., lost wages than the release of Muth in this case), it was not ambiguous; and the *Huml* court properly refused to consider extrinsic evidence as to its meaning:

> If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.
>
> *Huml,* at paragraph 52.

The court of appeals decision required Muth to elicit evidence that would have, in any event, been inadmissible.

Rather than addressing whether Muth itemized the damages paid in the prior civil settlement, the question should have been whether, having been compensated for those losses specified in the release, the victims may receive another recovery for the same losses, including lost wages and funeral expenses. This is not merely an error of law, but an error of law that will have unintended negative consequences.

The Court of Appeals Decision Harms the Policy Favoring Settlements and Their Finality

Muth acknowledges the public policy in favor of criminal restitution. Even so, a public policy that favors and promotes criminal restitution should acknowledge that the finality of a civil settlement also promotes restitution. If a civil settlement may simply be re-litigated in a criminal restitution proceeding, the tortfeasor has no incentive to settle, and the victims will not be promptly compensated. The court of appeals decision sets up a disincentive for settlement. A tortfeasor will now be compelled to instruct his or her insurer to decline to settle any civil claim, until after a criminal restitution order has been entered, so that the civil settlement may encompass the same special damages. Thus, while the court of appeals decision may have been mindful of the policy favoring restitution to victims, it actually delays their compensation. *Huml* recognized the issue:

> First, there is considerable value in permitting a victim to release her interest in a judgment derived from a restitution order because it allows the victim to settle the case and replace an uncertain, future recovery with a certain, immediate recovery.
>
> Second, permitting a release gives a victim an additional source of leverage to negotiate a favorable settlement.
>
> Third, there are safeguards to promote the recovery of restitution by victims. On the civil side, in most situations where a substantial dollar amount is at stake, a victim will be represented by an attorney when negotiating a settlement.

> Preserving the right to enforce a judgment derived from a restitution order, therefore, should be as simple as including an express exception in the settlement agreement….
>
> *Huml*, supra at paragraphs 47-50.

The court of appeals decision focuses on the lack of extrinsic evidence offered by Muth at the restitution hearing, without considering the consequences of such a hearing. While the restitution statute contemplates a simple review of the unambiguous language of a settlement release, the court of appeals decision now requires a far-reaching evidentiary hearing in every case. Such a hearing would involve not only testimony of victims, but also of insurance adjusters, employers, accountants, repairpersons, hospital representatives, doctors, and so on. In short, when the language of a civil release no longer controls the parameters of the meaning of that release, we can foresee onerous litigation on the subject.

The court of appeals has, essentially, crafted a "made whole rule," analogous to the rule outlined in *Rimes v. State Farm Mutual Automobile Ins. Co.*, 106 Wis.2d 263 (1982). This, however, is not contemplated by Wis. Stat. §973.20. Moreover, the "made whole rule" approach fails in an important respect. The made whole rule under *Rimes, et al*, involves the rights of third parties to proceeds of a settlement; whereas, this case deals with the rights of the same parties in two different forums. Unlike a "made

whole rule" situation, the question here is whether a party may claim damages, accept a settlement for those damages, execute a release, and then claim the same damages again from the same party.

While the court of appeals decision is well-meant, it creates a situation where crime victims will be less able to access available insurance funds and will be subjected to onerous restitution proceedings.

CONCLUSION

Muth, therefore, respectfully urges the Supreme Court to review the decision of the court of appeals.

Signed and dated this 5th day of August, 2019.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

___/*s/Andrew Mishlove* ___
BY: Andrew Mishlove
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CERTIFICATION

I certify that this reply brief and petition conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 3,184 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the

record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 6th day of August, 2019.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*/s/Andrew Mishlove*____
BY: Andrew Mishlove
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Signed and dated this 6th day of August, 2019.

Respectfully submitted,
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APPENDIX

INDEX TO APPENDIX