

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

-v.-

THOMAS J. HAIDUK,

Defendant-Appellant.

APPEAL NO. 2011-AP-551-CR

**BRIEF OF DEFENDANT-APPELLANT
THOMAS J. HAIDUK**

ON APPEAL FROM FINAL JUDGMENT OF THE
CIRCUIT COURT FOR VILAS COUNTY
CASE NO. 2008-CF-146
HONORABLE NEAL A. NIELSEN, III, PRESIDING

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STATEMENT OF ISSUES

1. Whether the court erred in utilizing the cost of completion method in determining restitution.
2. Whether the court erred in the exercise of its discretion in the determination of the restitution amount as applied to the evidence in the case.

STATEMENT OF THE CASE

Mr. Thomas Haiduk owns and operates a construction business known as Wood Work Sales and Service located in Conover, Wisconsin. In 2004, Mr. Haiduk was retained by Larry and Linda Hanke to do an alteration on their residence located in Vilas County. That contract was completed by Mr. Haiduk without incident and to the satisfaction of the Hanke's. In 2006, Mr. and Mrs. Hanke were going through a divorce which ultimately resulted in Mrs. Hanke retaining the property located in Vilas County. Ms. Hanke contacted Mr. Haiduk to do certain modifications and alterations to the structure located in Vilas County. Mr. Haiduk agreed to do the construction work for Ms. Hanke with the actual construction work beginning in the later part of October of 2006. During the course of the next several months, Ms. Hanke provided to Mr. Haiduk cash advances in the total sum of \$134,114.29. Neither party had prepared or signed any documentation as to this construction project up to and including any employment agreement, change orders, payment schedule,

total contract price or even start and finish dates. All communication between the parties relative to the amount of the project, etc. were verbal in nature, up to and including any change orders that occurred during the course of the building project. Mr. Haiduk was a building contractor that had been in the building and construction business in excess of 20 years. Ms. Hanke owns a communications company in Italy and freelances for the federal government. She currently holds a PHD in microbiology.

In the spring and early summer of 2007, Ms. Hanke was dissatisfied with the progress being made on the project by Mr. Haiduk which ultimately resulted in a stop work order written by Ms. Hanke dated June 27, 2007. (A-App.-101) In the correspondence, Mr. Haiduk is directed by Ms. Hanke to stop any further work on the construction project when he reaches the amount of \$134,114.29, which equals the amount of money Ms. Hanke had paid to Mr. Haiduk for the construction project to that date. Mr. Haiduk stopped work on the project near the end of June, 2007, prior to its ultimate completion. Ms. Hanke subsequently contacted law enforcement claiming Mr. Haiduk had not performed under the contract and had stolen in excess of \$70,000 of her money that she had paid to him as a down payment on the construction project. Ultimately, Mr. Haiduk was charged with a criminal offense for theft by contractor contrary to Wis. Stat. §943.20(3)(c). Ultimately, a Deferred Entry of Judgment Agreement was entered into on the charge of theft by contractor. Mr. Haiduk entered a plea of “no contest” to a misdemeanor theft,

contrary to Wis. Stat. §943.20(1)(b). A restitution hearing was held on August 12, 2010 and August 26, 2010 before the Hon. Neal A. Nielsen, III. On September 23, 2010, the court sentenced Mr. Haiduk and as part of the sentence ordered him to pay restitution in an amount totaling \$31,984.50.

ARGUMENT

I. WHETHER THE COURT ERRED IN UTILIZING THE COST OF COMPLETION METHOD IN DETERMINING RESTITUTION.

The trial court erred in ordering Mr. Haiduk to pay restitution based on a utilization of the cost of completion method when determining restitution. When determining restitution in a criminal case, the trial court utilizes Wis. Stat. §973.20. Specifically, a court may order the defendant to “pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing” See Wis. Stat. §973.20(5)(a). “The amount of restitution to be ordered lies within the discretion of the trial court.” State v. Fernandez, 316 Wis.2d 598, 604, 764 N.W.2d 509 (2009). On review, an appellate court will “examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion

that a reasonable judge could reach.” State v. Longmire, 272 Wis.2d 759, 775, 681 N.W.2d 534 (2004).

Wis. Stat. §973.20(5)(a) provides the court with a two-part analysis to utilize in the determination of a restitution amount. First, “there must be a showing that the defendant’s criminal activity was a substantial factor in causing pecuniary injury to the victim”. State v. Johnson, 256 Wis.2d 871, 877, 649 N.W.2d 284 (2002). In the case before the court, the defendant stands convicted of misdemeanor theft contrary to Wis. Stat. §943.20 (1)(b) as well as being a party to a deferred entry of judgment agreement on the original theft by contractor charge. Although the defendant is being sentenced on the misdemeanor theft, the court “may take a defendant’s entire course of conduct into consideration including all facts and reasonable inferences concerning the defendant’s activity related to the crime for which he was convicted, not just those facts necessary to support the elements of the specific charge.” State v. Madlock, 230 Wis.2d 324, 333, 602 N.W.2d 104 (1999).

The second element that the court must consider when determining restitution pursuant to Wis. Stat. §973.20(5)(a) is a limitation of the award to “special damages” which could be recovered in a civil action against the defendant for his conduct in the commission of the crime. The statute limits the court from ordering restitution for any “general damages” and instead limits the restitution to “any readily ascertainable pecuniary expenditures paid out because of the crime”. State v. Holmgren, 229 Wis.

2d 358, 365, 599 N.W.2d 876 (Ct. Appl. 1983). In the case before the court, the defendant had received advanced monies from the homeowner in the amount of \$134,114.29 toward the construction of her home project. Although there was considerable testimony concerning the total cost of the project and the cost estimates to complete the project, the consideration of that testimony in determining the restitution is erroneous. Longmire at 778, 779. With this being the case, the issue before the court in determining restitution is the value of the work performed by the defendant as it is compared to the amount of money he received from the homeowner as a down payment. Unfortunately, in the sentencing hearing held on September 23, 2010, the court utilizes the cost of completion method in determining restitution. (Sentencing, p. 33, lines 19-25). (A-App.-103). The court states in its decision on page 25, lines 1-10 (A-App.104) that it utilized the cost for completion method of restitution as a partial rationalization for the restitution figure determined. Clearly erroneous. The court went on to consider the emotional trauma dealing with the incomplete project and challenges of selecting other contractors to complete the project. (Sentencing, p. 34, lines 14-25). (A-App.-105). “This limitation restrains a sentencing court from ordering the payment of “general damages”, that is, amounts intended to generally compensate the victim for damages such as pain and suffering, anguish, humiliation. “State v. Behnke, 203 W.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996).

Again, an erroneous consideration. The court ultimately decides that it essentially

split the restitution between what would be looked at as a contract basis and as a cost basis and come up with an average figure of \$31,984.50. (Sentencing, p. 35, lines 3-7) (A-App-106).

It is clear from the court's decision that it considered the cost of completion method when determining restitution in the afore referenced case. Unfortunately, Wis. Stat. §973.20 does not allow for the court to award victims the cost to correct construction deficiencies. State v. Longmire, Id. In the Longmire case, Longmire is convicted of theft by contractor after he failed to complete a home improvement project for which he received a down payment of \$30,000 and had paid approximately \$5,533 to a subcontractor. The circuit court ordered Longmire to pay restitution in the amount of \$34,985, which included the \$30,000 down payment the contractor received as well as monies the homeowner had spent in the amount of \$3,100 to another subcontractor to complete the project. The Longmire court decided that the payment of the additional monies would not constitute "special damages...which could be recovered in a civil action against him for his conduct in the commission of a crime considered at sentencing." Id at 779. The criminal conduct considered at sentencing was the conversion of a down payment, not the breach of contract. In the instant case, the only pecuniary loss to be considered by the court suffered by Ms. Hanke as a result of Mr. Haiduk's

action would have been any loss of monies paid by Ms. Hanke to Mr. Haiduk, not the additional funds she may have to pay to complete the project. “The poor quality of work performed under the contract...is purely a civil wrong and the criminal restitution statute cannot be enlisted to remedy it.” Id at 781. In the case before the court, the court’s utilization of the cost of completion method when determining a damage amount for the purpose of restitution is providing purely a civil remedy analogous to a breach of contract theory and, as such, violates the criminal restitution statute and is contrary to the case law cited herein. As such, the appellant asserts the trial court erred in considering general damages and specifically the cost of completion method in the determination of restitution.

II. WHETHER THE COURT ERRED IN THE EXERCISE OF ITS DISCRETION IN THE DETERMINATION OF THE RESTITUTION AMOUNT AS APPLIED TO THE EVIDENCE IN THE CASE.

Restitution in criminal cases is governed by Wis. Stat. §973.20. However, Wis. Stat. §973.20(5)(a) limits the restitution a court may award in two ways. First, restitution is limited to special damages recoverable in a civil action. *See* Wis. Stat §973.20(5)(a). The victim’s loss must be attributable to the defendant’s criminal conduct considered at sentencing. Id. Although the amount of restitution ordered is generally within the circuit court’s discretion, whether a particular item of restitution comes under Wis. Stat §973.20 is a question of law to be reviewed independently

by the appellate court. State v. Rash, 260 Wis.2d 369, 659 N.W.2d 189 (2003). In the case before the court, the defendant was charged with theft by contractor for utilizing the funds given to him by the alleged victim to work on her real estate construction project. At the time of the deposit by the victim, the defendant was involved in a construction project in the Northern Wisconsin/Upper Peninsula area known as the Bahne project. As the records disclosed, the defendant utilized funds paid by the victim, Ms. Hanke, on the Bahne project and later supplanted those funds with payments received from Bahne. There is no allegation or evidence whatsoever that any material man, employee or contractor had not been paid on the Hanke project. Quite the contrary, the assertion made by the State was that the work performed by Mr. Haiduk did not equal the amount of money he had received from Ms. Hanke, the alleged victim. As stated previously, before a trial court may order restitution “there must be a showing that the defendant’s criminal activity was a substantial factor in causing pecuniary injury to the victim.” State v. Johnson, 256 Wis.2d 871, 649 N.W.2d 284 (2002). The reason this is important is because the case before the court is particularly unusual. The contract that was in play in this particular case was verbal in nature. There were no definitive terms whatsoever either at the onset or at the conclusion of the matter. All change orders, additions, modifications, etc. were communicated in verbal form. The reason that this is important is that the court must find that the defendant’s criminal activity was a substantial factor in causing the

pecuniary injury to the victim. In this particular case, the victim had worked with the defendant on a prior contract several years before and had knowledge of the defendant's mode of operating. Additionally, that prior experience coupled with her high degree of education would not place her in a category of a vulnerable victim or someone that was inexperienced in the construction industry. Quite the contrary, the previous experience she had with Mr. Haiduk undoubtedly provided a comfort level to her and, as such, no written documentation was prepared between the parties. Unfortunately for the trial court, that familiarity creates a quagmire on which to base its restitution award. As stated previously, the court must determine the amount of restitution on an item by item basis, apply the proper legal standard and use a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. Johnson at 649. "The determination of the amount of restitution to be ordered (and thus whether a victim's claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard." Johnson at 877. In the case before the court, Mr. Haiduk has argued to the court that the change orders or extra costs that have been incurred in this project due to verbal modification or change orders, total the amount of \$25,600. (Hearing Exhibit 29 and 30). This particular assertion is important for a couple of different reasons. First, with an anticipated completion price of approximately \$150,000, the project had now been altered or modified to an approximate completion price of \$175,600. Although the cost of

completion is an inappropriate manner in which to value restitution, it does purport to explain the gap between the work completed and the amount estimated for the actual completion of the project when analyzing the testimony of the State's witnesses. Additionally, by having an additional cost of \$25,600, it is clear the project would not have been as far along as Ms. Hanke had wished but also tends to indicate her loss was not due to the criminal activity of Mr. Haiduk. The court must make specific findings on each particular item of restitution as it relates to the defendant's criminal activity.

“Although the amount of restitution ordered is generally within the circuit court's discretion” State v. Johnson, 256 Wis.2d 871, 649 N.W.2d 284 (2002)...whether a particular item of restitution comes within Wis. Stat. §973.20 is a question of the law that we review independently. Rash, Id. In the case before the court, the court ordered Mr. Haiduk to pay restitution in the amount of \$31,984.50. (Sentencing Hearing September 23, 2010, p. 35, lines 22 & 23). (A-App.106). In determining the total of the restitution, there was a stipulation on materials and subcontractors that Mr. Haiduk had paid in the total of \$61,688. (Sentencing, p. 33, line 10).(A-App.103). However, the court did not award any markup, in particular, the 10% markup that was testified to as being customary in the industry. (Haiduk testimony August 12, 2010, p. 124, line 13 – 14). (A-App.-108). (George Zalinski August 12, 2010 p. 89, line 5-11). (A-App.-109). A 10% markup on the material costs would have totaled \$6,168.

That figure plus the cost of the materials and subcontractor fees of \$61,688 equals a total for materials, subcontractor fees and markup of \$67,856.

The next item the court analyzed was the design fee. As testified by Mr. Haiduk, he charged Ms. Hanke the amount of \$6,800 for design fees. (August 12, 2010, p. 124, line 16). (A-App.-108). Again, there is no writing to establish this number as a contractual term; just the testimony of Mr. Haiduk on what he charged for the preparation of the plans, permits, etc. in working on the Hanke project. In its decision, the court ordered \$1500 for design fees (p. 33, line 14). (A-App.-103). The court asserted the \$6800 figure charged by Mr. Haiduk was “grossly inappropriate”. (p. 33, line 13) (A-App.-103). However, although the court felt the design fee to be grossly inappropriate, the court failed to “use a demonstrated, rational process to reach a conclusion that a reasonable judge could reach”. Crawford Co. v. Mase1, 238 Wis.2d 380, 617 N.W.2d 188 (2000). In fact, the court went to great lengths during the restitution hearing to talk about the inadequacy of the plans yet the court did not consider all of the plans and particularly the multiple plans that were put into evidence at the preliminary hearing as State’s exhibit #2. (Preliminary Examination, February 18, 2009). Although those plans “mysteriously” disappeared for the restitution hearing from the court’s file, there is no question they were in existence since they were not only identified and numbered at the preliminary examination but testified to by

the victim in the case. Mr. Haiduk made mention of those plans during the restitution hearing but again, those plans had disappeared from the court file and were not ready and able to be examined by the court. Regardless of that fact, it is clear the plans were in existence and the court had the opportunity to make note of them at the preliminary examination. At the time of the decision by the circuit court concerning the design fees charged by Mr. Haiduk, the court clearly failed to recognize the existence of the previous set of plans that were utilized at the preliminary examination. The court's determination that \$1500 was an appropriate amount was arbitrary and capricious and not based on any articulatable facts determined at the restitution hearing. The amount proffered by Mr. Haiduk was the contract amount and, as such, should be accepted by the court in light of the fact there is no evidence to the contrary.

Although we have recognized that a trial judge has the expertise to evaluate the reasonableness of attorneys' fees, we have also held that when the reasonableness of the fees is contested, the expertise of a trial judge is not a substitute for evidence. Peterson v. Gauger, 148 Wis.2d 231, 237, 434 N.W.2d 819 (Ct. App. 1988).

...although a trial court has wide discretion in calculating an appropriate fee award, if an hourly rate or number of hours is reduced, "a clear explanation must be provided". McKabola v. Chicago Transit Authority, 10 F. 3d 501, 518 (7th Circuit 1993).

Both of the afore referenced cases clearly state that there is a prohibition against a trial court "eyeballing" a fee request and arbitrarily reducing a fee request by a prevailing party without evidence to support

the reduction. Although the circuit court may have felt the design fee to be inappropriate, the case law clearly indicates a clear explanation must be provided as well as a prohibition against “eyeballing” the amount as being inappropriate.

Clearly, this is a difficult situation for the circuit court in the absence of a written contract between the parties but the court cannot reform the contract simply to compensate the alleged victim for paying too much for design fees. Again, the civil remedy under the alleged contract would be the appropriate remedy, not the criminal restitution statute. Since the \$6800 design fee is the only evidence of the contract between the parties, that figure added to the previous amount of \$67,856 brings a total expenditure or utilization of the victim’s deposit in the amount of \$74,656.

Lastly, the court analyzed the labor put into the project by the individuals working with and for Mr. Haiduk. As the court accurately asserted in the sentencing hearing, the best evidence of the number of hours that were worked came from Andrew Haiduk since he had memorialized the hours worked by the individuals at the time it was occurring. The court utilized the demonstrated, rational process to reach a conclusion that Andrew Haiduk had worked 500.5 hours, Jacob Haiduk had worked 80 hours and Erik Hardtke had worked 80 hours. Andrew also testified that Tom Haiduk, the defendant, worked approximately 333 hours. The difficulty we have with the court’s analysis of the actual

restitution figure for labor is that the court ordered that Jacob and Erik be paid at the rate of \$25 per hour for restitution, Andrew at \$30 per hour and Tom Haiduk at \$55 per hour. Tom Haiduk testified that when he determines a project and bids a project, he bids all labor at \$55 per hour. (Restitution Hearing, August 12, 2010, p. 124, lines 3-12). (A-App.-111). Additionally, Mr. Haiduk testified that all employees are billed at \$55 per hour, not just himself. (Restitution Hearing, August 26, 2010, p. 55, lines 10-12). (A-App.112). Mr. Haiduk also testified that he pays Andrew Haiduk at the rate of \$30 per hour, Jacob Haiduk at the rate of \$25 per hour and Eric Hardtke at the rate of \$25 per hour. The court took that testimony and confused it at what Mr. Haiduk had actually billed for the labor on the project and reduced the amount of the labor to \$37,330 when, in fact, it should have been \$54,642.50. The difference, of course, is the profit that Mr. Haiduk would have realized on the project. Again, the labor of \$54,642.50 added to the previous figure of \$74,656 brings a total contract price of \$129,298.50. That figure subtracted from the amount paid by the victim in the amount of \$134,114.29 leaves a balance of restitution of \$4,815.79. Technically, Mr. Haiduk should be awarded a 10% percent markup on labor, which would total \$5464, leaving a final restitution balance of \$648.21 being owed to Mr. Haiduk on the construction contract.

As stated previously, the defendant acknowledges the circuit court's difficulty in assessing restitution in this matter due to the verbal

nature of the entire contract as well as every aspect of the construction project. However, in order for the court to order a restitution figure, the court must not reform the contract between the parties and may only make a decision utilizing a demonstrated, rational process to reach a conclusion that a reasonable judge could reach utilizing evidence presented to it by the victim at the restitution hearing. Crawford, Id at 383. Because the victim failed to provide any evidence contrary to what Mr. Haiduk said as to the contract itself between the two parties, the court must decide restitution based on the best evidence available at the time of said order and base the restitution figure as it relates directly to the defendant's criminal activity as it corresponds to the alleged victim's loss.

CONCLUSION

For the reasons stated herein, the appellant requests the circuit court order of restitution be set aside and the case remanded back to the circuit court with the proper amount of restitution to be ordered to be zero.

Dated this 13th day of May, 2011.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with New Times Roman font. The length of this brief is 4,258 words.

Dated this 13th day of May, 2011.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of sec. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of May, 2011.

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