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COURT OF APPEALS

**06-20-2011** DISTRICT III

STATE OF WISCONSIN,

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Plaintiff-Respondent,

-vs-

Case No. 2011-AP-551-CR  
(Vilas County Case No. 2008-CF-146)

THOMAS J. HAIDUK,

Defendant-Appellant.

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**RESPONSE BRIEF OF PLAINTIFF-RESPONDENT**

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Appeal from Final Judgment of Conviction entered in the Circuit Court of Vilas County  
Honorable Judge Neal A. Nielsen, III, Presiding  
Trial Court Case No. 2008-CF-146

Vilas County District Attorney  
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**TABLE OF CONTENTS**

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TABLE OF  
AUTHORITIES.....  
STATUTES.....  
STATEMENT OF ISSUES.....  
STATEMENT OF THE CASE.....  
ARGUMENT.....

**I. WHETHER THE COURT ERRED IN ITS  
METHOD OF DETERMINING RESTITUION**

**II. WHETHER THE COURT ERRED IN THE  
EXERCISE OF ITS DISCRETION IN  
DETERMINING THE AMOUNT OF  
RESTITUTION**

CONCLUSION.....  
CERTIFICATE OF FORM AND LENGTH.....  
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)...

## **TABLE OF AUTHORITIES**

### **CASES**

State v. Longmire, 272 Wis.2d 759, 681 N.W.2d 534 (2004)

State v. Holmgren, 229 Wis.2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999)

State v. Behnke, 203 Wis.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996)

Crawford Co. v. Masel, 238 Wis.2d 380, 617 N.W.2d 188 (2000)

State v. Johnson, 256 Wis.2d 871, 877, 649 N.W.2d (2002)

State v. Rash, 260 Wis.2d 369, 659 N.W.2d 189 (2003)

State v. Anderson, 215 Wis.2d 673, 682, 573 N.W.2d 872 (1997)

**TABLE OF STATUTES**

Wis. Stat. 943.20(3)

Wis. Stat. 943.20(1)(a)

Wis. Stat. §973.20

Wis. Stat. §973.20(1r)

Wis. Stat. §973.20(5)(a)

### **STATEMENT OF THE ISSUES**

1. Whether the court erred in its method of determining restitution in the instant case.
2. Whether the court erred in its exercise of discretion when it determined the amount of restitution as applied to the evidence in the case.

### **STATEMENT OF THE CASE**

In the summer of 2006, Linda Hanke hired Thomas Haiduk to build an addition onto her property in Vilas County. The project was for the fixed price of \$150,000 and included a 16' X 28' kitchen/living room combination, a 12' X 12' dining room with a walkout and an 8' X 12' deck connected to a 10' X 28' deck. The project also included plumbing, electrical, heating, walls, windows/doors, insulation, inside red cedar paneling, outside half-log siding, and decking. By April 2007, the only work that was done on the project was framing of the addition, placing OSB board on the outside of the addition, and the roof complete with shingles. Ms. Hanke was dissatisfied with Mr. Haiduk's progress on the project and she requested a detailed accounting from him for the work completed. Mr. Haiduk never provided her a detailed

accounting of his work, and he was subsequently terminated by Ms. Hanke in June 2007. The total amount Ms. Hanke paid to Mr. Haiduk for the project was \$136,395.29, the same total amount the circuit judge found Ms. Hanke to have paid Mr. Haiduk.

(Sentencing Hearing, p. 34, lines 5-6)

Ultimately, Mr. Haiduk was charged with Theft by Contractor in excess of Ten Thousand Dollars contrary to Wis. Stat. 943.20(3), a Class G felony, and Theft contrary to Wis. Stat. 943.20(1)(a), a Class A Misdemeanor. A Deferred Entry of Judgment Agreement was entered into on the charge of Theft by Contractor with the explicit condition that Mr. Haiduk would pay in full all restitution ordered by the court within thirty-six months of his plea. Haiduk entered a plea of “no contest” to the misdemeanor Theft. 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 ITS METHOD OF DETERMINING RESTITUION**

When reviewing the circuit court’s discretion, this Court must 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, 681 N.W.2d 534 (2004). Here, the circuit court used a demonstrated, rational process that a reasonable judge would use in determining the amount of restitution the defendant must pay the victim under the provisions of the Wisconsin criminal restitution statute, Wis. Stat. §973.20. The trial court only erred in considering the victim's subsequent cost of completing the project. However, the trial court's analysis concerning the defendant's legitimate costs and expenses is sound. Wis. Stat. §973.20 provides that the trial court "shall" order restitution for a crime considered at sentencing "unless the court finds substantial reason not to do so and states the reason on the record." See Wis. Stat. §973.20(1r). The circuit 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 term "special damages" as used in the criminal restitution context, means "[a]ny readily ascertainable pecuniary expenditure paid out because of the crime." State v. Holmgren, 229 Wis.2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). The sentencing court may not order the payment of "general damages," that is, amounts intended

to generally compensate the victim for damages such as pain and suffering, anguish, and humiliation. State v. Behnke, 203 Wis.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996).

Here, the court determined that victim paid the defendant advanced monies in the amount of \$136,395.29 toward the construction of her home. (Sentencing Hearing, p. 34, lines 5-6) The issue for the trial court in determining the amount of restitution owed to the victim is to consider the value of the work performed by the defendant as it is compared to the \$136,395.29 he received from the victim as a down payment towards the homebuilding. The court in making its restitution determination, utilized the stipulated value, agreed to by all parties, of the materials and subcontractors paid for by the defendant, the defendant's own testimony regarding the value of his labor on the project, and testimony regarding the value of preliminary designs drawn by the defendant. (Sentencing, p.33, lines 5-15) Each of these items pertain to the value of the work performed by the defendant before his termination and are proper factors that go into the restitution calculus. After carefully considering these factors, the court used a "demonstrated, rational process to reach a conclusion that a reasonable judge could reach," and found that there were \$100,518 of legitimate expenses and costs for the defendant (the next section of this brief deals with the individual



costs and expenses the trial court found to be legitimate and why \$100,518 is an appropriate figure; this section solely deals with the circuit court's method of analysis). Crawford Co. v. Masel, 238 Wis.2d 380, 617 N.W.2d 188 (2000). The court then subtracted \$100,518 from the down payment of \$136,395.29 to reach a restitution amount of \$35,466.29 owed to the victim. (Sentencing, p.34, lines 1-10) This should have been the restitution award, plain and simple.

Appellant argues that the circuit court proceeded to err by considering the victim's subsequent cost of completion as a partial realization for the restitution figure determined. (Sentencing, p. 33, lines 19-25) Appellant also argues that the trial court inappropriately considered the "emotional trauma [of] dealing with the incomplete project and challenges of selecting other contractors to complete the project." (Sentencing, p.34, lines 14-25) The State agrees with the appellant on the first issue, but not the latter. The victim's cost of completion is outside the definition of the "special damages" Wis. Stat. §973.20 allows restitution for. "Special damages" as used in the criminal restitution context, means "[a]ny readily ascertainable pecuniary expenditure paid out because of the crime." Holmgren, at 365. The victim's subsequent cost of completion, including any costs to correct the defendant's work, should not factor into the restitution analysis because it is a

“general damage” that occurs after the criminal acts have taken place, and it does not constitute a victim’s pecuniary loss attributable to the criminal act. Longmire, at 543.

Wis. Stat. §973.20 explicitly prohibits consideration of general damages, including emotional trauma because it does not factor into the determination of the victim’s readily ascertainable pecuniary expenditures. The judge explicitly stated that the victim endured “emotional trauma” and was tired of the ordeal; as any victim of contractor theft would be. (Sentencing, p. 34, lines 17-21) However, the judge did not award any money based on her emotional trauma; it never explicitly stated a certain amount was for emotional trauma. Instead, it awarded her money for “out of pocket” expenses including “all the other difficulties” she endured. The court

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) . . .

I think that represents absolutely money that’s out of pocket for Ms. Hanke, plus something for all of the other difficulties, and it’s not a lot, but its something for that. (Sentencing, p. 35, lines 7-10)

The State disagrees that the circuit judge awarded money based on “emotional trauma,” but the restitution figure it determined, \$31,984.50, is tainted by its consideration of the victim’s subsequent cost to complete

the construction project. However, it is of tantamount importance to note that the first part of the trial court's restitution analysis where it determined the defendant's legitimate expenses to be \$100,510, comports with the provisions of Wis. Stat. §973.20 and is properly justified. (Sentencing, p. 33, lines 5-15) The appellant repeatedly mischaracterizes the trial court's analysis by stating that "in the sentencing hearing held on September 23, 2010, the court utilizes the cost of completion method in determining restitution." (Appellants brief, p. 5) The fact of the matter is that there is no "cost of completion method," and just because the circuit court considered general damages does not taint its entire restitution analysis. In this case the Court should truncate the circuit court's analysis containing the consideration of general damages, and determine the restitution amount to be \$35,877.29, consistent with the first part of the circuit court's analysis and which is an appropriate determination of restitution under the standard of review.

**II. WHETHER THE COURT ERRED IN THE EXERCISE OF ITS DISCRETION IN DETERMINING THE AMOUNT OF RESTITUTION**

The trial court did not err in determining restitution with respect to its calculation of the defendant's legitimate costs and

expenses. The trial 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. Crawford Co., at 385. Circuit courts have discretion in deciding on the amount of restitution and in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed. State v. Johnson, 256 Wis.2d 871, 877, 649 N.W.2d (2002). Whether an item included within a restitution order comes within statutory limitations on what a court may order is a question of law that this Court decides de novo. State v. Rash, 260 Wis.2d 369, 659 N.W.2d 189 (2003). Additionally, the Court of Appeals is allowed to “construe the restitution statute broadly and liberally in order to allow victims to recover their losses [that occur] *as a result of a defendant's criminal conduct.*” State v. Anderson, 215 Wis.2d 673, 682, 573 N.W.2d 872 (1997) (emphasis added).

As previously stated, the issue before the circuit court was to consider the value of the work performed by the defendant as it is compared to the \$136,395.29 he received from the victim as a down payment towards the homebuilding. The value of the defendant’s work was then subtracted from the victim’s down payment, and that subtraction produced an accurate restitution figure of \$35,877.29. The circuit court correctly calculated the

defendant's work and legitimate expenses to be \$100,518.

(Sentencing, p. 33, lines 5-15) First, the circuit judge calculated the defendant's labor to be \$37,330. He determined the hours worked by the defendant and his construction group to be 993.5 based on Andrew Haiduk's testimony, which the judge had basis to find credible because Andrew Haiduk had a method of memorializing the hours worked. (Sentencing, p. 31, lines 22-25) The appellant accepts that the judge's conclusion regarding the hours was within his discretion.

The judge then billed the hours at the rates that the defendant *actually paid* the primary workers as testified by the defendant himself. (Sentencing, p. 32, lines 16-17) This yielded the amount of \$37,330 for labor. The appellant argues that because the defendant first bids all labor on a project at \$55 an hour, \$55 an hour is what the circuit judge should have billed the 993.5 hours worked. (Appellants brief, p. 14) The appellant's proposition is preposterous and audacious. The circuit judge did not bill the labor at \$55 an hour because that is not what the defendant *actually paid* his workers for the work done on the victim's project. Additionally, there was a dispute between whether or not the defendant himself received \$35 an hour or \$55 an hour, and the judge determined that the defendant received \$55 an hour for his labor; an extremely favorable determination for the

defendant that the State accepts as within the judge's discretion but does not think it is appropriate. The appellant's suggestion to not only bill his but all the labor at \$55 an hour is a meritless assertion because although that figure may be what the defendant originally bids a project at, it is not the *actual* billable rate paid to the workers on this project, and the defendant should not be permitted to profit by his wrongdoing.

To determine the next chunk of the defendant's costs and expenses, the circuit judge considered the amount the defendant spent on materials and subcontractors. This amount was easily discernable because all parties stipulated that the defendant spent \$61,688 on materials and subcontractors. The appellant, despite having stipulated to this amount, now argues that this amount did not include a 10% markup that is customary in the industry and would have totaled \$6,168. It is obvious the defendant is attempting to grasp any possible straw left that would increase his costs and expenses thereby reducing the amount of restitution owed to the victim. He has no right to do this under a verbal contract that was subject to a fixed price of \$150,000. The bottom line is that the defendant agreed to stipulate that \$61,668 was the amount he spent on materials and subcontractors, and if he wrongly believed that he was entitled to a 10% markup, he should

not have stipulated to the amount knowing that it did not include the markup.

Additionally, the appellant also argues that “technically, Mr. Haiduk should be awarded a 10% markup on labor, which would total \$5464, leaving a final restitution balance of \$648.21 being *owed* to Mr. Haiduk” by the victim. (Appellant’s brief, p. 14) Once again, such a recommendation is preposterous and audacious. In regards to the purported 10% markup on labor, the circuit judge was not certain whether this 10% markup on labor was “built in somewhere” into the contract or specifically “built into any of the individuals labor rates.” (Sentencing, p.33-34, last paragraph on 33) Because the 10% markup on labor was indeed most likely built into either the labor rates or the materials and subcontractor stipulation, this purported markup should be disregarded.

The circuit judge added the labor completed on the project, \$37,330, to the stipulated amount that was spent on materials and subcontractors, \$61,688, which resulted in the amount of \$99,018. Lastly, the circuit judge added \$1,500 dollars for monies that the defendant spent on creating a preliminary design of the project. The defendant had charged the victim \$6,800 in design fees, but the circuit judge found “that awarding \$6,800 for design fees based on the design that [he] saw would be grossly inappropriate.” These were hand drawn. (Sentencing, p.33, lines 11-14) The appellant

argues that the court's determination of \$1,500 for design fees was "not based on any articulable facts determined at the restitution hearing." (Appellants brief, p. 12) The appellant goes on to state that \$6,800 was the verbally agreed to contract amount for design fees, and that in light of no evidence to the contrary, it should be accepted as such. (Appellant's brief, p.12)

The appellant demonstrates a irresponsible disregard for important testimony at the Restitution Hearing regarding the design plans. The circuit judge heard testimony from the State's witness, Charles Hunter, at the Restitution Hearing regarding the value of the design plans. (Restitution Hearing Vol. II, p. 4-8 discusses the design plan fee) At the Sentencing hearing, the court had Charles Hunter's testimony when it determined the value of the design fees. Charles Hunter gave expert testimony for the purpose of establishing the value of the designs at \$1500. The court's determination was most certainly grounded in expert testimony and articulable facts.

The circuit judge also based his decision about the design fee on other significant evidence; that evidence being the design plans themselves! The circuit judge examined the actual designs produced by the defendant, and exercised his rightful discretion to reduce the design fees to \$1,500, an amount a reasonable judge would find more appropriate based on the testimony he heard



regarding their value and what he actually saw. The appellant cites Gauger which held that “when the reasonableness of 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 (Ct. App. 1988). This case is immediately distinguishable from Gauger because in this case the Judge did not substitute his expertise for evidence; in fact he had heard evidence in the form of testimony by Charles Hunter at the Restitution Hearing. Further, the appellant misses a crucial distinction between the fees in Gauger, attorney fees, and the fees in the instant case, fees for designs of the project. Gauger warns against a judge making a determination of the reasonableness of attorney fees because the specific tasks an attorney bills for require sufficient testimony from the actual attorney in order to properly establish whether they were appropriate or not. Here, the judge was able to make an assessment about the reasonableness of the design fees because he had the designs right in front of him; whereas a billable hour sheet does not provide adequate information for a judge to surmise the amount of actual work an attorney put into a specific billed item. The judge in his capacity as a reasonable judge, exercised his discretion to lower the design fee amount to \$1,500 based on the designs produced at the Restitution Hearing, and most importantly,

the testimony he heard regarding the designs actual value.

(Restitution Hearing Vol. II, p. 4-8)

The circuit judge added the \$1,500 design fee to the previous amount of \$99,018 to arrive at a grand total of \$100,518 in legitimate costs and expenses by the defendant. Once the circuit judge determined this amount, it subtracted the amount from the victim's down payment but then erred by considering the amount it cost the victim to complete the project. As previously stated, the proper restitution amount should be \$35,877.29; the amount yielded by subtracting the defendant's legitimate costs and expenses from the victim's down payment.

The appellant asks the Court of Appeals to reform the terms of the contract by conducting a new mini Restitution Hearing. This is not what the appellate court's function is here. The appellate court's function is to decide 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. Longmire, at 759. The appellant seeks more for labor, more for the stipulated materials and subcontractors, and more for the design fees. None of these requests are legitimate functions for this Court to undertake. It was the circuit court's task to determine the proper restitution figures, which for the most part, it did.

The circuit judge in this case did not attempt to reform a contract or apply unsubstantiated discretion. The circuit court simply determined the defendant's legitimate costs and expenses and compared them against what the victim paid; in other words, the court carried out the essence of the Wisconsin criminal restitution statute, WI. Stat. §973.20. The court only erred in its consideration of one general damage item. In every other item that the circuit court considered for the restitution analysis, it utilized a demonstrated, rational process to reach a conclusion that a reasonable judge could reach, based on the evidence presented to it by the victim at the restitution hearing. Crawford, Id. at 383. Because the court's analysis regarding the defendant's legitimate costs and expenses is properly grounded in reasonableness and appropriate judicial discretion, this Court should subtract those legitimate costs and expenses, \$100,518, from the victim's down payment for the construction of her home, \$136,395.29, to determine the proper amount of restitution to be ordered at \$35,877.29.

### **CONCLUSION**

For the reasons stated herein, the respondent requests the circuit order of restitution to be set aside and the case remanded

back to the circuit court with the proper amount of restitution to be  
order to be \$33,596.29.

Dated this 15<sup>th</sup> day of June, 2011

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## **CERTIFICATION OF FORM AND LENGTH**

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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 3,683 words.

Dated this 15<sup>th</sup> day of June, 2011

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