RECEIVED
07-05-2011
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent

-v.-

THOMAS J. HAIDUK,

Defendant-Appellant.

APPEAL NO. 2011-AP-551-CR

REPLY 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

CIRILLI LAW OFFICES, S.C.
Gary S. Cirilli
State Bar No: 1000633
Attorneys for Defendant-Appellant
116 East Davenport Street
Rhinelander, WI 54501
(715) 369-3443

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES

1. Whether the court erred in its method of determining restitution in the instant case.

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

ARGUMENT

I. WHETHER THE COURT ERRED IN ITS METHOD OF DETERMINING RESTITUTION.

When reviewing the Response Brief of the plaintiff-respondent, it is clear that some confusion exists as to the amount of money that was paid to Mr. Haiduk by Ms. Hanke. Although the exhibit entered in at court indicated the payment of $134,114.29, there was a stipulation at the preliminary examination that Ms. Hanke paid Mr. Haiduk the amount of $136,395.29. The difference of the two numbers amounts to a total of $2,281 of additional monies paid to Mr. Haiduk by Ms. Hanke. As the Court accurately stated "I am sure you appreciate when the attorneys tell me something by stipulation…my inquiry stops when the attorneys tell me that that is the dollar amount." (Sentencing Hearing p. 17, lines 13-17) (App-102)

It is acknowledged by the respondent that the Court erred in considering the victim's subsequent cost of completion of the project in

determining the restitution figure owed by Mr. Haiduk. Additionally, the respondent accurately states that the 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. (Respondent's Brief, p. 3 and 4) State v. Behnke, 203 Wis.2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996). However, the court, in making its restitution determination, did consider general damages. "So what I'm going to do essentially is since both parties testified both ways, I am going to do it both ways as well, and split the restitution between what would be looked at as a contract basis and as a cost basis, so the average of those two figures is $31,984.50, and I think that represents absolutely money that's out-of-pocket for Ms. Hanke, plus something for all the other difficulties, and it's not a lot, but it is something for that." (Decision p. 35, lines 3-10) (App-104) As was mentioned in the defendant-appellant's brief, the court did utilize the cost approach basis when determining the restitution figure. The above quote, however, also indicates that the court considered general damages by its statement, "Plus something for all the other difficulties, and it's not a lot, but it's something for that." (Decision p. 35, lines 8-10) (App-104) Again, there is no question that the Court considered general damages in its decision in the determination of restitution, and it is also clear that it is impossible to determine what portion or proportion of the restitution figure could be attributable to general damages vs. special damages. "Unfortunately, at this stage, we are uncertain exactly what that

amount is, so it is impossible to determine with certainty that the court demonstrated a rational process to reach a conclusion that a reasonable judge could reach." Crawford Co. v. Masel, 238 Wis.2d 380, 617 N.W.2d 188 (2000).

The respondent continues on page 7 of its brief to conclude that the appeals court should simply 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. (Respondent's brief p. 7) This is faulty reasoning. The respondent wishes the appellate court to simply look past the consideration of general damages and come up with a simplified figure. Although the actual dollar figure is more a part of the analysis of the second issue of this appeal, it is respectfully suggested to the court an improper method of the determination of restitution was utilized by the trial court, and on that basis the decision set aside.

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

As the respondent accurately states, 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. (Respondent's brief p. 8) Citing State v. Rash, 260 Wis.2d 369, 659 N.W.2d 189 (2003). Unfortunately, the respondent utilizes faulty

reasoning thereafter. The respondent indicates that the defendant's work and legitimate expenses were $100,518, including defendant's labor. (Respondent's brief p.9) Unfortunately, the analysis is more complex than that. On page 9, paragraph 1, the respondent argues that the judge bill the hours worked by the employees at the rates that the defendant actually paid the primary workers, rather than the amount that Mr. Haiduk billed the project at. As stated in our initial brief, the appellant, Mr. Thomas Haiduk, bills all of his employees at $55.00 an hour and bids all labor projects at that rate. (Appellant's brief p.14) The circuit judge allowed that rate for Mr. Haiduk, but did not allow that rate for all of his employees and instead only allowed credit for the amount actually paid the primary workers. Although the plaintiff-respondent believes the proposition of all labor being credited at $55.00 an hour to be preposterous and audacious (Respondent's brief p.9), the contract between the parties anticipated labor at $55.00 per hour. For the court to reform the contract to anything less is not substantiated by the evidence. Ms. Hanke did not testify or provide any evidence that the labor rates were anything other than the $55.00 as provided by Mr. Haiduk, and as such that is the single best evidence of the labor rate. The fact Mr. Haiduk may have paid his employees less per hour than the rate charged the customer per the contract is not preposterous or audacious… it is called "profit". The actual billable rate and the rate paid to the workers on the project are two separate entities. One allows the defendant to realize a profit, while the

other is the payment of employees per the employment agreement within the contract. Quite frankly, for the respondent to assert that Mr. Haiduk not be permitted to profit on this case because there is a question as to what monies may or may not be owing, is fundamentally unsound. For the court to reduce the hourly labor rate from the contract amount to the employee rate is in essence a reformation of the contract, which is an equitable remedy, and as applied to this case creates an erroneous exercise of judicial discretion.

The purpose of the restitution hearing is to determine whether any money or monies are owed, and the plaintiff, or victim in this case, has the burden of proof by preponderance of evidence that Mr. Haiduk did in fact, take monies that were not owed to him. The defendant stood before the court on a conviction for misdemeanor theft under §943.20(1)(a); for utilization of the victim's money without her consent. The "crime considered at sentencing" was just that, not felony theft by contractor. In addition, this is not the typical theft case in that there are no claims by any subcontractors that have not been paid, no material men that have not been paid, and no mechanic's liens on the property. This, quite frankly, is a case that is closer to a civil breach of contract claim relative to the amount of work that was performed in comparison to the amount of money that was paid. Although the respondent continues to assert the contract was for $150,000, even law enforcement acknowledge it was not a "firm" number. Additionally, the respondent fails to acknowledge the change orders, or

alterations to the contract, that were made by the victim which she acknowledged on the stand under oath. Again, the reason that is important is because the $150,000 initial figure is no longer a relevant or set figure due to the change orders. Haiduk's failure to complete the construction contract was not a "crime considered at sentencing," and as such, the failure to complete the project for the agreed upon price is again irrelevant to this discussion. The contract has basically become a time and materials contract.

On page 10 of the respondent's brief, the respondent goes to great lengths to assert that number one, the defendant stipulated to a figure of $61,668 on materials and subcontractors, which is accurate. However, the respondent attempts to include any markup on the materials as part of the stipulation. A review of the record clearly shows that is not the case. (Restitution Hearing Volume I, p. 5, lines 22-25 and p.6, lines 1-2 of the same volume). (App-106 - 107) The stipulation was placed into the record concerning the materials and subcontractors, and there is absolutely no mention of any markup. Again, the respondent attempts to deprive Mr. Haiduk of the opportunity to make any profit on this job at the customary industry standard of 10%. As we identified in our initial brief to the court, the State's own witnesses indicated that a 10% markup on materials was customary. Contrary to the respondent's position, the court acknowledges on page 86, line 25 and page 87, lines 1-10 that Mr. Haiduk, or any contractor for that matter, would build in overhead and profit into any bid

or job that he was working on. The State goes on to argue with the court that because it is not a written contract but a verbal contract, he is not allowed to take profit, yet the court acknowledges that Mr. Haiduk would not have contracted to build the project at a loss. (Volume I of the Restitution Hearing, August 12, 2010, p. 88, lines 3-11). (App-108)

The respondent continues on page 12 of its brief to discuss the design fees and categorize the appellant's position as a demonstration of irresponsible disregard for important testimony at the restitution hearing regarding the design plans. (P.12, paragraph 1). Quite the contrary, it is the respondent who has failed to recognize certain important facts. On the final paragraph of page 12, the respondent states that the circuit judge examined the actual design plans produced by the defendant and exercised his rightful discretion to reduce the design fee to $1,500. The court's rationale in doing so was based on its analysis of the plans and testimony from Mr. Hunter. What the court failed to recognize is that the plans the court reviewed at the restitution hearing are not the totality of the plans, and were not even the total plans that were placed into evidence. A review of the preliminary transcript clearly shows that several building plans were marked as an exhibit and testified to by the victim. (Preliminary Transcript p.6, lines 4-25 and p.24, lines 4-6) (App-116-117). Those plans were not present at the restitution hearing and were not made available to the judge for his review. Clearly, once those plans were marked as an exhibit at the preliminary examination, they are out of the

dominion and control of the defendant, and are instead in the control of the court. Although the respondent did not address that issue in its reply brief, it is clear the plans were in existence and were additional drawings of some value that could be attributed to the work performed by Mr. Haiduk, which was not considered by the court when deciding a reasonable design fee. Additionally, although Mr. Hunter testified what he would charge for those plans, there was no evidence from the victim that would indicate Mr. Haiduk's fee for the design of the addition to her home was anything other than $6,800, or even that she objected to that amount at any time. As Mr. Zalewski testified on page 86, lines 13-16, there was no set rate for contractors in northern Wisconsin and lower Michigan and there was a variety of different rates.

Clearly the court acknowledges Mr. Haiduk is entitled to profit on what he has done. Again, there is no allegation that any material supplier, subcontractor, or claims have gone unpaid by Mr. Haiduk as a result of his actions in this matter.

The respondent asserts that the appellant requests additional set-offs to the restitution amount, but that request is not the function of the Court of Appeals. However, and as the respondent aptly noted, the Court of Appeals reviews this case de novo. It is true the appellant seeks more for labor because the testimony and evidence suggest that was the agreement. The appellant does not seek more for stipulated materials and subcontractors as that was a stipulated amount. The appellant is seeking a

10% markup on the materials and subcontractors, as was testified is custom in the industry and was testified to was pursuant to the contractual terms of the parties. And lastly, the appellant is certainly asking for the design fees quoted and testified to by the appellant, as that fee was the only evidence of the contractual terms between the parties. The victim provided no evidence whatsoever as to the amount of the design fee, nor did she inquire as to any of the specifics relative to the contract. Although it is not the intent of the appellant that the victim be penalized for her lack of inquiry, it is the victim's burden to prove by a preponderance of the evidence the amount of loss sustained by the victim as a result of the crime considered at sentencing. Wis. Stat. §973.20(14)(a) As stated in our initial brief to the court, the crime considered at sentencing is not theft by contractor, but misdemeanor theft, and as such, the victim has the responsibility and the burden to prove her losses as attributable to that crime. The fact that the defendant failed to complete the construction project is not attributable to that crime and therefore irrelevant for consideration by the court relative to restitution.

We even suggested that the following accurately depicts the balance sheet relative to this project.

Total Paid:		$136,395.29
Materials	$ 61,688.00	
Material mark up	6,168.00	
Design Fees	6,800.00	
Labor	54,642.50	
Total Expenses:	$129,298.50	

Sub total:		$ 7,096.79
w/ 10% labor markup	$ 5,464.00	
Sub Total:		$ 1,632.79

As you can see from the balance sheet, accepting the numbers agreed upon by the parties would show a sub total owed by Mr. Haiduk to Ms. Hanke in the amount of $7,096.79. That figure does not reflect the typical 10% markup on labor of $5,464. With the 10% labor markup calculated in, the final restitution owed by Mr. Haiduk to Ms. Hanke is $1,632.79.

CONCLUSION

The appellant respectfully requests that the court set aside the order of restitution ordered by the circuit court and the case be remanded back to the circuit court with the direction that the proper amount of restitution to be paid by the defendant-appellant to be $1,632.79.

Dated this 5th day of July, 2011.

/s/ Gary S. Cirilli
Gary S. Cirilli
Wis. Bar #1000633
CIRILLI LAW OFFICES, S.C.
116 East Davenport Street
Rhinelander WI 54501
(715) 369-3443
Attorneys for Attorneys for Defendant-Appellant

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 2,849 words.

Dated this 5th day of July, 2011.

/s/ Gary S. Cirilli

Gary S. Cirilli
Wis. Bar #1000633
CIRILLI LAW OFFICES, S.C.
116 East Davenport Street
Rhinelander WI 54501
(715) 369-3443
Attorneys for Attorneys for Defendant-Appellant

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 5th day of July, 2011.

____/s/ _Gary S. Cirilli_____
Gary S. Cirilli
Wis. Bar #1000633
CIRILLI LAW OFFICES, S.C.
116 East Davenport Street
Rhinelander WI 54501
(715) 369-3443
Attorneys for Defendant