STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2015AP001855 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ZACHERY J. PAGENKOPF,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION ENTERED BY THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE THOMAS P. EAGON PRESIDING

Respectfully submitted,
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2. In addition and in the alternative, did the trial court erroneously exercise its discretion when it concluded that Mr. Pagenkopf's actions "caused" the injuries at issue?

3. In addition and in the alternative, did the trial court erroneously exercise its discretion in awarding restitution related to medical costs?

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5. In addition and in the alternative, did the trial court erroneously exercise its discretion in awarding the bulk of the restitution to insurance companies?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Pagenkopf requests neither oral argument nor publication.

STATEMENT OF THE CASE

This appeal concerns the process by which restitution was determined by the lower court as well as the restitution order itself. (54:1). Following Mr. Pagenkopf's pleas to charges of battery and disorderly conduct, counsel for Mr. Pagenkopf requested a restitution hearing. (45:1; 41:1-2). The matter was referred to a court commissioner, who conducted an evidentiary hearing on December 3, 2014. (25:1; 58:1). The commissioner made "findings of fact" and transmitted a proposed order to the Circuit Court. (41:1-3). The Circuit Court signed off on those findings on January 5, 2015. (41:3). The restitution amount was eventually added to an amended judgment of conviction. (45:1-2).

On January 6, 2015, counsel for Mr. Pagenkopf filed a request for a de novo review of the restitution matter (39:1). That request was denied in a written order the following day. (40:1). Counsel for Mr. Pagenkopf filed a motion for reconsideration. (42:1-4). A hearing was held and the motion was orally denied. (59:5). A notice of intent to pursue postconviction relief was filed. (43:1-2). This appeal eventually followed. (54:1-2).

STATEMENT OF FACTS

The Restitution Hearing

The victim in this case, S.D., testified at the restitution hearing presided over by Circuit Court Commissioner David Worzalla. (58:1; 58:6). S.D. is the undisputed victim of the underlying misdemeanor battery pleaded to by Mr. Pagenkopf.

(58:6).

The underlying altercation occurred on January 1, 2013—roughly two years before the restitution hearing. (58:7). As a result of that fight, S.D. claimed that he had a "torn quadriceps tendon" in his left knee. (58:8). S.D. claimed the injury occurred when he was "taken down to the ground" by Mr. Pagenkopf. (58:8).

Notwithstanding that alleged injury, S.D. testified that he was able to leave the residence following the fight. (58:8). S.D. indicated that he was forced to crawl. (58:37). However, the investigating officer testified that while the snow was examined for footprints, there was no apparently no evidence of crawl marks. (58:55).

S.D. testified that he noticed the injury the morning after the fight when his knee appeared to be swollen. (58:8-9). He claimed that he had difficulty walking. (58:9). However, S.D. did not report the injury to law enforcement when he was contacted by Deputy Chad McClellan on that same day. (58:53; 58:58).[1] Deputy McClellan also testified that the knee was neither "braced" nor "iced." (58:57). S.D. was not limping and actually went to work following the police contact. (58:57). S.D. corroborated this, responding affirmatively to counsel's question as to whether he "walked out the door and went to work" following his interview with law enforcement. (59:30).

S.D. continued to work for roughly another month.

[1] Mr. Dietz also did not report it the night of the fight, having left the scene before the arrival of law enforcement. (58:28). He did so out of fear that he would be arrested. (58:27).

(58:23). S.D. first visited a doctor three weeks after the fight on January 22, 2013. (58:31-33). His family doctor generated a contemporaneous report regarding that visit. (36:1). That report indicates that the knee pain had been in existence for at least six months prior to the visit. (36:1).[2] The report indicates that S.D. "has no known significant injury to that knee." (36:1). S.D. continued working for several more weeks after that visit, until February 13, 2013. (58:35).

Eventually, S.D. visited a specialist, who performed the actual tendon repair. (58:41). A "Physician Certification" was submitted to the Wisconsin Crime Victim Compensation Program. (58:40-41; 36:1). That report indicates that S.D. twisted his knee on the ice. (58:41; 36:1).

With respect to the report of his family doctor, S.D. testified that the doctor may have confused a long-term injury in the right knee with the allegedly new injury to the left knee. (58:47). With respect to the statement of the specialist, S.D. was able to obtain a later statement from the physician that contradicted the earlier report and supported the restitution claim. (58:48).

The Restitution Order

The court commissioner indicated in his "findings of fact" that "[a]lthough S.D. did not originally complain of knee pain and there was some confusion by doctors as to causation, testimony at the hearing...sufficiently rehabilitated the previous confusion and the court specifically finds that Mr.

[2] Mr. Dietz also tried unsuccessfully to submit bills for unrelated medical costs to the Crime Victim Compensation Fund. (58:40).

Pagenkopf's actions were the cause of S.D.'s knee injury." (41:2).

Regarding the amount owed, the commissioner first concluded that a health insurance company, ACS, was owed $9,594.75 for bills apparently related to S.D.'s injury. (41:2). The source of that figure was a summary exhibit prepared by the Portage County District Attorney's Office. (36:1). In addition, the commissioner also found that S.D. was owed an additional $4,332.04 related to out of pocket costs. (41:2).

Another insurance company—Reliance Standard Life Insurance—was awarded $1,730.16 in restitution to compensate for disability payments made to S.D. (41:2). Finally, the State of Wisconsin was awarded $3,617.74 as a result of payments made under the Crime Victim Compensation Program. (41:2). All in all, Mr. Pagenkopf was ordered to pay $19,274.69 in restitution. (41:3).

SUMMARY OF ARGUMENT

Mr. Pagenkopf first asserts that he was wrongly denied de novo review of the underlying "decision" by the circuit court commissioner regarding restitution. The plain language of the statute, as well as well-settled case law, supports the proposition that de novo review should have been available to Mr. Pagenkopf.

Mr. Pagenkopf also asserts that the restitution award itself was erroneous for several reasons. First, it was not based on sufficiently rational or convincing evidence that Mr. Pagenkopf's actions caused the injury at issue. Second, the evidence relating to medical bills was vague, confusing and

incomplete. More importantly, the lower court appears to have made at least one serious error in calculating the amount owed by Mr. Pagenkopf. Third, the lower court gave no consideration to Mr. Pagenkopf's indigency. Finally, there is no reliable way of assessing whether "justice required" the award of restitution to an insurance company.

STANDARD OF REVIEW

Interpretation of the statute governing the applicability of de novo review by the circuit court is a question of law reviewed de novo. *See State v. Gillespie,* 2005 WI App 25, ¶6 278 Wis.2d 630, 693 N.W.2d 320

A challenge to the restitution order is reviewed under the erroneous exercise of discretion standard. *State v. Haase*, 2006 WI App 86, ¶5, 716 N.W.2d 526, 293 Wis.2d 322.

ARGUMENT

I. The Circuit Court erred in denying the defense motion for de novo review.

A. Background.

Here, the Circuit Court referred the restitution matter to the court commissioner in accordance with WIS. STAT. § 973.20(13)(c)(4). That commissioner then held a hearing, at which it found facts and, in so doing, effectively determined the credibility of the witnesses, weighed the evidence and evaluated the competing legal arguments advanced by the parties. At the conclusion of that hearing, it submitted a proposed restitution order to the Circuit Court. The proposed

order was adopted without a further hearing and without modification.

The underlying decision was then challenged by defense counsel via a motion for de novo review pursuant to WIS. STAT. § 757.69(8) which states:

> Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing de novo.

The motion was denied as was the ensuing motion for reconsideration. (40:1; 59:5). The Circuit Court concluded that 1) no "decision" had actually been made by the commissioner and 2) "the intent of the legislature was not to require a de novo hearing for this restitution phase." (59:4-5).

B. Mr. Pagenkopf was entitled to de novo review of the commissioner's "decision."

The de novo statute allows a party to obtain circuit court review whenever a court commissioner makes a "decision." WIS. STAT. § 757.69(8).

The issue is therefore relatively clear-cut. The commissioner did hold a hearing and did make findings. Those findings were the basis for the restitution order. (In fact, the commissioner's proposed order became *the* order). Importantly, the findings do more than articulate basic facts, rather, they are the clear result of a deliberative legal process.

They embody substantive legal conclusions regarding the proper application of the restitution statute to this set of circumstances. On these facts, the statute allowing for de novo review appears to clearly fit. Because the statute is straightforward and has broad language giving it wide application, the issue should therefore be resolved in Mr. Pagenkopf's favor.

However, one potential objection should be briefly dealt with: A claim that the de novo statute does not apply because the commissioner has not *really* made a decision for the purposes of that statute. After all, so the argument goes, the ultimate order was actually imposed by the Circuit Court. (*See* 59:3). However, such legalistic shuffling ignores the fact that the underlying judgments on which that order is based—who is owed what, whether causation has been proven, etcetera—are entirely "determined" by the commissioner. To claim that this is not a "decision" for the purposes of the de novo statute appears to fly in the face of common sense. It also contravenes sound principles of statutory interpretation.

After all, it is settled law that, when performing statutory interpretation, a controverted term ought to be given its "common, ordinary, and accepted meaning." *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶43, 271 Wis.2d 633, 681 N.W.2d 110. One meaning of "decision" found in the dictionary is "a determination arrived at after consideration."[3]

Here, the commissioner clearly made such a "determination" inasmuch as he ascertained who was owed what, and more importantly, why. While those "findings" were

[3] http://www.merriam-webster.com/dictionary/decision

later ratified by the Circuit Court that does not deprive them of their status as a "decision." The term is not ambiguous and reasonably decipherable, in Mr. Pagenkopf's favor, by application of relatively straightforward interpretative tools. Mr. Pagenkopf was therefore entitled to de novo review.

C. De novo review of the restitution decision is not foreclosed by other legal authority.

The lower court is correct that *State v. Gillespie* exempts certain decisions made by the court commissioner from de novo review. (40:1); *State v. Gillespie*, 2005 WI App 25, 278 Wis.2d 630, 693 N.W.2d 320. However, a close reading of the proffered authority fails to support the ruling from which Mr. Pagenkopf appeals.

Gillespie dealt with a request for a de novo review of a commissioner's probable cause determination after a preliminary hearing—essentially a request for a second preliminary hearing. *Id.* ¶1. The Court of Appeals held that review by the circuit court under the de novo statute was precluded in that case for two specific reasons. First, there is already a statute addressing those circumstances under which a second preliminary hearing may be held. *Gillespie,* 2005 WI App. at ¶8. The existence of that statute "reveals that the legislature had the opportunity to address a second examination in [the defendant's] favor and chose not to do so." *Id.* The Court of Appeals was therefore disinclined to create a statutory right which was at odds with implicit legislative intent. In other words, because the legislature had already addressed the issue of a second preliminary hearing elsewhere in the statutes, the de novo statute's general statement was

effectively preempted by the legislature's more restrictive statutory scheme.

Second, a defendant requesting circuit court review of a probable cause determination already has a means of obtaining such review by filing a motion to dismiss. *Id.* ¶9. Lacking evidence to the contrary, the Court of Appeals therefore rejected an interpretation of the de novo statute that would "radically change" that legal status quo. *Id.*

Gillespie therefore stands for the proposition that the de novo statute's blanket rule will not apply when the legislature has either already addressed the specific issue elsewhere in the statutes or when there is another preexisting legal alternative.

The most recent opinion of this Court on the subject puts forth a corollary of that rule and holds that unless specifically precluded by other statutory authority, the de novo statute *will* apply to a court commissioner's decision. *In the Matter of the Mental Commitment of T.B.,* No. 2015AP799, unpublished slip op. (Wis. Ct. App. October 1, 2015). *T.B.* concerns the availability of a second probable cause hearing in mental commitment proceedings held before court commissioners. *Id.* ¶15. Because there is nothing in the mental commitment statutes precluding de novo review of that determination, individuals in mental commitment proceedings may use the statute to obtain circuit court review. *Id.* In other words, unless there is authority to the contrary, the blanket de novo provision applies.

Here, the Circuit Court claimed that the de novo statute is unavailable to criminal defendants simply because the controverted "decision" occurred in context of a restitution

proceeding. However, there is no procedure outlined in the statutes for a second restitution hearing. There is no alternative procedure for obtaining circuit court review prior to the imposition of an amended judgment of conviction. Most importantly, there is nothing in the statutes specifically precluding de novo review. In light of both *Gillespie* and *T.B.*, Mr. Pagenkopf had a right to de novo review.

D. Concerns of efficiency are not relevant and do not "trump" Mr. Pagenkopf's right to have the restitution issue decided by an elected judge rather than by a commissioner.

Following *T.B.*, it is clear that extrinsic concerns—such as judicial economy and circuit court workloads—are simply not relevant to the question of what a given statute says. *In re T.B.*, No. 2015AP799, ¶13. Speculative inferences that that de novo review will "slow down" the restitution process should have little to do with whether Mr. Pagenkopf was entitled to de novo review. (59:5).

This is because application of the de novo statute serves core ideals in our judicial system. Circuit court commissioners are not subject to the same scrutiny as elected judges and may labor under conditions that are less conducive to a just result.[4] Mr. Pagenkopf had a right to have his restitution arguments heard by an elected court of his jurisdiction, not merely a commissioner thereof.

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[4] *See In the Matter of the Mental Condition of C.M.B.*, 165 Wis.2d 703, 716, 478 N.W.2d 385 (1992) (Abrahamson, C.J., *dissenting*).

For all these reasons, reversal is therefore warranted at this time.

II. In addition and in the alternative, the Circuit Court erroneously exercised its discretion when it concluded that Mr. Pagenkopf's actions were a "substantial factor" in causing S.D.'s injury.

At the restitution hearing, the burden was on S.D. to prove by a preponderance of the evidence that his injuries were causally linked to the actions of Mr. Pagenkopf. WIS. STAT. § 973.20(14)(a); *State v. Canady*, 2000 WI App 87, ¶ 9, 234 Wis.2d 261, 610 N.W.2d 147. This means that, prior to restitution being awarded, S.D. was required to prove that Mr. Pagenkopf's actions were "the precipitating cause of the injury and the harm must have resulted from the natural consequences of the actions." *Canady*, 2000 WI App ¶ 9 (quoting *State v. Behnke*, 203 Wis.2d 43, 553 N.W.2d 265 (Ct. App. 1996)) (quotations and brackets omitted).

Here, Mr. Pagenkopf challenges the restitution order itself. That order is reviewed under the "erroneous exercise of discretion" standard. *Haase*, 2006 WI App 86, ¶5. A trial court erroneously exercises its discretion when the ruling at issue is either not based on a "logical interpretation of the facts" or does not reflect a reasonable conclusion. *Id.* ¶6; *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis.2d 67, 629 N.W.2d 698. That standard is satisfied here.

The dispositive issue is whether it was reasonable to conclude that S.D.'s injury was really caused by Mr. Pagenkopf. The testimony at the restitution hearing makes such a finding plainly unreasonable. First and most importantly, the

contemporaneous medical records are at odds with S.D.'s story. The initial report to the family doctor details a long-standing injury to his left leg that had been worsening for several months. (36:1). The report clearly distinguishes between the right knee (which also had a preexisting issue) and the left knee, which was the subject of the January 22, 2013 visit. (36:1). When confronted with the inconsistency, S.D. testified that his doctor must have made a "mistake" and somehow mixed up the two knees. (58:45-47). The doctor was never called as a witness and, in any case, S.D.'s explanation of the "mistake" lacks credibility and is transparently self-serving.

When S.D. finally visited a specialist, that specialist was apparently told that the injury was caused by slipping on ice. (36:1). When confronted with a document to that effect at the hearing, S.D. indicated that it was the first time he was seeing the doctor's contrary opinion and expressed confusion as to why that information would be present. (58:42). However, S.D.'s confusing testimony appears to suggest that this version of events came directly from his own lips. (58:48). S.D. claimed that he hid the truth out of embarrassment. (58:48). Contrary to his initial response, he was aware of the inconsistency as he later requested that the specialist write a note more consistent with the restitution claim. (58:49).

Second, the evidence related to the fight's aftermath fails to support the claim. S.D. claimed to suffer from a serious leg injury the night of the fight but also claimed that this injury did not prevent him from fleeing the scene before the arrival of law enforcement. (58:8). When confronted on cross-examination, S.D. tried to keep his story consistent by claiming that he had been forced to crawl. (58:37). However, S.D. was

unable to provide any corroboration of that story. (58:38). Although responding officers tracked Mr. Pagenkopf through the snow, there was apparently no evidence of crawl marks in the same vicinity. (58:55). Officer McClellan, one of the responding officers, testified that if the account were true he would expect to find such marks. (58:54). Witnesses interviewed by law enforcement reported that S.D. was able to leave the scene. (58:62).

Third, S.D. did not report the injury to law enforcement until many months after the initial incident—despite claiming to notice the injury the very next day. (58:8-9). Although S.D. claimed to have included the injury in his initial statement, Officer McClellan testified that no such report was made. (58:58). Although S.D. described multiple injuries to law enforcement, he said nothing about his leg. (58:59). Likewise, while photos were taken of injuries, none were of his leg. (58:59). Officer McClellan testified that the knee was not braced or iced. (58:57). S.D. did not have a noticeable limp and actually left the interview to go straight to work. (58:58).

Finally, his post-fight behavior is inconsistent with the alleged injury. Despite his claim that he could "barely walk" as a result of the injury, S.D. admitted he "walked out the door" and went to work following that initial interview with law enforcement. (58:30). He continued working jobs that required the use of his leg for at least another month before the injury was ever reported. (58:10; 58:35).

No medical or expert testimony was presented at the restitution hearing that might sufficiently explain the actual causation of S.D.'s injury. The only such information was in the form of a conclusory doctor's note prepared specifically at

S.D.'s request long after the initial consultation was performed. (58:49-50).

Simply put, the available evidence fails to link S.D.'s knee injury with the fight. A conclusion that such causation had been sufficiently proven is simply unreasonable on the face of these facts, which evince multiple alternative causes and numerous instances of incredibility on the part of S.D. Even with the lesser standard of proof at a restitution hearing—and even under the comparatively forgiving standard of review—the evidence is simply not convincing and the conclusions drawn manifestly unreasonable as a matter of law. The entire restitution award is therefore erroneous and should be vacated on appeal.

III. In addition and in the alternative, the Circuit Court erroneously exercised its discretion with respect to the order awarding restitution for alleged medical costs.

In support of the restitution request, a restitution summary was prepared. (36:1). Little supporting documentation regarding the health insurance costs was prepared or submitted. While a court may rely on a summary when that summary is not contested, that was not the case here. *See State v. Szarkowitz*, 157 Wis.2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990).

The commissioner concluded that ACS was owed $9,594.75 for payments apparently made to medical providers as a result of S.D.' knee injury. (41:2). In addition, S.D. was apparently also owed $4,332.04 for *his* out of pocket costs. (41:2). With respect to the latter sum, S.D. testified that amount

"must be what I paid toward my bills" although he also indicated that some *other* amount was still outstanding. (58:14).

On cross-examination, S.D. testified that he had a $2,500 deductible that he would be required to pay. (58:21). In S.D.'s account, the insurance was responsible for "80 [percent] on certain things but, I mean, that is not set, no, they don't pay everything over that $2,500, absolutely not." (58:21). The exact payment structure was not further clarified. Moreover, S.D. was unclear as to how much of the deductible he had actually paid, indicating he "paid a good portion to this for my insurance to pick up." (58:21). He assumed that he would have paid the deductible plus "some" of the twenty percent remaining. (58:21). No documentation to further explain the situation was entered into evidence. More problematically, there was no evidence introduced to explain what overlap, if any, existed between the payments from the Crime Victim Compensation Fund and the medical bills at issue.

The restitution order, however, takes the numbers at face value. Lacking more specific testimony and documentation, the Circuit Court erroneously exercised its discretion when it awarded restitution on the strength of this evidence. The testimony simply does not establish what S.D.'s actual medical costs were and it offers no meaningful way of understanding the distribution of costs across the parties. For these reasons, the award is erroneous as it based on an incomplete record which cannot reasonably support the lower court's exercise of discretion.

However, there is also a bigger problem. As it stands, the Circuit Court appears to have treated the amount submitted by

ACS as a "gross" expense. It then deducted from that amount a portion that it believes S.D. would be separately responsible for. (41:2). However, it then ordered that Mr. Pagenkopf pay S.D. for his portion *and* that he pay the total insurance amount at issue. (41:2). This is double-dipping and plainly contrary to a reasonable exercise of discretion.

Accordingly, the restitution award with respect to health care costs is the result of an erroneous exercise of discretion and should be vacated on appeal.

IV. In addition and in the alternative, the Circuit Court erroneously exercised its discretion when it failed to consider Mr. Pagenkopf's indigency.

The defendant's financial position is an issue the circuit court *must* consider when imposing restitution. WIS. STAT. 973.20(13)(a)2-4 all speak to the defendant's ability to pay. These are factors that the restitution authority "shall consider." *Id.* The statute, however, places the burden of proof regarding these factors on the defendant. WIS. STAT. § 973.20(14)(b). The Court of Appeals has held that when a defendant fails to present such evidence, the issue is not before the court imposing restitution and thus no findings on this point are required. *Szarkowitz*, 157 Wis.2d at 749-50.

Mr. Pagenkopf, while acknowledging the controlling authority, nevertheless urges this Court to revisit the issue here. This case should be distinguished from *Szarkowitz* because it presents an issue not directly addressed therein. Here, the record plainly demonstrates that Mr. Pagenkopf was represented by the State Public Defender. (34:1). In order to qualify for such assistance, Mr. Pagenkopf had to disclose

financial information to the State Public Defender and satisfy indigency criteria. Thus, at the time of his hearing, a governmental agency had already found Mr. Pagenkopf to be indigent and the Circuit Court, via the continued involvement of SPD counsel, was on notice of Mr. Pagenkopf's financial situation.

It is Mr. Pagenkopf's position that when the lower court is confronted with a defendant already determined to be indigent, the burden should no longer be on that defendant to prove that his financial situation may have an impact on his ability to repay close to $20,000 in restitution. In other words, when the record plainly demonstrates the defendant's indigency, the defendant is implicitly presenting evidence and that evidence should be given some consideration.

Restitution hearings must be conducted so as to do "substantial justice between the parties according to the rules of substantive law." WIS. STAT. 973.20(14)(d). As applied, a rule requiring the restitution authority to bury its head in the sand when confronted by an obviously indigent defendant does no justice to Mr. Pagenkopf. Rather than abetting a result where a poor defendant bears the responsibility for duplicative proof of his already established indigency, the Court should hold that an erroneous exercise of discretion results when the lower court fails to consider clearly established indigency.

Accordingly, Mr. Pagenkopf asks that the award be vacated on appeal.

V. In addition and in the alternative, the Circuit Court erroneously exercised its discretion in awarding the bulk of the restitution to insurance

companies.

The restitution statute authorizes insurance companies to receive restitution if the lower court concludes that "justice so requires" such an award. WIS. STAT. § 973.20(5)(d). However, an award of restitution to an insurance company will not be overturned on appeal simply because the lower court fails to make separate and specific findings as to whether or not justice so requires that result. *State v. Fernandez,* 2009 WI 29, ¶62, 316 Wis.2d 598, 764 N.W.2d 509. In other words, the Supreme Court of Wisconsin has concluded that such a determination is implied whenever the lower court makes a superficially correct award that includes the insurance companies. *Id.* If justice did not require the award, so the reasoning goes, the lower court would not have ordered it. *See Id.* n. 32. So long as the lower court exercised its discretion properly in all other respects, the award will not be disturbed. *Id.*

Mr. Pagenkopf's situation can be distinguished. As has been asserted throughout the brief, the lower court's restitution award is thoroughly problematic and evinces several instances where discretion appears not to have been exercised reasonably. If the Supreme Court is willing to presume that justice requires the award of restitution in the face of an otherwise proper determination, it follows that this presumption can be overcome when the determination is proven to be either inaccurate or the result of an erroneous exercise of discretion in other respects.

In such a case, the lack of specific findings does matter. Lacking the presumption of validity created by the Supreme Court, this Court is left with no basis with which to evaluate

the lower court's order. Accordingly, this Court should find that the award to the insurance companies was an erroneous exercise of discretion and vacate the award.

CONCLUSION

Mr. Pagenkopf should have received a de novo review upon request. Because he did not, the Court should reverse and remand the matter for such a hearing. In the alternative, Mr. Pagenkopf asks that the award be vacated in light of the numerous instances of erroneously exercised discretion identified herein.

Dated this 30th day of November 2015.

Respectfully submitted,

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CERTIFICATION OF BRIEF

I certify that this brief conforms to the rules contained in WIS. STAT. sections 809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,823 words.

I hereby certify that the text of the electronic copy of the brief, which was filed pursuant to WIS. STAT. § 809.19(12)(13), is identical to the text of the paper copy of the brief.

I further certify that I have complied with WIS. STAT. § 809.86 requiring the usage of pseudonyms for crime victims.

Dated this 30th day of November, 2015.

Christopher P. August
State Bar No. 1087502

CERTIFICATION OF APPENDIX

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

Dated this 30th day of November, 2015.

Christopher P. August
State Bar No. 1087502

CERTIFICATION OF SERVICE

I hereby certify that on this 30th day of Nov., 2015, pursuant to § 809.80(3) and (4), ten (10) copies of the Appellant's Brief were served upon the Wisconsin Court of Appeals by hand delivery. Three (3) copies of the same were served upon counsel of record via first class mail.

Dated this 30th day of November, 2015.

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