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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Court of Appeals case nos.:
2018AP000875 - CR

RYAN M. MUTH,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A RESTITUTION ORDER IN THE
CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH 3,
THE HONORABLE TODD K. MARTENS, PRESIDING

Andrew Mishlove
State Bar Number: 1015053

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ISSUES PRESENTED

Did the trial court err in making a restitution order requiring the defendant to pay for lost wages and other expenses, when the victims had previously accepted a civil settlement and executed a release of claims against the defendant for lost wages and expenses?

The trial court answered, no.

Did the trial court err in ordering restitution for persons who are not crime victims under Wis. Stat. §973.20?

The trial court answered, no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant takes no position on oral argument or publication.

STATEMENT OF PERTINENT FACTS AND

STATEMENT OF THE CASE

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

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

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

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

- a. \$8,401.00 to be paid to Scott Fahser, Ms. Kempf's brother. Muth subsequently agreed to this payment.
- b. \$12,480.41 to be paid to Holly Marquardt, Ms. Kempf's daughter. This sum included the amount of \$1,600.00 for lost wages for Ms. Marquardt, and an additional \$2,600.00 for lost wages of her husband,

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

- c. \$13,689.00 to be paid to Katie Mortenson, Ms. Kempf's daughter. This sum included the amount of \$6,480.00 for lost wages for Andrew Mortenson, Ms. Mortenson's husband. It also included \$5,820.00 in funeral expenses, plus costs for school expenses for Mortenson's daughter, etc. (R:77, pp. 28-31)
- d. \$8,700.01 to be paid to Rodney Kempf, Ms. Kempf's son. This amount included \$1,209.60 for lost wages. It also included \$5,820.00 in funeral expenses, plus costs for a cell phone, attorney, postage, storage, and mileage. (R:77, pp.31-33).

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

\$33,333.33 payment. Ms. Kempf's brother, Scott Fahser, was not a party to the settlement; hence, Muth did not object to the restitution order for Mr. Fahser, in the amount of \$8,401.00. (R49: Exh. 1, and par. 7; R: 77 throughout.)

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

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

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

Based on the prior settlement payment and release, Muth objected to the restitution order, and asserted a defense to the restitution claims of setoff, and accord and satisfaction, as to the claims of Ms. Kempf's three

surviving children. Thus, Muth argued that he should be ordered to pay only the outstanding restitution claim of Scott Fahser, as the other claims were either satisfied, or were not allowable under the restitution statute. (R:77). Muth agreed that Ms. Kempf's children and her brother were victims within the meaning of Wis. Stat. §973.20. The claims of Ms. Kempf's daughters, however, include amounts for lost wages of their spouses. Muth also asserted that Ms. Kempf's sons-in-law were not victims within the meaning of Wis. Stat. §973.20, and objected to their claims.

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

ARGUMENT

The Restitution Order Imposed a Prohibited Double Recovery

The restitution claimed by Ms. Kempf's surviving children was based on claims for special damages specifically enumerated in the release, and paid in the insurance settlement: lost wages and expenses stemming from the accident. Crime victims are not allowed a double recovery by virtue of an insurance payment for damages, and a restitution claim for the

same damages. When a release enumerates specific items of special damages, those damages may not thereafter be claimed in a criminal restitution proceeding. In consideration of the payment of \$100,000.00 to Ms. Marquardt, Ms. Mortenson and Mr. Kempf, and the release executed by them, they are not entitled to the restitution for any items of damages enumerated in that release. The release included all of the items order by the court (including marital property claims for lost wages). Hence, there was an accord and a satisfaction of those restitution claims.

Wis. Stat. §973.20 is intended to redress the loss of special damages suffered by crime victims. Crime victims, however, are not entitled to recover the same damages twice. *Huml v. Vlazny*, 716, N.W.2d 807, 813 (2006). In *Huml*, the Wisconsin Supreme Court held, “a defendant may assert any defense, including accord and satisfaction or setoff, in the sentencing hearing at which the circuit court determines whether to impose restitution. *Id.* (citing Wis. Stat §973.20(14)(b); *State v. Sweat*, 208 Wis.2d 409, 424, 561 N.W.2d 695 (1987)). Wis. Stat. §973.20(14)(b) permits a defendant to “assert any defense that he or she could raise in a civil action for the loss sought to be compensated.” Moreover, “the availability of accord and satisfaction and setoff as defenses to the amount a circuit court

can order supports the idea that a victim can give up her right to enforce a judgment derived from a restitution order.” *Id.* at 816.

A settlement agreement can preclude a restitution order, if the release executed pursuant to the civil settlement specifies the damages subsequently sought in the restitution action. *Huml*, discusses *State v. Walters*, 224 Wis. 2d 897, 816, 820, 591 N.W.2d 874 (Ct. App. 1999). In *Walters*, the court examined the language of a release to determine whether the civil settlement restricted the power of a court to order a defendant to pay restitution. The language of the release was extraordinarily vague, referring only to “all claims and damages” resulting from the accident. *Id.* citing *Walters*, 224 Wis. 2d at 899. The vague language of the release, combined with the defendant’s failure to even attempt to prove that enforcement of the restitution order would result in a double recovery for the victim, led the court in that case to rule that recovery under the restitution statute was permissible. *Id.*

In this case, the trial court relied on the supposed vagueness of the settlement agreement, holding that it was unable to determine what portion of the settlement was earmarked for the special damages listed in the

restitution order. This was in error, as the release was quite specific stating, “(L)ost wages” and “(E)xpenses.”

The language in the release executed in this case was far more specific than that in *Huml*. In that case, the release barred the parties from enforcing “any and all claims, actions, causes of actions, demands, rights [or] damages”. *Id.* at 820. The lodestar of contract interpretation is the intent of the parties. *Huml* citing *Dieter v. Chrysler Corp.*, 2000 WI 45, 234 Wis. 2d 670, 610 N.W.2d 832. The release in *Huml* was found to be specific enough to bar a recovery in a criminal restitution order. The far more specific release in this case must also do so.

The trial court also erred in holding that Muth had failed to meet his burden of proof as to the intent of the parties when they executed the release and accepted the settlement funds. While intent is the issue, it is a question of construction of the contract, rather than the subjective, self-serving statements of the parties. In ascertaining the intent of the parties, contract terms should be given their plain or ordinary meaning. *Goldstein v. Lindner*, 2002 WI App 122, 254 Wis. 2d 673, 648 N.W.2d 892. If the contract is unambiguous, the court’s attempt to determine the parties’ intent ends with the four corners of the contract, without consideration of extrinsic

evidence. *Id.* Thus, the trial court faulted Muth for failing to elicit evidence that would have been inadmissible.

The release signed by Ms. Kempf's surviving children specifically outlined the damages which were covered by the civil settlement. Although the victims stated that they did not realize they were giving up a claim for restitution of the amounts paid in the civil settlement, the language of the release was clear and unambiguous. As the language of the release in this case is unambiguous, there can be no reference to extrinsic evidence of the parties' intent. *Huml*, supra.

The trial court's restitution order requires Mr. Muth to pay the sums to Ms. Marquardt, Ms. Mortenson and Mr. Kempf, for which they had already been paid. The amounts already paid should be set off against the restitution order; and there has been an accord and satisfaction. Further restitution will result in a prohibited double recovery.

The Restitution Order Required Payment to Improper Persons

Only crime victims are entitled to restitution under the terms of Wis. Stat. §973.20. Ms. Kempf's sons-in-law are not enumerated victims in Wis. Stat. §973.20, and therefore may not claim restitution. The statute makes no allowance for a marital property interest.

The restitution order includes amounts claimed by the spouses of Ms. Kempf's children for lost wages. Muth does not believe that the court need reach the issue of whether sons-in-law are entitled to restitution for lost wages, as those claims have been satisfied. In the alternative, however, we assert Wis. Stat. §973.20 which allows restitution only to crime victims. "Victim" is defined under Wis. Stat. §950.02(3), as a spouse, minor child, adult child, sibling, parent, or legal guardian. Extended family, such as in-laws, aunts, etc. are not entitled to restitution. *State v. Gribble*, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488. Thus, in *Gribble*, an aunt of the victim was disallowed restitution for the expenses of counseling necessitated by the crime. In this case, the accord and satisfaction of the three surviving children bar any recovery for a marital property interest on lost wages. So, the court need not reach this issue. Even if the sons-in-law's claims for lost wages were not satisfied in the civil settlement, they are not allowed in a restitution order.

CONCLUSION

For these reasons, the defendant-appellant Ryan Muth respectfully prays that this court find that Muth previously reached accord with Holly Marquardt, Katie Mortenson, and Rodney Kempf, and that Muth had

satisfied the terms of that accord, disallowing restitution to those parties. In the alternative, Muth prays that this court order that the amount restitution ordered to those parties be setoff off by the amounts previously on Muth's behalf. As a further alternative, Muth prays that this court find that the spouses of Ms. Kempf's children are not victims with the meaning of Wis. Stat. §973.20, and disallow any restitution order to those persons.

Signed and dated this 25th day of July, 2018.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*s/Andrew Mishlove*_____
BY: Andrew Mishlove
Attorney for the Defendant-Appellant
State Bar No.: 1015053

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,026 words.

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of

persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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

Signed and dated this 25th day of July, 2018.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*s/Andrew Mishlove*_____

BY: Andrew Mishlove
Attorney for the Defendant-Appellant
State Bar No.: 1015053

APPENDIX CERTIFICATION

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

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.

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Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*s/Andrew Mishlove*_____
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