

**RECEIVED**

**09-26-2018**

**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.

---

**REPLY BRIEF 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

MISHLOVE & STUCKERT, LLC  
4425 N. Port Washington Road, Suite 110  
Glendale, WI 53212  
(414) 332-3499 Fax: (414) 332-4578

**TABLE OF CONTENTS**

**The Issue Before This Court is Whether a Restitution Order May  
Require Double Recovery from the Victim ..... 1**

**Public Policy Favors the Finality of Settlements ..... 3**

**Lost Income of the Victims’ Spouses Is Not Included in the Restitution  
Statute ..... 5**

**Conclusion ..... 7**

**Certification ..... 9**

## TABLE OF AUTHORITIES

### Cases

<i>Huml v. Vlazny</i> , 716, N.W.2d 807, 813 (2006) .....	1, 2, 3, 4, 5
<i>Rimes v. State Farm Mutual Automobile Ins. Co.</i> , 106 Wis.2d 263 (1982)..	5
<i>State v. Johnson</i> , 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284.....	6

### Statutes

Wis. Stat. §973.20 .....	5, 7
--------------------------	------

**The Issue Before This Court is Whether a Restitution Order  
May Require Double Recovery for the Victim**

The state frames the issue in this case as whether the defendant proved the portion of the payment of \$100,000.00 received by the victims was for the special damages subsequently ordered as criminal restitution. This is a mistaken view of the issue. Muth was not, as the state suggests, required to itemize the damages that the victim received in the civil settlement; but rather, Muth was required to, and did show that the restitution order entailed a double recovery for the victims. The state fails to substantially distinguish the holding of *Huml v. Vlazny*, 716, N.W.2d 807, 813 (2006); and, the state ignores the law of evidence in a contract dispute.

The state argues that Muth was required to elicit extrinsic evidence, to show the intended apportionment of the civil damages. Yet, the state has not addressed *Huml's* holding that the language of the release itself is the only allowable proof. The lodestar of contract interpretation is the intent of the parties. In ascertaining the intent of the parties, courts should give to contract terms their plain or ordinary meaning. If the contract is unambiguous, a court's attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.

*Huml*, supra at paragraphs 51-52. In *Huml*, the court considered the issue of a very general global settlement agreement, as follows:

*This Settlement Agreement and Release shall apply to all claims, whether known or unknown, on the part of all parties to this Agreement. In consideration of the payments called for herein, Plaintiff completely releases and forever discharges Defendants, Insurer, and their agents ... from any or all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, including court costs, legal expenses and attorneys' fees which the undersigned now has or had or which may hereafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries ... resulting from the accident, casualty or event listed in Plaintiff's Amended Complaint.*

*Huml*, at paragraph 9 (emphasis added by court).

Despite the general nature of the release (far less specific than the release of Muth in this case), it was not ambiguous; and the *Huml* court refused to consider extrinsic evidence as to its meaning:

*If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.*

*Huml*, at paragraphs 52.

The state asserts that Muth failed to elicit evidence that would have, in any event, been inadmissible. The state asserts that this rule of evidence goes to the issue of the intent of the parties, rather than the apportionment

of damages. This sophistic distinction ignores that, even as to the apportionment of damages, *Huml* holds that the intent of the parties is the issue in interpreting the effect of a civil release on a restitution order.

The court should not look any farther than the language of the release in this case to determine its meaning, which is clear. The victims agreed to the following:

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....

The question is whether, having been compensated for those losses specified in the release, the victims may receive another recovery for the same losses, including costs, loss of wages, and expenses. They cannot.

### **Public Policy Favors the Finality of Settlements**

The state correctly points out that *Huml* deals with the post-probation civil enforcement of a restitution order, rather than the criminal restitution order itself – and that this involves different public policies.

While this is true, *Huml* also points out that public policy favors the finality of settlements.

*Huml* discusses the three points where a defendant may assert a defense of accord and satisfaction, or setoff. One of those points is at the time the original restitution proceeding, as Muth has done in this case:

Muth acknowledges the public policy in favor of criminal restitution. Even so, a public policy that favors and promotes criminal restitution should acknowledge that the finality of a civil settlement also promotes restitution. If a civil settlement may simply be re-litigated in a criminal restitution proceeding, the tortfeasor has no incentive to settle, and the victims will not be promptly compensated. *Huml* addresses this issue:

First, there is considerable value in permitting a victim to release her interest in a judgment derived from a restitution order because it allows the victim to settle the case and replace an uncertain, future recovery with a certain, immediate recovery.

Second, permitting a release gives a victim an additional source of leverage to negotiate a favorable settlement.

Third, there are safeguards to promote the recovery of restitution by victims. On the civil side, in most situations where a substantial dollar amount is at stake, a victim will be represented by an attorney when negotiating a settlement. Preserving the right to enforce a judgment derived from a restitution order, therefore, should be as simple as including

an express exception in the settlement agreement...  
*Huml*, supra at paragraphs 47-50.

The state makes an argument implying that this court should craft a “made whole rule,” analogous to the rule outlined in *Rimes v. State Farm Mutual Automobile Ins. Co.*, 106 Wis.2d 263 (1982). This, however, is not contemplated by Wis. Stats. §973.20. Moreover, the “made whole rule” approach fails in an important respect. The “made whole rule” involves the rights of third parties to proceeds of a settlement; whereas, this case deals with the rights of the same parties in two different forums. Unlike a “made whole rule” situation, the question here is whether a party may claim damages, accept a settlement for those damages, execute a release, and then claim the same damages again from the same party. Neither statute, nor precedent, endorses this type of double recovery.

**Lost Income of the Victims’ Spouses  
Is Not Included in the Restitution Statute**

Muth does not believe that the court needs to 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 address the issue.



The state argues that the lost income of the victims' spouses were properly included in the restitution order as income lost to the victims. The state acknowledges that this argument was rejected by this in *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284, but asserts that was because the argument was undeveloped. That is only partially true. In fact, this court rejected the state's position because it was contrary to the intent of the legislature:

Additionally, because there is no language in the restitution statute or in WIS. STAT. § 950.02(4)(a) suggesting that restitution be permitted through such an indirect route, we conclude that the restitution statute intended to limit the recovery of lost wages for attending court proceedings to the persons identified in WIS. STAT. § 973.20(5)(b).

*Johnson*, at paragraph 12.

While the state's policy arguments in favor of enforcing marital property interests in restitution orders may be valid, those arguments are a matter for the legislature. Muth respectfully submits that it would be improper for this court to adopt the state's position, contravening its prior holding in *Johnson*.

## **Conclusion**

This court should look no further than the language of the release executed by the victims, specifying that they released all claims for the same items of damages they later claimed in the restitution proceeding.

Moreover, while there may be policy arguments in favor of including the lost wages of the victims' spouses in a restitution order, it is contrary to the restitution statute.

For these reasons, the defendant-appellant, Ryan Muth, respectfully prays that this court find that Muth previously reached an accord with Holly Marquardt, Katie Mortenson, and Rodney Kempf, and that Muth has satisfied the terms of that accord, disallowing further restitution to those parties. In the alternative, Muth prays that this court order that the amount of restitution ordered to those parties be set off by the amounts previously paid 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 within the meaning of Wis. Stat. §973.20, and disallow any restitution order to those persons.

Signed and dated this 25<sup>th</sup> day of September 2018.

Respectfully submitted,  
MISHLOVE & STUCKERT, LLC

*Electronically signed by Andrew Mishlove*

BY: Andrew Mishlove  
Attorney for the Defendant  
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 1,468 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.

Finally, I affirm and certify that on September 25, 2018, ten copies of the Reply Brief of Defendant-Appellant were mailed to the Court of Appeals and three copies were mailed to counsel for the Plaintiff-Respondent (including the District Attorney's Office and the Attorney General's Office).

Signed and dated this 25<sup>th</sup> day of September 2018.

Respectfully submitted,  
MISHLOVE & STUCKERT, LLC

*Electronically signed by Andrew Mishlove*

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