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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant-Cross-Petitioner.

ON APPEAL FROM A RESTITUTION ORDER ENTERED
IN WASHINGTON COUNTY CIRCUIT COURT, THE
HONORABLE TODD K. MARTENS, PRESIDING

**INITIAL BRIEF AND APPENDIX OF
PLAINTIFF-RESPONDENT-PETITIONER**

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ISSUE PRESENTED¹

May a circuit court order a criminal defendant to pay restitution to a deceased victim's family member for lost marital income resulting from the crime?

The circuit court held, "Yes."

The Court of Appeals held, "No."

This Court should hold, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review demonstrates that argument and publication are warranted.

INTRODUCTION

Muth drove drunk and killed Tammy Kempf. Kempf's adult daughters attended Muth's court proceedings and their mother's funeral proceedings. As any supportive spouse would have done, their husbands came with them.

As a direct result of Muth's crime, Kempf's daughters in turn lost income. But, under the Court of Appeals' holding, because only one of Kempf's daughters worked outside of the home, only one of Kempf's daughters could recover any restitution for that lost income.

¹ This Court granted both the State's petition for review and Muth's cross-petition for review. Muth's cross-petition raises the issue of whether the circuit court properly concluded that Muth failed to prove that an insurance settlement agreement offset the restitution ordered here. Pursuant to this Court's order granting the petitions, that issue will be addressed in separate briefing.

And—despite the fact that our marital property laws provide that each spouse has an equal interest in income earned by either spouse—under the Court of Appeals’ holding, neither daughter could recover restitution for her lost marital income.

This harsh result runs contrary to the language and purpose of our restitution and marital property statutes. The restitution statute serves to compensate crime victims, and provides circuit courts with authority to order restitution for income lost from the prosecution of the crime, and for special damages. The marital property statute establishes the presumption that income earned by a spouse belongs to both spouses.

The Court of Appeals’ decision in *Johnson*—which the Court of Appeals concluded it was bound to follow here—is distinguishable in key respects. But insofar as this Court concludes otherwise, then this Court should overturn or modify *Johnson*.

Indeed, the Court of Appeals’ decision here also runs contrary to other key principles of statutory interpretation, and to case law demanding a broad interpretation of our restitution statute—holdings reflecting that restitution is the rule, not the exception.

This Court should reverse the Court of Appeals’ holding reversing the circuit court’s restitution order for lost marital income. This Court should hold that a circuit court may order restitution to the family member of a deceased victim for lost marital income resulting from the crime.

STATEMENT OF THE CASE

Muth’s crime, plea, and sentencing. Muth drove drunk, crashed into Tammy Kempf’s car, and killed her. (R. 1.) He pled no contest to one count of homicide by intoxicated use of

a vehicle with one or more prior operating-while-intoxicated offenses. (R. 9; 76.) The court dismissed and read-in related charges. (R. 76:12.) The court sentenced Muth to 13 years of initial confinement followed by 13 years of extended supervision. (R. 33:1, Pet-App. 106.)²

The judgment of conviction listed restitution in an amount of \$42,877.47, and noted that the court scheduled a restitution hearing. (R. 33:2, Pet-App. 107.) The judgment of conviction also ordered that the bond previously posted—a \$25,000 cash bond—would be applied to restitution. (R. 33:2, Pet-App. 107; 76:14 (noting bond amount).)

Restitution hearing and arguments. Muth objected to restitution on two grounds. First, Muth would not agree to pay restitution to Kempf’s children (H.M., K.M., and R.K.) because of a \$100,000 settlement payment by Muth’s insurance company. (R. 46:1–2; 77:8, Pet-App. 136.) He filed with the court a document titled “claim information” from Progressive Insurance to Muth, noting that Kempf’s children “accepted the \$100,000 offer we had extended” “for a full and final release of you and our company.” (R. 46:3; *see also* R. 81:1.) He argued this settlement extended to Kempf’s children’s spouses—“marital property interests.” (R. 77:8, Pet-App. 136.)

Defense counsel also attached a one-page document titled “Full Release of All Claims with Indemnity,” signed by Kempf’s daughters, H.M. and K.M, and by Kempf’s son, R.K. (R. 46:4; *see also* R. 81:2.) It stated that, in exchange for the consideration of the \$100,000, Kempf’s children agreed to “forever discharge Ryan Muth and Progressive Artisan & Truckers Casualty Insurance Company” “from any and all

² The sentencing transcript is not included in the record on appeal.

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” resulting from the car crash. (R. 46:4; *see also* R. 81:2.)

Second, Muth argued that Kempf’s sons-in-laws were not “victims” for restitution purposes, and he challenged Kempf’s daughters’ ability to recover restitution for their husbands’ lost wages. (R. 46:1–2.)

The court took testimony from Kempf’s brother and three adult children. (R. 77:16–34, Pet-App. 144–62.)³

H.M. requested \$1600 for her lost wages and \$2600 for her husband’s lost wages. (R. 77:25–27, Pet-App. 153–55.) The district attorney asked approximately how many hours she believed she was “unable to work because [she] needed to be taking care of things with the funeral or court hearings, meetings with the DA, that kind of thing.” (R. 77:26–27, Pet-App. 154–55.) H.M. testified she missed 16 days of work, and her job involved working four-hour shifts at \$25 per hour. (R. 77:27, Pet-App. 155.) Her husband lost 13 days of work, and his job involved working eight-hour shifts at \$25 per hour. (R. 77:27, Pet-App. 155.)

K.M. sought restitution for her husband’s lost wages. (R. 77:29–30, Pet-App. 157–58.) K.M. explained she does not work outside the home. (R. 77:11, Pet-App. 139.) She testified her husband missed 54 hours of work to fulfill obligations related to her mother’s death, and his wage is

³ Restitution ordered to Kempf’s brother, S.F., is not at issue before this Court.

\$120 per hour—a total of \$6480. (R. 77:29–30, Pet-App. 157–58.)

Kempf's three adult children also testified that they split certain costs related to their mother's death among the three of them: canceling their mother's cell phone contract (\$70 each), outstanding payments their mother owed to an attorney (between \$700–800 each),⁴ funeral expenses (\$5820 each), a storage unit (\$150 each), and postage related to the funeral (\$40 each). (R. 77:25, 32, Pet-App. 153, 160.)

Beyond the costs split with his sisters, Kempf's son, R.K., also sought mileage (\$677) and lost wages for time spent in court. (R. 77:32–33, Pet-App. 160–61.) He testified he missed five days of work with 12-hour shifts at \$20.16 per hour, for a total of \$1,209.60. (R. 77:32–33, Pet-App. 160–61.)

Beyond the costs split with her siblings and the lost wages, H.M. requested restitution for mileage (\$696.50), and childcare during the funeral and court dates (\$720.50). (R. 77:25–26, Pet-App. 153–54.) Beyond the costs split with her siblings and the lost wages, Kempf's daughter K.M. sought restitution for mileage (\$230), her daughter's missed private school (\$76), and a babysitter (\$40). (R. 77:29–30, Pet-App. 157–58.)

Kempf's three adult children confirmed they each received one-third of the \$100,000 settlement. (R. 77:27–28, 31, 33, Pet-App. 155–56, 159, 161.) Kempf's daughter H.M. believed the Progressive Insurance settlement “was towards [her mother's] life.” (R. 77:24, Pet-App. 152.) R.M., H.M.'s husband, stated he was the main contact with Progressive

⁴ As to the attorney payments, H.M. testified she paid \$783.41, K.M. testified she paid \$783, and R.K. testified he paid \$733.41. (R. 77:25, 30, 32, Pet-App.153, 158, 160.)

Insurance, and he believed the settlement “was towards any civil suit,” not “the state criminal case.” (R. 77:34, Pet-App. 162.)

The court found the victims met their burden to prove the losses incurred, and it imposed the requested restitution. (R. 48:2; 77:39; Pet-App. 110, 167.) The court noted that restitution ordered by a criminal court does not limit a victim’s right to sue in a civil action and that any restitution imposed may be offset against a civil judgment. (R. 77:41–43, Pet-App. 169–71.)

The circuit court imposed the requested restitution, totaling \$43,270.42: \$8401 to S.F. (Kempf’s brother), \$12,480.41 to H.M. (Kempf’s daughter), \$13,689 to K.M. (Kempf’s daughter), and \$8,700.01 to R.K. (Kempf’s son) (R. 77:39, Pet-App. 167.) The restitution included the \$2600 and \$6480 for the lost wages of H.M. and K.M.’s husbands. (R. 77:25–27, 29–30, 39, Pet-App. 154–55, 157–58, 167.)

The court allowed the defense time to finalize its position on whether the court was “required to hold a separate hearing” concerning the “setoff provision” of the restitution statute. (R. 77:44–45, Pet-App. 172–73.)

The defense then filed a written objection to the restitution order, arguing that the insurance settlement precluded the restitution ordered to Kempf’s children because the settlement language was “clear and unambiguous.” (R. 49:3–6.) The defense also argued that the court improperly imposed restitution for the lost wages of Kempf’s sons-in-law because they were not “victims.” (R. 49:6–7.)

The State filed written responses. (R. 50; 51; 56.) The State argued that the restitution order must stand unless Muth proved the restitution would result in a double recovery. (R. 56:1–2.) H.M., one of Kempf’s daughters, also

submitted her receipt of payment for the insurance settlement, noting the insurance company described it as a “[f]ull and [f]inal [s]ettlement of all [b]odily [i]njury [c]laims.” (R. 52:2.) As to the lost wages of Kempf’s sons-in-law, the State explained, “Wisconsin is a marital property state.” (R. 51:1.)

Circuit court ruling on restitution challenges. The circuit court upheld its restitution order. (R. 63; 78, Pet-App. 112–28.)

The court rejected Muth’s argument that Kempf’s sons-in-law were not “victims.” (R. 78:13–14, Pet-App. 125–26.) It concluded that Muth “interprets the statutory definition of ‘victim’ too narrowly.” (R. 78:13, Pet-App. 125.) It noted Wisconsin is a marital property state and held that “[l]oss of wages to the husband is a loss of a marital asset. If it damages him, it damages her.” (R. 78:13, Pet-App. 125.)

The court also rejected Muth’s setoff argument. (R. 78:5–12, Pet-App. 117–26.) It found the Progressive Insurance release to be “quite broad”—“a release for both special damages and general damages.” (R. 78:5, Pet-App. 117.) It explained the restitution statute only allows for special damages. (R. 78:5, Pet-App. 117.) It acknowledged crime victims cannot recover the same damages twice. (R. 78:6, Pet-App. 118.) At the same time, it stressed that the restitution statute serves two purposes: to “make victims of crimes whole” and the “punishment and rehabilitation” of the defendant. (R. 78:7, Pet-App. 119.)

The court found the victims “did sustain both special and general damages” and concluded Muth did not present any evidence “that particular amounts” of the \$100,000 settlement “were for general damages and other specific amounts were for special damages.” (R. 78:12, Pet-App. 124.)

The court concluded that Muth failed to meet his burden to prove offset: “although the Defendant did articulate his legal theories, the Defendant did not point to any specific facts from which the Court could have exercised its discretion to adjust the amount downward.” (R. 78:11, Pet-App. 123.)

Court of Appeals decision. Muth renewed his restitution challenges in the Court of Appeals. *State v. Muth*, No. 2018AP875-CR, 2019 WL 2377271, ¶¶ 10–11 (Wis. Ct. App. June 6, 2019) (unpublished) (per curiam) (describing Muth’s appellate arguments). (Pet-App. 102.)

In a per curiam opinion, the Court of Appeals agreed with the State that Muth failed to prove sufficient facts to show a setoff defense to the restitution. *Muth*, 2019 WL 2377271, ¶¶ 13–22. (Pet-App. 102–03).⁵ As to the marital property restitution issue, however, the Court of Appeals concluded that it was bound by its prior opinion in *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284. *Muth*, 2019 WL 2377271, ¶¶ 26–27, (Pet-App. 104).

The Court explained that no dispute existed that “victim” for restitution purposes “obviously includes Kempf’s daughters and does not include the sons-in-law.” *Muth*, 2019 WL 2377271, ¶ 25. (Pet-App. 104.) The Court held that *Johnson* “foreclose[d]” the State’s marital property argument, and reversed the portion of the circuit court’s restitution order awarding lost marital income to Kempf’s daughters. *Muth*, 2019 WL 2377271, ¶¶ 23, 26. (Pet-App. 103.) It expressed “no opinion as to whether, in the absence of *Johnson*, the State’s policy and legislative intent

⁵ Though this is a Washington County case, the Court of Appeals transferred the matter from District II to District IV, and District IV issued the decision.

arguments, or any other argument, would have merit.” *Muth*, 2019 WL 2377271, ¶ 27 n.4. (Pet-App. 105.)

Petition and cross-petition for review. This Court granted both the State’s petition for review and Muth’s cross-petition for review. The State sought review of the Court of Appeals’ decision reversing the circuit court’s order awarding lost marital income to Kempf’s daughters. Muth sought review of the Court of Appeals decision affirming the circuit court’s order imposing restitution on grounds that he failed to prove a setoff defense.⁶

STANDARD OF REVIEW

This Court independently determines whether the circuit court had statutory authority to order restitution, given a particular set of facts. *State v. Walters*, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999).

SUMMARY OF ARGUMENT

The circuit court had authority to order Muth to pay restitution for the lost marital income of Kempf’s daughters.

The plain language of the restitution statute authorizes a circuit court to order restitution for income lost from prosecution of the crime and for special damages, the crime victim’s right statute defines “victim” for restitution purposes to include the adult children of a deceased victim, and the marital property statute provides that spouses have

⁶ Pursuant to this Court’s order, each party will file an initial, response, and reply brief. In this brief, the State therefore only addresses the marital property restitution issue—the issue it asked this Court to review. It will respond to arguments concerning Muth’s failure to prove a setoff defense in its response brief.

equal ownership of marital income. Moreover, courts interpret the restitution and marital property statutes broadly, given their important purposes. A broad reading of these statutes permits restitution for lost marital income.

The Court of Appeals' rejection of an undeveloped marital property argument in *Johnson*, in the critically distinct context of a stepfather seeking his own lost wages, does not control here. Insofar as this Court should disagree, it should overturn any conflicting portion of *Johnson*.

Beyond the plain language and purposes of the statutes, other key principles of statutory construction further show that circuit courts have authority to order restitution for lost marital income. The language of closely related statutes reflects that the Legislature intended lost marital income to be recoverable as restitution. Statutory history shows that the Legislature knew that "income" for restitution purposes would include marital property, and that the Legislature intends for courts to have extensive authority to impose restitution. And interpreting the statutes otherwise would lead to an absurd, harsh result, contrary to the purposes of both the restitution and marital property statutes—that whether a victim may recover lost income resulting from a defendant's crime depends on the division of labor within the victim's marriage.

Lastly, related case law supports the circuit court's authority to impose restitution. This Court and the Court of Appeals have time and again reinforced the importance of reading of the restitution statute broadly, given the Legislature's purpose to compensate crime victims for losses resulting from the defendant's actions. Of all of the places where the Legislature would have drawn the line, this is not the place.

ARGUMENT

A circuit court may order a criminal defendant to pay restitution to a deceased victim's family member for lost marital income resulting from the crime.

A. Relevant legal principles

1. When interpreting statutes, this Court looks to plain language and purpose.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

“Statutory purpose is important in discerning the plain meaning of a statute.” *Westmas v. Creekside Tree Service, Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *Kalal*, 271 Wis. 2d 633, ¶ 48). “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46.

“Therefore, in construing a statute, [this Court] favor[s] a construction that fulfills the purpose of the statute over one that defeats statutory purpose.” *Westmas*, 379 Wis. 2d 471, ¶ 19; *see also State v. Wiskerchen*, 2019 WI 1, ¶¶ 20–22, 385 Wis. 2d 120, 921 N.W.2d 730 (setting forth statutory interpretation principles when interpreting the restitution statute).

A court may consider “statutory history as part of the context analysis.” *State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467. “By analyzing the changes the legislature has made over the course of several years, [this Court] may be assisted in arriving at the meaning of a statute.” *Id.* n.6 (citation omitted).

Lastly, statutory provisions dealing with the same matter “should be read in harmony such that each has force and effect.” *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373.

2. The restitution statute, crime victim rights statute, and marital property statute are relevant here.

The circuit court’s ability to impose restitution here involves three statutes: the restitution statute, set forth in Wis. Stat. § 973.20; the definition of a crime “victim,” set forth in Wis. Stat. § 950.02; and the marital property statute, set forth in Wis. Stat. § 766.31.

a. The restitution statute in Wis. Stat. § 973.20 authorizes recovery for income lost, and for special damages incurred.

Wisconsin Stat. § 973.20(1r) provides that when imposing sentence in a criminal case, the circuit court “shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.” Wis. Stat. § 973.20(1r).

Our restitution statute sets forth four types of restitution which a court may order in any case. Wis. Stat. § 973.20(5). Two are relevant here: (1) income lost; and (2) special damages.

A court may order a defendant to “[p]ay an amount equal to the income lost, and reasonable out-of-pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.” Wis. Stat. § 973.20(5)(b).

A court may also require the defendant to “[p]ay 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.” Wis. Stat. § 973.20(5)(a).

General damages—not permitted—are those that “compensate the victim for damages such as pain and suffering, anguish or humiliation.” *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999) (citation omitted). Special damages, on the other hand, “represent the victim’s actual pecuniary losses.” *Id.* at 365.⁷

Beyond the lost income provision of Wis. Stat. § 973.20(5)(b), Wis. Stat. § 973.20 mentions “income” one other time in the context of a victim’s income. If the crime resulted in bodily injury, a court may order the defendant to

⁷ A wrongful death action, for example, “may be brought” by the “person to whom the amount recovered belongs.” Wis. Stat. § 895.04(1). “Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action.” Wis. Stat. § 895.04(4).

“[r]eimburse the injured person for income lost as a result of a crime considered at sentencing.” Wis. Stat. § 973.20(3)(c).

Notably, that same subsection further provides that “[i]f the injured person’s sole employment at the time of the injury was performing the duties of a homemaker,” the court may order the defendant to “pay an amount sufficient to ensure that the duties are continued until the person is able to resume performance of the duties.” Wis. Stat. § 973.20(3)(d).

Lastly, at a restitution hearing, the victim only has to prove by a preponderance of the evidence that she sustained the loss as a result of a crime considered at sentencing. Wis. Stat. § 973.20(14)(a). A restitution hearing is “not the equivalent of a civil trial.” *Holmgren*, 229 Wis. 2d at 367.

b. The crime victim rights statute in Wis. Stat. § 950.02 defines “victim” to include a deceased victim’s family members.

Our restitution statute uses the term “victim” but does not define it. *See* Wis. Stat. § 973.20. But the term “victim” is defined in Wis. Stat. § 950.02(4)(a), within the chapter concerning the rights of crime victims. When the “person against whom a crime has been committed” is deceased, the statute defines “victim” to include a “[f]amily member of the person who is deceased.” Wis. Stat. § 950.02(4)(a)1., 4(a).

In *State v. Gribble*, 2001 WI App 227, ¶¶ 71–74, 248 Wis. 2d 409, 636 N.W.2d 488, the Court of Appeals concluded that the definition of “victim” for the restitution statute “is most reasonably interpreted using the definition in Wis. Stat. § 950.02(4)(a).” *Id.* ¶ 71. In *Gribble*, the Court of Appeals rested its conclusion—that the definition set forth in

Wis. Stat. § 950.02(4)(a) defines “victim” for the restitution statute—on two main factors:

First, Wis. Stat. § 950.04(1v) provides the rights of crime victims, one of which is “to restitution” as provided under Wis. Stat. § 973.20. *Gribble*, 248 Wis. 2d 409, ¶ 71 (citing Wis. Stat. § 950.04(1v)(q)).⁸

Second, the Court considered the legislative history of Chapter 950. *Gribble*, 248 Wis. 2d 409, ¶ 71. It noted that the Legislature broadened Chapter 950’s definition of “Victim” in 1997, and at the same time enumerated restitution as a victim’s right. *Id.* (citing 1997 Wis. Act. 181, §§ 60–61, 65).⁹ The Court found the Legislature’s “expansion of the definition of victim at the same time that it added the reference to restitution under § 973.20” to be “an indication that the [L]egislature intended that everyone included in the expanded definition of victim has the right to restitution under § 973.20.” *Id.*

So, when a victim is deceased, “[v]ictim” means “[a] family member of the person who is deceased.” Wis. Stat. § 950.02(4)(a)4.a. Wisconsin Stat. § 950.02(3) defines “Family member” to mean “spouse, minor child, adult child, sibling, parent, or legal guardian.”

⁸ Wisconsin Stat. § 950.04(1v)(q) also provides victims with the right to restitution under separate statutes, outside of Wis. Stat. § 973.20, not applicable here.

⁹ Prior to 1997, Wis. Stat. § 950.02(4) defined “Victim” as “a person against whom a crime has been committed.” *See, e.g.* Wis. Stat. § 950.02(4) (1993–94.)

c. The marital property statute in Wis. Stat. § 766.31 provides that spouses have an undivided interest in income earned by each spouse.

Wisconsin Stat. § 766.31 addresses the “classification of income” under Wisconsin’s marital property laws. Marital property means that “[e]ach spouse has a present undivided one-half interest in each item of marital property.” Wis. Stat. § 766.31(3).

Importantly, our marital property laws establish a presumption that all property of spouses is marital property. Wis. Stat. § 766.31(2). Therefore, with certain limited exceptions, “income earned or accrued by a spouse or attributable to property of a spouse during the marriage and after the determination date is marital property.” Wis. Stat. § 766.31(4).

Our marital property statutes also provide that a “recovery for personal injury” acquired during marriage is individual property “except for the amount of that recovery attributable to expenses paid or otherwise satisfied from marital property and except for the amount attributable to loss of income during marriage.” Wis. Stat. § 766.31(7)(f).

3. The restitution and marital property statutes are liberally construed to serve the purposes of each statute.

Courts read both the restitution statute and the marital property statute broadly, given their important purposes.

First, this Court has explained that courts should construe the restitution statute “broadly and liberally in

order to allow victims to recover their losses as a result of a defendant's criminal conduct.” *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted). Broad and liberal construction of the restitution statute aligns with “[t]he primary purpose of Wis. Stat. § 973.20 [that] is to compensate the victim.” *Id.* ¶ 22. Our restitution statute “reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution.” *Id.* ¶ 22 (citation omitted).

Therefore, “Wisconsin courts have repeatedly held that ‘restitution is the rule and not the exception.’” *Wiskerchen*, 385 Wis. 2d 120, ¶ 22 (citation omitted).

Second, Chapter 766 explains that the marital property laws “shall be liberally construed,” and that Legislature intended that “marital property is a form of community property.” Wis. Stat. § 766.001.

Liberal construction of the marital property statute supports its purpose—shared ownership: “The rights of a wife in a community property system do not stem from title, but from a legally imposed undivided shared *ownership* interest in the couple’s community estate.” Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. Md. L.J. Race, Relig., Gender & Class 1, 11 (2011).

Thus, under our marital property laws, “Property classified as marital property is owned by both spouses equally.” 14 Jay E. Grenig and Nathan A. Fishbach, *Wisconsin Practice Series, Methods of Practice* § 24:12 Marital Property (5th ed.).

- B. The circuit court had authority to order restitution for the lost marital income of the deceased victim's daughters resulting from the crime.**
- 1. The plain language and purposes of our restitution and marital property statutes permit restitution for lost marital income.**

The plain language and purposes of our restitution and marital property statutes show that the circuit court had authority to order Muth to pay restitution for the lost marital income of his victim's adult daughters.

To start, it is important to clarify that Kempf's adult daughters, H.M. and K.M., are "victims" under the plain language of the applicable crime victim rights statutes. *See* Wis. Stat. §§ 950.02(3), 950.02(4)(a)4.a. Muth has never argued to the contrary.

Additionally, beyond his arguments about the insurance settlement (to be addressed in his initial brief and the subsequent briefing) and his challenge to the lost wages of Kempf's daughters' husbands, Muth has not otherwise argued that the specific lost wages sought were not recoverable under Wis. Stat. § 973.20, or that the victims did not meet their burden of proof at the restitution hearing.

Put differently, if H.M. and K.M. had both worked outside of the home and their husbands had not, Muth would not be challenging their ability to recover all of the lost income they sought as restitution.

The question, therefore, is simply whether the circuit court had the authority to order restitution to Kempf's adult daughters for the lost wages of their husbands.

The answer to that question is yes. The circuit court had authority to order restitution to H.M. and K.M. for their lost marital income under the plain language and purpose of the restitution and marital property statutes.

As this Court has explained, when construing a statute, it favors a construction “that fulfills the purpose of the statute over one that defeats statutory purpose.” *Westmas*, 379 Wis. 2d 471, ¶ 19. Here, we have two key statutory purposes:

First, we know the primary purpose of the restitution statute is to allow victims to recover losses resulting from the defendant’s criminal conduct. *Wiskerchen*, 385 Wis. 2d 120, ¶ 22. Because of this important purpose, this Court interprets the restitution statute such that “restitution is the rule and not the exception.” *Id.* (citation omitted).

So, when this Court reads the plain language of the restitution statute, it reads it broadly to *permit* restitution, instead of narrowly to prohibit restitution. *See Wiskerchen*, 385 Wis. 2d 120, ¶ 22. This, of course, does not mean that this Court reads into the statute what is not there. But it does mean that if the plain language permits a reading that allows for restitution, this Court should favor that reading. *Westmas*, 379 Wis. 2d 471, ¶ 19.

Second, we know that the Legislature intended that “marital property is a form of community property,” that our marital property laws be liberally construed, and that each spouse has an equal interest in marital property. Wis. Stat. §§ 766.001, 766.31(3). The *presumption* is that all property of spouses is marital property. Wis. Stat. § 766.31(2).

In short, our laws should be read to presume that (1) restitution should be ordered wherever possible and (2) marital property belongs to both spouses.

With that in mind, a plain language reading of the relevant statutes in harmony shows that the court had authority to order restitution to H.M. and K.M. for their lost marital income:

The circuit court had the authority to award income lost and special damages to a victim. Wis. Stat. § 973.20(5)(a)–(b). Lost income is recoverable to “the person against whom a crime. . . was committed” (i.e. the Wis. Stat. § 950.02(4)(a)1. definition of “Victim”). Wis. Stat. § 973.20(5)(b). Victims may recover restitution for “special damages”—the victim’s “pecuniary losses.” Wis. Stat. § 973.20(5)(a); *Holmgren*, 229 Wis. 2d at 365. Again, Muth has not argued that the lost wages were not specifically recoverable for any reason other than the fact that the wages were lost by H.M. and K.M.’s husbands, not by H.M. and K.M. themselves.

The circuit court had the authority to award restitution to H.M. and K.M. as victims, because as the adult children of the woman Muth killed, they are victims of his crime. Wis. Stat. §§ 950.02(3), 950.02(4)(a)4.a. Pursuant to the Court of Appeals holding in *Gribble*, we look to Chapter 950’s definition to determine who may recover restitution. 248 Wis. 2d 409, ¶¶ 68–74. And Muth has not disputed that Kempf’s daughters are “victims” who could recover their own lost wages as restitution.

Lastly, we know that income lost includes marital property, because our marital property statute presumes that income earned during marriage is marital property. Wis. Stat. § 766.31(2), (4). And “marital property is owned by both spouses equally.” 14 Jay E. Grenig and Nathan A. Fishbach, *Wisconsin Practice Series, Methods of Practice* § 24:12 Marital Property (5th ed.). Lost marital income is a pecuniary loss. As the circuit court aptly put it, “Loss of

wages to the husband is a loss of a marital asset. If it damages him, it damages her.” (R. 78:13, Pet-App. 125.)

Thus, the statutes permitted the circuit court to order restitution to H.M. and K.M. for their lost marital income.

2. The Court of Appeals’ decision in *Johnson* does not prohibit the restitution ordered here.

Johnson does not control here. Whether lost wages are recoverable under marital property law was an undeveloped argument summarily rejected in that case on appeal. *State v. Johnson*, 2002 WI App 166, ¶ 23, 256 Wis. 2d 871, 649 N.W.2d 284. It was not the basis to grant or deny restitution to a victim’s stepfather for lost wages. *See id.*

Instead, *Johnson* addressed whether the definition of “parent” within the crime victim rights statute included a stepparent. Johnson was convicted of false imprisonment of teenage girls, and the circuit court ordered him to pay restitution to the stepfather of one of the girls for his (the stepfather’s) lost wages from attending court proceedings. *Johnson*, 256 Wis. 2d 871, ¶¶ 2, 6. Johnson argued that the court could not order this restitution because the stepfather was not a “victim” for restitution purposes. *Johnson*, 256 Wis. 2d 871, ¶¶ 15, 18.

Johnson noted that Wis. Stat. § 950.02(4)(a)2 provides that when the person against whom a crime was committed is a child, “victim” includes a “parent, guardian or legal custodian of the child.” *Johnson*, 256 Wis. 2d 871, ¶¶ 17 (citing Wis. Stat. § 950.02(4)(a)2). He argued that the child’s stepfather did not meet this definition. *Id.* ¶ 18.

The Court of Appeals agreed with Johnson. *Johnson*, 256 Wis. 2d 871, ¶ 19. The Court noted that Chapter 950 did not define “parent,” and the Court stressed that where the

Legislature elsewhere meant to include both natural and stepparents, “it clearly did so by listing both parents and stepparents.” *Johnson*, 256 Wis. 2d 871, ¶ 19. The Court “identified *no* occasions where the [L]egislature has indicated directly or indirectly that it meant ‘parent’ to include both natural parents and stepparents.” *Id.*

The Court of Appeals explained that Wis. Stat. § 973.20(5)(b) “allows a ‘person against whom a crime . . . was committed’ to recover such lost wages as restitution,” and concluded that the victim’s stepfather “is not such a person, and there is no comparable provision that applies to a child-victim’s stepparent.” *Johnson*, 256 Wis. 2d 871, ¶ 22.

In so holding, the Court of Appeals rejected an undeveloped marital property argument; it explained that “[t]he circuit court held that [the stepfather’s] lost wages were tantamount to a victim’s lost wages or property due to the operation of Wisconsin’s marital property laws. The State mentions, but does not develop this argument on appeal.” *Johnson*, 256 Wis. 2d 871, ¶ 23. The Court then stated, “Additionally, because there is no language in the restitution statute or in Wis. Stat. § 950.02(4) 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).” *Id.*

Johnson does not control here for five reasons.

First and foremost, unlike in *Johnson*, there is no dispute that Kempf’s adult daughters are each a “victim” for restitution purposes. Wis. Stat. § 950.02(3), (4); *Gribble*, 248 Wis. 2d 409, ¶¶ 67–76.

Second, and relatedly, unlike in *Johnson*, here the court ordered the restitution *to* the victims, not to their spouses. In *Johnson*, the restitution was ordered *to* the

stepfather, who did not meet the statutory definition of “victim.” *Johnson*, 256 Wis. 2d 871, ¶ 3. Thus, Muth’s characterization of the issue presented here—as whether Kempf’s sons-in-law are “victims” for restitution purposes—is misplaced, because the restitution was sought by and ordered to women who unquestionably are victims for restitution purposes. (See State’s COA Br. 18.)

Third, whereas the Court of Appeals stressed in *Johnson* that it could find no occasions where the Legislature intended the word “parent” to include both natural parents and stepparents, *Johnson*, 256 Wis. 2d 871, ¶ 19, the opposite is true for the Legislature’s intentions with regard to the income of spouses. Our marital property law *presumes* that income accrued by either spouse belongs to *both* spouses. Wis. Stat. § 766.31(4). Indeed, in the context of his separate insurance settlement offset argument, Muth himself argued that the insurance settlement—signed only by Kempf’s children, not their spouses—included “marital property claims for lost wages.” (Muth’s Initial COA Br. 6).

Fourth, the slippery slope concerns the Court of Appeals articulated in *Gribble*, and echoed in *Johnson*, are not present here. See *Gribble*, 248 Wis. 2d 409, ¶ 76; *Johnson*, 256 Wis. 2d 871, ¶ 23. The relevant statutes already create the boundaries: the definition of “victim” set out in Wis. Stat. § 950.02 limits who may recover restitution, Wis. Stat. § 973.20 limits what restitution may be recovered, and Wis. Stat. § 766.31(4) limits the concept of marital property income to *spouses*.

In a footnote, the Court of Appeals here noted that “the circuit court included the full measure of the spouses’ lost wages in the restitution order, even though, as the victims, H.M. and K.M.’s marital property interest would only be one-half of that income.” *Muth*, 2019 WL 2377271, ¶ 26 n.3. (Pet-App. 105.)

But this misunderstands the nature of marital property. Each spouse has an *undivided* one half-interest. Wis. Stat. § 766.31(3). As long as they are married, spouses own marital property *equally*. See Wis. Stat. § 766.31(4). By the Court of Appeals' logic here, H.M.—who worked outside the home, as did her husband—should recover one-half of the combined total of her lost wages and her husband's lost wages (as opposed to her own lost wages), because that would be “one-half” of the marital property. This flawed logic further shows the problematic lines drawn by the Court of Appeals' holding.

Lastly, *Johnson* is distinguishable because there the State's marital property argument was undeveloped, and the Court of Appeals accordingly, and properly, rejected it in summary fashion. *Johnson*, 256 Wis. 2d 871, ¶ 23. When an appellate court rejects an argument as undeveloped, it is—by so doing—generally declining to address the merits of that argument. See, e.g. *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 26, 374 Wis. 2d 487, 893 N.W.2d 12 (discussing how the Court of Appeals declined to address an argument by instead concluding it was undeveloped).

The Court of Appeals here nevertheless concluded that because it, “albeit briefly,” addressed the merits of the marital property argument, it was bound by its decision. *Muth*, 2019 WL 2377271, ¶ 27, (Pet-App. 104); see also *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (only this Court has the power to overrule, modify or withdraw language from a published opinion of the Court of Appeals).

This Court, however, could fairly conclude that *Johnson* did not provide a full analysis of the role of marital property in the restitution statute, because the Court there was only presented with an undeveloped argument in the

first place. Ultimately, of course, this Court is in no way constrained by *Johnson. Cook*, 208 Wis. 2d 189–90.

This Court should hold that a circuit court may order restitution to the family member of a deceased victim for incurred lost marital income. Insofar as it concludes that *Johnson* conflicts with that holding, it should hold that any conflicting portion of *Johnson* is overturned.

3. Key principles of statutory interpretation and related case law further demonstrate that lost marital income may be recovered as restitution.

On top of the plain language and purposes of our restitution and marital property statutes, other statutory interpretation principles and related case law also show that the circuit court had authority to impose restitution for H.M. and K.M.’s lost marital income.

a. The language of closely related statutes supports the imposition of restitution for lost marital income resulting from the crime.

This Court interprets statutory language in relation to surrounding and closely related statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46. Surrounding and closely related provisions of both the restitution and marital property statutes further support interpreting our statutes to permit the restitution ordered here.

First, where a crime involves bodily injury, and the injured person’s only employment at the time of injury was “performing the duties of a homemaker,” a court may order

the defendant to pay restitution “sufficient to ensure that the duties are continued” until the person may resume them. Wis. Stat. § 973.20(3)(d). The Legislature’s recognition of the financial *value* of a homemaker in this related provision reflects that the Legislature would not have intended that a married victim’s recovery of restitution for lost income be dependent on which spouse earned the income.

Second, the fact that the Legislature drew a specific exception to the rule that recovery for personal injury is individual property (as opposed to marital property), “for the amount attributable for loss of income during marriage,” Wis. Stat. § 766.31(7)(f), is also persuasive. It shows that an assessment of income lost by a married person caused by the actions of another should be an assessment of *marital* income.

b. Statutory history supports the imposition of restitution for lost marital income resulting from the crime.

Statutory history also supports the imposition of restitution here. *See Williams*, 355 Wis. 2d 581, ¶ 17.

First, the Legislature added the “income lost” provision to the restitution statute *after*—indeed, only one year after—Wisconsin became a marital property state.

The enactment of the relevant portions of Wisconsin’s marital property laws took effect in 1986. 1983 Wis. Act 186; 1985 Wis. Act 29; 1985 Wis. Act 37. One year later, in 1987, the Legislature created the section 973.20 statutory scheme for the imposition of restitution in criminal cases—including the provision permitting a court to order the defendant to pay “an amount equal to the income lost” by a victim. 1987 Wis. Act 398, § 43; *see also* Judicial Council Committee Note,

1987, Wis. Stat. § 973.20 (discussing the “new provision” allowing for restitution for lost income).

This demonstrates that when the Legislature authorized courts to order restitution for lost income, it knew that income—under its recently-enacted marital property laws—is presumed to be marital property that belongs equally to spouses.

Second, when the Legislature then articulated the right of crime victims in 1997, it simultaneously (1) included the right to restitution and (2) clarified that “Victim,” in the context of a deceased person, included the deceased person’s family members. 1997 Wis. Act. 181, §§ 60–61; *Gribble*, 248 Wis. 2d 409, ¶ 71.

This shows that the Legislature intended to provide broad authority to circuit courts to order restitution to crime victims.

c. Reading the statutes to say marital income is not recoverable would lead to absurd results.

This Court also interprets statutes to avoid absurd results. *Kalal*, 271 Wis. 2d 633, ¶ 46. Where the restitution statute should be interpreted broadly compensate victims, and where the central concept of marital property is that both partners have equal ownership in income earned during marriage regardless of division of labor, it would be illogical to think that our Legislature would draw the harsh line caused by the Court of Appeals’ decision.

Consider the ramifications of the Court of Appeals’ decision: At the restitution hearing, H.M. and K.M. both testified about restitution *they* sought for actual losses to *them*—income that by law belongs just as much to them as it does to their husbands. Yet, under the Court of Appeals’

holding, the division of labor in each marriage determines how much each victim may recover as restitution.

Under the Court of Appeals' holding, K.M., whose husband was the only spouse working outside the home, cannot recover *any* lost income because she was not the income earner in her marriage. If the division of labor in K.M.'s home had been reversed, she could recover it. That is an absurd result. K.M. lost her marital income—her family's *only* income—as a direct result of Muth's crime. How is this not a loss to K.M.?

d. Related case law further supports the imposition of restitution for lost marital income.

Lastly, related case law demonstrates the importance of a broad reading of the restitution statute to permit restitution for lost marital income.

First, consider the Court of Appeals' holding in *State v. Howard-Hastings*, 218 Wis. 2d 152, 579 N.W.2d 290 (Ct. App. 1998). The Court held that a government entity could be a "victim" under the restitution statute. *Id.* at 155–59. The Court concluded that a plain language reading of "victim" compelled this conclusion; in so holding, it noted that other chapters of the criminal code defined "victim" to include government entities. *Id.* at 156.

Notably, the Court of Appeals' reading of the restitution statute looked to be *inclusive*, not exclusive: "Because none of [the definitions of "victim" in other chapters of the criminal statutes] suggest that the common and ordinary meaning of 'victim' excludes governmental entities, we conclude that a governmental entity may be considered a 'victim' under § 973.20(1r)." *Howard-Hastings*, 218 Wis. 2d at 156.

Second, consider the Court of Appeals holding in *State v. Rouse*, 2002 WI App 107, 254 Wis. 2d 761, 647 N.W.2d 286. The defendant pled no contest to forging checks; the court imposed restitution for the time employees of the victims' bank spent researching the forgery allegations instead of doing other work. *Id.* ¶¶ 2, 12.

On appeal, the defendant challenged the court's authority to impose this restitution, arguing that the employee's salaries would have been paid out anyway. ¶¶ 10–15. The Court of Appeals, however, affirmed the imposition of restitution. *Id.*

Its analysis reflects the requisite broad reading of the restitution statute: the Court acknowledged that though the defendant's crime "was not the cause of the bank's employees being paid their salaries," the defendant's crimes were a substantial factor in "causing them to investigate his forgeries rather than perform other tasks." *Rouse*, 254 Wis. 2d 761, ¶ 12. The Court concluded the lost value of the employee time constituted a special damage. *Id.* ¶¶ 12–15.

Next, consider the Court of Appeals' holding in *State v. Canady*, 2000 WI App 87, ¶ 2, 234 Wis. 2d 261, 610 N.W.2d 147. The Court held that restitution could be ordered for damage to an apartment door caused by a police officer as the defendant resisted arrest. *Id.* ¶ 12. The defendant was convicted of crimes including burglary and resisting arrest. *Id.* ¶ 3. The defendant argued that the damage caused by the police officer did not result from the "crime[s] considered at sentencing," under the restitution statute. *Id.* ¶¶ 9–10 (citing Wis. Stat. § 973.20(2)).

The Court of Appeals stressed that it had to interpret the statute "broadly and liberally," and concluded that the court could order the defendant to pay restitution for the damage caused by the police officer: "While damaging the

glass door pane may not have been intended or expected on Canady's part, the natural consequences of grabbing for a metal pry bar while resisting arrest was that he would be disarmed." *Canady*, 234 Wis. 2d 261, ¶ 12.

Lastly, consider this Court's recent decision in *State v. Wiskerchen*, 385 Wis. 2d 120. There, the defendant was charged with burglarizing a woman's home on one occasion; no other charges were dismissed and read-in for sentencing. *Id.* ¶ 27. The victim sought restitution for all of the items she realized were missing after that particular burglary; however, there was indication that the defendant burglarized her home on prior occasions. *Id.* ¶¶ 10–12. The defendant argued that because the victim did not know what items he stole on the charged occasion, she could not meet her burden and the circuit court did not have the authority to order restitution. *Id.* ¶¶ 12–13.

This Court—without dissent—concluded that the circuit court had authority to impose the restitution. *Id.* ¶¶ 19–27. This Court stressed that restitution is the rule and not the exception, and that it had to interpret the statute broadly given the important public policy reasons behind the statute. *Id.* ¶¶ 22.

This Court emphasized the “breadth” of the relevant language in the restitution statute. *Wiskerchen*, 385 Wis. 2d 120, ¶ 26. This Court concluded that because the defendant was convicted of burglarizing the victim's home—a “crime considered at sentencing”—the court had authority to impose the restitution. *Id.* ¶ 27.

Thus, time and again our appellate courts have affirmed a broad reading of the restitution statute in light of the important public policy behind the statute.

This Court should do the same here. Prohibiting K.M. and H.M. from recovering income that, by law, belongs

equally to their husbands and them—income they lost as a direct result of Muth killing their mother—runs counter to the plain language and purpose of our statutes. This is not where the Legislature intended to draw the line.

This Court should therefore hold that under the terms of Wis. Stat. § 973.20, and the relevant definitions set forth in Wis. Stat. § 950.02, a circuit court may order restitution to the family member of a deceased victim for incurred lost marital income.

CONCLUSION

This Court should reverse the Court of Appeals' decision reversing the circuit court's restitution order for marital income lost by H.M. and K.M., and affirm the circuit court's restitution order.

Dated this 10th day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7998 words.

HANNAH S. JURSS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February 2020.

HANNAH S. JURSS
Assistant Attorney General

**APPENDIX OF
PLAINTIFF-RESPONDENT-PETITIONER**

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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, 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 Wis. Stat. § 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 10th day of February 2020.

HANNAH S. JURSS
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 10th day of February 2020.

HANNAH S. JURSS
Assistant Attorney General