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STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant-Respondent-Cross-Petitioner.

COMBINED BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT-RESPONDENT-CROSS-PETITIONER

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STATEMENT OF THE ISSUES PRESENTED

1. In a criminal restitution proceeding where the crime victims received a prior civil settlement for damages including "lost wages, expenses…," must the defendant produce extrinsic evidence of the nature of the unambiguous civil settlement agreement to show that the victims are seeking a double recovery?

   The court of appeals answered, no.

2. In a criminal restitution proceeding, does the marital property law allow recovery of the lost wages of the spouse of a crime victim?

   The court of appeals answered, no.

STATEMENT OF THE CASE

On March 6, 2016 the defendant-appellant-respondent-cross-petitioner, 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, along with their spouses and 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. 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 sentencing hearing, and reaffirmed in post-conviction proceedings on February 9, 2017, and July 28,

2017, where the court denied Muth's defenses of setoff and accord and satisfaction[1], 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).

[1] Although the court of appeals characterized Muth's defense as setoff, Muth also asserted the defense of accord and satisfaction. (R: 49). This is significant since setoff is a defense that requires the asserting party to prove specific payments to be credited against specific losses; whereas accord and satisfaction requires the asserting party to prove the existence of an agreement settling the claim, and payment pursuant to that agreement.

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 civil 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…." (emphasis added).

Based on the prior settlement payment and release, Muth objected to the

restitution order, and asserted defenses of setoff, and accord and satisfaction, as to the claims of Ms. Kempf's three surviving children. 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 objections 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) reaffirming the restitution order.

Muth appealed to the court of appeals. The court of appeals agreed with Muth regarding the claims of Ms. Kempf's sons-in-law. The state was granted review of that decision. The court of appeals also held that Muth failed to satisfy his burden of proof as to what portion of the civil settlement may have satisfied the claim of damages in the criminal restitution proceeding. Muth was granted review of that decision.

ARGUMENT

The Victims Entered into a Clear, Unambiguous Accord with Muth, and Received Payment for Lost Wages and Expenses; Hence the Restitution Award of Lost Wages and Funeral Expenses Provided a Prohibited Double-Recovery

Applicable Statutes

Wisconsin's restitution statute, Wis. Stat. §973.20 was enacted in 1987 and is patterned after the federal Victim Witness Protection Act (VWPA). 18 U.S.C. §3663-64. See also, *State v. Sweat*, 208 Wis. 2d 409, pp. 14-15 (1997). In pertinent part, it is as follows (emphasis added):

> 973.20(1r): When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12 (1) (am) or 968.075 (1) (a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing…
>
> 973.20 (5): In any case, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay 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…
>
> 973.20(8): Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action. Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil

> action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.
>
> 973.20(14)(b): The burden of demonstrating, by the preponderance of the evidence, the financial resources of the defendant, the present and future earning ability of the defendant and the needs and earning ability of the defendant's dependents is on the defendant. ***The defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated…***

Accord and Satisfaction, and Setoff

Muth asserted both setoff and accord and satisfaction as defenses to the restitution order. To the extent that Muth's defense was based upon the existence of a settlement agreement that identified the victims' damage claims, and the satisfaction of that agreement by payment of $100,000.00, it was, strictly speaking, a defense of accord and satisfaction. Even so, the argument that Muth's payment to the crime victims should be applied to amounts ordered as restitution, was more in the manner of a setoff defense. The nature of the two defenses is quite different.

Setoff is a defense that allows a debt to be reduced by virtue of payments made by the debtor to the creditor. The payments may or may not be related to the subject matter of the debt. The defense of setoff requires the asserting party to prove that specific payments or other consideration should reduce the claim of the other party.

> "Set off is a mode of defence by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff, to counter-balance it either in whole or in part." Oliver L. Barbour, A Treatise on the Law of Set Off 3 (1841). Black's Law Dictionary (online) 11th ed. 2019).

Accord and satisfaction, by contrast is not a defense based on specific payments, but rather it is based on an agreement to settle a disputed claim and payment of the sums required by that agreement.

> 'Accord and satisfaction' means an agreement between the parties that something shall be given to, or done for, the person who has the right of action, in satisfaction of the cause of action. There must be not only agreement ('accord') but also consideration ('satisfaction'). Such an arrangement is really one of substituted performance." 1 E.W. Chance, Principles of Mercantile Law 101 (P.W. French ed., 13th ed. 1950). Black's Law Dictionary (online) 11th Ed. 2019.

The distinction is significant, as the setoff defense is not a complete defense, but rather it requires a finding of the amount of damages and the amount of payments, crediting the payments where appropriate. Since the general damages inherent in an injury or death case are by their nature indeterminate, the setoff defense places a substantial burden of proof on the defendant. Accord and satisfaction, by contrast, requires an agreement and payment to resolve a disputed claim. It is the accord itself that defines the amount of the damages. Importantly, in a tort claim where there are both special and general damages, and a payment of an insurance company's policy limits to satisfy the claim, the indeterminate nature of the general damages is enough of a "dispute" to trigger a defense of accord and satisfaction. See, e.g. *Parsons ex rel. Cabaniss v. American Family*

Ins. Co.,2007 WI App 211, 305 Wis.2d 630, 740 N.W.2d 399, at pp. 10:

> Even if we were to accept Parsons' contention that the accepted offer of judgment extinguished any dispute as to the value of her claim, we cannot accept the implication that the amount of damages that Parsons might have claimed over the $100,000 policy limit was resolved as well. The ultimate value of her claim was still subject to a good faith dispute.

Accord and satisfaction is a complete defense within the plain meaning of "any defenses" of Wis. Stat. §973.20(14)(b)[2] yet it was, unfortunately, ignored in the court of appeals decision.

The statutory clause stating that a defendant in a restitution proceeding may assert "any defense that he or she could raise in a civil action," has been the subject of significant litigation that is useful to review.

Applicable Case Law

The state relies primarily on *State v. Walters*, 224 Wis. 2d 897 (Ct.App. 1999), that essentially bars the defense of accord and satisfaction. Muth asserts that *Walters* is distinguishable and that it requires clarification, as it should not have abrogated accord and satisfaction in restitution proceedings. As such, it is necessary to review the history of precedent interpreting the restitution statute.

In 1996 the court of appeals considered a modified "setoff" defense, in *Olson v. Kaprelian* 202 Wis.2d 377 (Ct. App. 1996). *Olson* was a contempt proceeding initiated by the crime victim, attempting to recover restitution from funds deposited as bail in an unrelated proceeding. The defendant challenged the

[2] Also referenced as "Section (14)(b)" herein.

authority of the court to attach the bail posted in the unrelated case, and also asserted that recovery was barred by "collateral estoppel," based upon the apparent settlement and dismissal of a civil suit arising out of the same incident.[3] Olson offered no evidence of the settlement agreement in the civil suit, nor the amount of any payment. All that was offered was the order dismissing the case. The court of appeals disallowed any attachment of the unrelated bail money, and also addressed the defendant's substantive defense to the restitution claim, applying Wis. Stat. §973.20(8): "The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant." The court of appeals analogized the post-conviction contempt proceeding to a civil proceeding initiated by the crime victim to obtain a judgement based on the restitution order. Since the defendant offered no evidence of the "validity and amount of any setoff," the court of appeals declined to reduce the restitution order. The failure of the criminal defendant to offer any evidence of the supposed prior settlement and payment doomed this awkwardly asserted defense to restitution.

In a 1997 decision, *State v. Sweat*, *supra*, this court considered the issue of whether the "any defense" language of section (14)(b) included the assertion of the civil statute of limitations. The defendant sought to use the civil statute of limitations to bar the victim from recovery. A divided court found the statute to

[3] *Olson* offers no explanation as to why the defendant asserted collateral estoppel, rather than setoff or accord and satisfaction, nor any explanation of why a civil settlement agreement was not offered as evidence.

be ambiguous, interpreted the "any defenses" language to apply only to those defenses as to the amount of restitution, and excluded procedural defenses such as the statute of limitations. This court, thus, applied the criminal statute of limitations applicable to the criminal case underlying the restitution proceeding. *Sweat* was based on the policy considerations underlying the restitution statute. "A restitution hearing in a criminal proceeding is part of the criminal sentencing process, and serves the goals of the criminal justice system." *Sweat, supra* at pp.21. Applying these policy considerations to section (14)(b), this court also stated:

> The natural interpretation of Wis. Stat. § 973.20(14)(b) and (d), and the only one which most comports with Wis. Stat. § 973.20 as a whole and the legislative policies that restitution is intended to serve is that in a restitution proceeding, a defendant should be able to raise substantive defenses, such as mitigation, set-off, or accord and satisfaction, which go to the measure or amount of total restitution.
>
> *Sweat, supra*, at pp.26.

Thus, while *Sweat* interpreted the statute in a manner that limited its application, it also specifically placed accord and satisfaction in the category of available defenses.

Walters, supra, relied in part on *United States v. Scheinbaum*, 136 F.3rd 443 (5th Cir. 1998). *Scheinbaum* was a complicated banking and bankruptcy fraud case, resulting in a restitution order of $498,955.00. The defendants argued that they did not owe the restitution, because they had entered into a prior civil settlement agreement with the victim. Critically, the defendants offered neither the terms of the agreement, nor the amount of consideration. The record contained

only the bare fact that an agreement was made. The federal court weighed the policy goals of restitution in terms of the private interest of the victim and the public interests of the state. Acknowledging that restitution is for "the benefit of" the victim, the court, nevertheless, held that the public interests of the state were the primary purpose of restitution and disallowed any reduction in the absence of evidence of the amount of payment. The court, however, also stated: "Of course, to avoid double-counting, a district court must reduce the size of its restitution order by any amount received by the victim as part of a civil settlement." *Scheinbaum*, at pp.3.

In 1999, the court of appeals decided *Walters, supra*, abrogating the defense of accord and satisfaction in restitution proceedings. Muth respectfully asserts that *Walters* was mistaken. The plain meaning of section 14(b) allows the accord and satisfaction defense, and the policy considerations relied on by *Walters* do not mandate abrogation of the defense. Moreover, unlike this case, the settlement agreement in *Walters* was vague, failing to identify any item of damages, thus leaving the court with no basis to determine if restitution was redundant. *Walters* was a drunk driving case in which the victim was injured. The victim entered into a settlement agreement with the defendant's insurer to settle the matter for a payment of $25,000.00, in exchange for a release of "all claims and damages." Subsequently, the court ordered the defendant to pay restitution of $24,000.00. The defendant asserted both accord and satisfaction and setoff defenses. As to accord and satisfaction, *Walters,* focusing on the policy underlying restitution,

determined it to be a matter of public interest rather than the private interest of the victim. Restitution serves the public interest of rehabilitation and deterrence by compensating a victim. *Walters* reasoned that since restitution was a right of the state, the victim had no ability to waive that right. Hence, accord and satisfaction as a complete defense to a restitution claim was not allowed. Even in a case of a valid accord and satisfaction, the court may still order restitution. *Walters* declined to be bound by the statement in *Sweat* acknowledging the defense of accord and satisfaction, finding it to be mere *obiter dictum*. Yet *Walters* treatment of the accord and satisfaction defense was also in the nature of *dicta,* since the settlement agreement at issue was too vague to be a basis for any defense.

In 2006, this court decided *Huml v. Vlazny*, 293 Wis.2d 169, 716 N.W.2d 807, 2006 WI 87. *Huml* was a case involving damages resulting from a drunk driving accident. The defendant caused the victim special damages resulting in a restitution order of $140,000.00, to be paid at the rate of $425.00 per month during the period of probation. When the probation expired there was a balance on the restitution of $107,900.46, that was converted to a civil judgment. Meanwhile the victim filed a civil suit against the defendant. The civil suit was settled for an initial lump sum payment of $548,000.00 plus continuing monthly and periodic payments for the rest of the victim's life. As a result of the civil settlement, the defendant sought to enforce the settlement agreement against the civil restitution judgment. The victim objected, citing *Sweat*, *Olson*, and *Walters*. In holding for the defendant, the court noted:

> An overview of Wis. Stat. §§ 973.09 and 973.20 reveals that a fundamental policy of these statutes is to make victims whole ***without allowing them to receive double recoveries***. To achieve this result, the statutes afford three opportunities to avoid double recovery. ***First, 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.*** § 973.20(14)(b); *Sweat*, 208 Wis. 2d at 424. Second, before a circuit court reduces any unpaid restitution to a civil judgment, the probationer may prove that the victim has already recovered damages from him that are the same as the damages covered by the restitution order. § 973.09(3)(b). Third, in a civil action a defendant may prove that restitution payments set off part or all of a civil judgment in favor of the victim. § 973.20(8).
>
> *Huml*, supra at pp.22 (emphasis added).

Thus, *Huml* contradicted the court of appeals in *Walters* as to the applicability of an accord and satisfaction to criminal restitution. *Huml* also acknowledged the public interest in restitution, holding:

> For all these reasons, we conclude that a civil settlement agreement can have no effect upon a restitution order while the defendant is on probation unless the circuit court first finds that continued enforcement of the restitution order would result in a double recovery for the victim. After a defendant is released from probation and any unpaid restitution becomes a civil judgment, however, a settlement agreement between the victim and the defendant may preclude the victim from enforcing the judgment.
>
> *Huml, supra*, at pp.50.

Huml noted that the public policy concerns underlying the criminal restitution statute are largely abated when a defendant has been discharged from probation. That is, the victim's interest in enforcing the civil restitution judgment is fundamentally a private interest, as the state's interest has been served. Nevertheless, *Huml* disavowed the notion that a defendant is precluded from

asserting an accord and satisfaction at a restitution hearing.

By its nature, accord and satisfaction is dependent upon the meaning of the settlement agreement, that is the meaning of the accord. *Huml* is instructive in its discussion of the interpretation of settlement agreements and the use of extrinsic evidence.

> The lodestar of contract interpretation is the intent of the parties. In ascertaining the intent of the parties, contract terms should be given their plain or ordinary 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*, supra, at pp.52.

In light of these precedents, some principles are unassailable. First, a restitution order may not give a victim a double recovery. Second, at the very least, setoff is available as a defense to a restitution claim. Third, in those cases where the meaning of a settlement agreement is at issue, extrinsic evidence is inadmissible if the agreement is clear and unambiguous.

Walters requires clarification in light of these principles. *Walters* asserts that a victim may not enter into an agreement whose terms would preclude the state from seeking restitution, as restitution is a right of the state, rather than the victim. *Walters* also acknowledges that a victim may not receive a double recovery. *Walters,* however, fails to consider the issue of how a settlement agreement relates to whether a victim will receive a double recovery. In fact, even under *Walters*, a victim can enter into an agreement, which by its terms alone would bar a restitution order as a double recovery. For example, if a settlement

agreement identifies and itemizes specific items of special damages together with the amount of the special damages (e.g. "lost wages in the amount of $1000.00), then even under *Walters,* the state would be precluded from a restitution order on those same damages. While restitution is a right of the state and not the victim, it is dependent upon the property interests of the victim.[4]

Whether it is termed a setoff or an accord and satisfaction, a restitution order may not provide for a double recovery. In determining whether there will be a double recovery, the court must look at the terms of any settlement agreement for which the defendant claims a setoff or accord and satisfaction. We acknowledge that under Wis. Stat. §973.20, *Walters,* and *Sweat,* the state's interest in a restitution order requires the court to consider more than the victim's private interests. Under no circumstances, however, may the state's interests result in a double recovery. If the terms of a settlement agreement are clear and unambiguous, then extrinsic evidence is inadmissible. If those terms indicate that restitution would result in a double recovery, then such restitution is barred.

In *Walters*, the court refused to consider accord and satisfaction, and held the general global settlement agreement to be too vague to trigger a setoff. The agreement in *Walters* released all claims, but critically, it failed to identify those claims. A similarly vague agreement in *Huml,* however, was held to be so specific that it barred a civil restitution judgment, and the court disallowed the use of any

[4] Interestingly, at the restitution hearing in this case the state declined to appear or assert any interest in the amount of the restitution order. The examination of the victims was conducted by the court and defense counsel only.

extrinsic evidence. The court of appeals stated that the distinction is that *Walters* was a criminal restitution proceeding and *Huml* was a post-probation civil restitution proceeding. Thus, the state's interest was much less in *Huml.* The basic principles of *Huml*, however, still apply to this case: restitution may not grant a double recovery, and the terms of an unambiguous contract stand for themselves.

So, the court must determine whether the settlement agreement in this case is sufficient to bar restitution as a double recovery. This question was not addressed by either the trial court or the court of appeals. The settlement agreement in this case is materially distinct from the agreement in *Walters*. As the *Walters* agreement failed to identify any item of damages, it was too vague for the court to determine that there had been either an accord and satisfaction, or that a setoff was proper. In this case, the settlement agreement explicitly identified the two items of special damages that were also the subject of the restitution order: lost wages and expenses. Although these items of damages were not itemized, the court cannot ignore the fact that they were identified. Itemization of a clear and unambiguous settlement agreement is not required in an accord and satisfaction. The nature of accord and satisfaction is that the agreement resolves any potential dispute as to the itemization of damages. When a restitution order replicates a claim that was explicitly identified and paid pursuant to a settlement agreement, that is a double recovery.

Muth relied on the plain meaning of the civil settlement agreement in asserting the defenses of setoff and accord and satisfaction. The court of appeals,

however, framed the issue as whether Muth proved the portion of the payment of $100,000.00 received by the victims was for the special damages (e.g. lost wages and funeral expenses) subsequently ordered as criminal restitution, as opposed to general damages. This mistaken view ignores the fact that by its nature, a settlement agreement resolves disputed amounts. There is no requirement that a settlement agreement itemize the damages. If the agreement specifically identifies the item of damages, i.e. lost wages, it is sufficient to bar a future claim for lost wages. Extrinsic evidence is inadmissible as to the construction of unambiguous contracts. Similarly, a contract that specifies a specific item of damages is sufficiently clear to preclude extrinsic evidence, even in a restitution proceeding. Otherwise, there will be a prohibited double recovery. The identification of lost wages and expenses in the settlement agreement is, therefore, the critical fact that distinguishes this case from *Walters*.

In this case the restitution order by its terms awarded sums for items that the settlement agreement, by its terms, settled. There was, therefore, a prohibited double recovery.

The Court of Appeals Decision Harms the Policy Favoring Settlements and the Policy Favoring Restitution

The victims received substantial benefit from the settlement. They obtained payment quickly, without litigation. They were also relieved of any dispute as to the amount of damages, especially the identified special damages.

There is a substantial public benefit to the availability of insurance funds in

a prompt civil settlement, while there is also public policy in favor of criminal restitution. The prompt availability and finality of a civil settlement, however, also promotes the policy of criminal 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. The court of appeals decision sets up a disincentive for settlement. A tortfeasor will now be compelled to instruct his or her insurer to decline to settle any civil claim, until after a criminal restitution order has been entered, so that the civil settlement may encompass the same special damages.[5] Thus, while the court of appeals decision may have been mindful of the policy favoring restitution to victims, it actually delays their compensation. *Huml* recognized the 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.

[5] In light of the court of appeals decision, counsel now routinely sends such written demands to insurance carriers.

The court of appeals decision focuses on the lack of extrinsic evidence offered by Muth at the restitution hearing, without considering the unintended consequences. While the restitution statute contemplates a simple review of the unambiguous language of a settlement agreement, the court of appeals decision now requires a far-reaching evidentiary hearing in every case. Such a hearing would involve not only testimony of victims, but also of insurance adjusters, employers, accountants, repairpersons, hospital representatives, doctors, and so on. In short, when the language of an unambiguous civil release no longer controls the meaning of that release, there will be onerous litigation.

The court of appeals has, essentially, crafted 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. Stat. §973.20. Moreover, the "made whole rule" approach fails in an important respect. The made whole rule under *Rimes, et al*, 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.

While the court of appeals decision was well-meant, it created a situation where crime victims are less able to access available insurance funds without unnecessary litigation.

CONCLUSION

The defendant-appellant-respondent-cross-petitioner, therefore, prays that this court reverse the decision of the court of appeals and the trial court, and find that the restitution order is barred in its entirety as a double-recovery by the victims.

THE RESTITUTION STATUTE DOES NOT ALLOW RECOVERY OF THE LOST INCOME OF A VICTIM'S SPOUSE

The court of appeals held that Wis. Stat. §973.20 (hereinafter, the restitution statute) does not apply to wage loss of the spouses of victims under Wis. Stat. §766.31 (hereinafter, the marital property statute). While the court of appeals followed precedent in determining that the legislature did not intend to extend the restitution statute to victims' spouses, the state argues that the precedent should be reversed, for three reasons. First, the controlling precedent, *State v. Johnson*, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284, rejected an "undeveloped" argument by the state. Second, the marital property statute requires an extension of the meaning of the restitution statute. Finally, public policy favors extending the restitution statute.

The state minimizes *Johnson*, implying that it did not really address the issue. *Johnson*, however, tersely but squarely addressed the issue on its merits, correctly finding that the legislative intent was to limit the restitution statute to the named parties, and not extend restitution to marital property interests:

> However, Johnson's contest over the $555 that W.L. lost in wages for the days he took off from work to accompany
> J.M.K. to court appearances stands on different footing than does the security system due to the statutory provisions that specifically identify who may collect lost wages as restitution. WISCONSIN STAT. § 973.20(5)(b) allows a "person against whom a crime ... was committed" to recover such lost wages as restitution. W.L. is not such a person, and there is no comparable provision that applies to a child-victim's stepparent. Further, because *887 J.M.K.'s stepfather's lost wages were his own, we agree with Johnson that J.M.K.'s stepfather has not compensated any victim for those lost wages

> within the meaning of § 973.20(5)(d).
>
> 12 ¶ 23 The circuit court held that W.L.'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. 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*, 256 Wis.2d at paragraphs 22, 23.

Johnson correctly analyzed the intent of the restitution statute. It does not specifically provide for spousal damages; therefore, they are excluded. The marital property statute broadly outlines the basis of property rights; whereas the restitution statute specifically names the parties who are entitled to compensation. The court of appeals correctly noted that in those instances where the legislature intended to extend rights of action by virtue of the marital property statute, it has done so specifically. It does not do so in the restitution statute. Moreover, accepted canons of statutory interpretation require application of a specific statute over a general statute, *generalia specialibus non derogant*. See, e.g. *Green v. Bock Laundry Mach. Co*., 490 U.S. 504, 524-26 (1989); *Crawford Fitting Co. v. J. T. Gibbons, Inc*., 482 U.S. 437, 444-45 (1987).

Finally, the state relies on public policy arguments favoring broad application of restitution in criminal cases. While Muth agrees that there are excellent policy reasons to extend the restitution statute, the court of appeals

correctly determined that this is a matter for the legislature. Muth acknowledges the Supreme Court's role in making policy decisions concerning the application of the law. When the legislative intent is clear, however, this court should defer to the policy choices inherent in the legislation.

The decision of the court of appeals as to the lost income of the victims' spouses should be affirmed.[6]

Signed and dated this 10th day of February, 2020.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

___/*s/Andrew Mishlove* ___
BY: Andrew Mishlove
Attorney for the Defendant-Appellant-Respondent, Cross-Petitioner for Review
State Bar No.: 1015053

[6] The court of appeals also correctly noted (Decision, p.10, fn.3) that the amount of spousal income that might be attributed to the victims was miscalculated, and actually doubled by the trial court, as the marital property stature allows for an undivided one-half interest, rather than a full interest. Therefore, even if this court reverses the court of appeals and awards spousal lost income, the correct amount of marital property spousal wages would $4540.00. In that instance the correct total amount of restitution would be $38,730.42.

CERTIFICATION

I certify that this brief and petition 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 5,851 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 10th day of February, 2020.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____*/s/Andrew Mishlove*____
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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 it 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.

Signed and dated this 10th day of February, 2020.

Respectfully submitted,
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APPENDIX

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