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**STATE OF WISCONSIN
IN THE SUPREME COURT**

No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN M. MUTH,

Defendant-Appellant-Cross-Petitioner.

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

**RESPONSE BRIEF OF THE
DEFENDANT-APPELLANT-CROSS PETITIONER**

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In a Restitution Proceeding, the Marital Property Law Does Not Provide a Vehicle for a Crime Victim to Claim the Lost Wages of a Non-Victim Spouse.

Introduction

The state argues that in a criminal restitution proceeding under 972.30, the marital property¹ law provides a vehicle for the crime victim to claim the lost wages of the non-injured spouse. The restitution statute, however, clearly excludes losses to a child-in-law who does not reside with the deceased. The state, citing no authority, argues from a perspective of public policy and legislative interpretation. Yet, no other marital property jurisdiction has adopted such a rule. In the absence of a clear legislative mandate or a body of precedent, such a policy change is a matter of legislative, not judicial determination. Hence this court should affirm that part of the court of appeals decision.

Relevant Statutes

It is useful to review the relevant statutes, which tie criminal restitution to the law of civil damages. Wisconsin's restitution statute,

¹ We will use the term "marital property" as synonymous with "community property" herein.

Wis. Stats. sec. 973.20 (the restitution statute) was enacted in 1987 and is patterned after the federal Victim Witness Protection Act (VWPA). See *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(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...

950.02 (4)(a) "Victim" means any of the following:

1. A person against whom a crime has been committed.

4. If a person specified in subd. 1. is deceased, any of the following:

- a. A *family member* of the person who is deceased.
- b. A person *who resided* with the person who is deceased.

950.02 (3) “*Family member*” means spouse, minor child, adult child, sibling, parent, or legal guardian.

Wis. Stats. sec. 766.31, (the marital property statute) enacted in 1985, in pertinent part is as follows:

(1) General. All property of spouses is marital property except that which is classified otherwise by this chapter and that which is described in sub. (8).

(2) Presumption. All property of spouses is presumed to be marital property.

(3) Spouse's interest in marital property. Each spouse has a present undivided one-half interest in each item of marital property, subject to all of the following:

(4) Classification of income. Except as provided under subs. (7)(a), (7p) and (10), income earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property.

The Spouse of a Crime Victim is Not a Victim.

The state emphasizes that restitution should be paid to a family member under the statute. “Family member,” however, means spouse, minor child, adult child, sibling, parent, or legal guardian. Sons and daughters-in-law are omitted. The specific inclusion of the persons listed entails exclusion of those not listed, such as sons-in-law. *Expressio unius est*

exclusio alterius, See *State v. Delaney*, 259 Wis.2d 77, 658 N.W.2d 416 (2003).² The legislative language is explicit, indicating clear policy choices. The state argues that this court should inappropriately revisit those policy choices.

**The Marital Property Law is Not a Means
to Extend the Language of the Restitution Statute**

The state argues that the marital property law provides a means for a crime victim to make a direct claim for the lost wages of her spouse. This argument is necessary to the state, as the restitution statute does not allow a claim by the non-victim spouse himself. The language of the marital property law, at first glance, seems to imply a right of direct action on the part of an injured spouse for the lost wages of a non-injured spouse. That, however, has never been held to be the case, and it is inconsistent with the plain meaning of the restitution statute. The state's argument, nevertheless, has allure; as, the public policies that favor the marital property statute and the restitution statute also support the notion that a criminal defendant should repay lost income from the non-victim spouse. The state strenuously attempts to forge an interpretation of the restitution statute that is in keeping

² The exception to this would be a daughter or son-in-law who resides with the deceased under Sec. 950.02(4)(b).

with those policies. The problem with the state's argument is that it advances policy choices that are not in the legislation. The state seeks to dramatically expand the damages available to crime victims, and by inference tort victims. In effect, the state is advocating judicial legislation.

The state cites *State v. Wiskerchen*, 385 Wis.2d 120, 921 N.W.2d 730 (2019) in support of its novel use of statutory interpretation to expand criminal restitution. *Wiskerchen*, however, is very far afield. In *Wiskerchen*, this court considered the factual evidence of the loss of items in a burglary, and whether those items may have been stolen by the defendant in a different burglary. The court considered whether the statutory language of “crimes considered at sentencing” included uncharged offenses that were not read in. While *Wiskerchen* is generally instructive in the policies underlying the restitution statute and holds that the statute should be construed in accordance with those policies, it has no bearing on whether a crime victim may claim the lost income of a non-victim spouse, using the marital property statute. In fact, its holding indicates the contrary, as the court ultimately the court took a narrow view of the statute and did not allow consideration of other, uncharged, not read-in offenses. The court's holding affirming the

lower court's decision was factual in nature; as, the evidence supported the circuit court's finding that all of the losses related to the charged burglary. *Wiskerchen*, therefore, is of no help to the state.

The state cites *State v. Howard-Hastings*, 218 Wis.2d 152, 579 N.W.2d 290 (Ct. App. 1998). *Howard-Hastings*, similarly, provides no help to the state. The defendant was an ardent pacifist who cut down several telephone poles used to support antennae for Project ELF, the military project allowing communication with submerged submarines. He was ordered to pay restitution to the United States government for the damage. The defendant argued that Sec. 973.20 Stats. does not define the term "victim," and thus, the United States was excluded as a victim. The court found that the plain meaning of the word victim included governmental entities. Moreover, the court found that the definition of victim as a "person" under Sec. 950.02(4) Stats. explicitly included "all...bodies politic," under Sec. 990.01(26) Stats. *Howard-Hastings* was based on the plain meaning of the relevant statutes, and it eschewed any reference to policy or legislative intent. *Howard-Hastings* gives no support to the state's advocacy of an unprecedented expansion of restitution damages.

The state continues with *State v. Rouse*, 2002 WI App 107, 254 Wis.2d 761, 647 N.W.2d 286. In *Rouse*, the court awarded a bank the salaries paid to those bank employees for time spent investigating a series of forgeries. The defendant argued that there was no loss to the bank, as the salaries would have been paid anyway. The court of appeals agreed that the salaries would have been paid anyway, but that the lost services of the employees for the time spent investigating the forgeries was an item of special damages under the restitution statute. The court of appeals cited seven cases from various jurisdictions in support of the majority rule that the value of lost employee services was an item of special damages. Contrary to the state's assertion that *Rouse* reflects a "requisite broad reading," of the restitution statute, *Rouse* is in keeping with precedent on the law of damages. This is in stark contrast to the state's novel argument in this case. *Rouse*, therefore, gives no help to the state.

The state next turns to *State v. Canady*, 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147. *Canady* was a case on causation. In *Canady*, the defendant got in a scuffle police officers while being arrested for burglary.

A police officer found a pry bar on the ground near the defendant, and believing the defendant would grab the bar, the officer picked it up and tossed it out of reach. The pry bar hit and broke a glass door. The defendant argued that he should not pay restitution for the broken door, as it was the police who threw the pry bar. The trial court found that the damage to the door was caused by the “crime considered at sentencing,” or in civil terms, proximately caused by the defendant’s actions. In affirming this finding of fact, the court of appeals noted the broad interpretation of “crime considered at sentencing.” The court of appeals decision was in keeping with established criminal and civil law of damages and proximate causation. It is an extraordinary stretch to say that *Canady* has any bearing whatsoever on the issue of whether a crime victim can claim restitution for lost earning of a non-victim spouse.

The state’s conspicuous lack of any precedent on point is telling. That is, the state is arguing for something that is simply unprecedented.

The state failed to cite, and we found no precedent in any of the marital property states³ to support the state's interpretation of marital property law. There is no body of law to the effect that a crime victim can recover the lost earnings of her non-victim spouse under a marital property theory.⁴ The state's argument entails a dramatic policy decision, based on no authority other than the state's policy arguments and strained interpretations of case law. It may be good policy to allow a crime victim to make a direct claim for the lost earning of a non-victim spouse, just as it may be good policy to allow a civil tort injury victim to make a direct claim for the lost earning of a non-injured spouse. It is, however, a matter for the legislature, not the courts.

As the criminal restitution statute explicitly invokes civil damages as the measure of restitution,⁵ we would expect to find precedent in the law of civil damages. Yet again, the state failed to cite, and we found no precedent in any of the marital property states to support an argument that an injured

³ "Opt out" community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. "Opt In" community property states are Alaska, South Dakota, and Tennessee. <https://www.nolo.com/legal-encyclopedia/marriage-property-ownership-who-owns-what-29841.html>.

⁴ An unpublished California decision, *People v. Burke IV*, 2018 WL 1939809, supports the state's decision under California's far more expansive statutory language.

⁵) Sec. 973.20(5)(a) Stats.: 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...

tort victim has a direct claim for the lost earnings of a non-injured spouse. If this court finds that the marital property law confers such a direct right of action by a victim for damages suffered by the non-victim spouse, it will dramatically expand the damages available to plaintiff in tort actions. The language of Sec. 973.20(5)(a), that provides that restitution may be ordered for damages recoverable in a civil action, provides the connection that links the concepts of criminal restitution and civil damages. A decision in one area, thus, necessarily can be applied to the other area.

This case is significant because it involves the nexus between criminal restitution, civil damages, and the law of property. We would, therefore, expect that there would be applicable precedent in either the civil or criminal arenas from one of the other community property states. The lack of such precedent is a testament to the audaciousness of the state's position. While it seems innocuous at first glance - merely an application of the marital property statute – it is without authority. The state is asking this court to go into uncharted waters. While that may be a good idea from a policy standpoint, it is not an appropriate exercise of this court's authority.

The state arduously seeks to distinguish and minimize *State v. Johnson*, 2002 WI App 166, 256 Wis.2d 871, 649 N.W.2d 284, stating that Johnson does not “control” this case. In a sense, the state is right. The court of appeals in this case was not free to ignore *Johnson*. This court, however, is free to overrule *Johnson*. So, the larger issue is not whether *Johnson* controls this case, but rather whether its reasoning is applicable and whether it was correctly decided. That is, was *Johnson*’s refusal to apply the marital property law to the restitution statute proper? In *Johnson*, the defendant was convicted of one count of false imprisonment and one count of disorderly conduct, for participating in forcing two minor girls into a car, refusing to release them and, over the course of several hours, harassing and mistreating them. One of the victims, J.M.K., lived only five or six houses from Johnson's parents' house. J.M.K. lived with her mother and stepfather. One of the restitution items claimed was the stepfather’s lost wages for attending court proceedings. The state argued that the lost wages were recoverable by J.M.K.’s mother as marital property. The court of appeals stated that the marital property law did not allow a victim (the mother) to make a marital property claim for a non-victim’s lost wages:

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, supra, at pp. 23 (emphasis added).

The state offers five reason why *Johnson* does not control. On close analysis, these reasons display a fundamental misunderstanding. The state repeatedly distinguishes *Johnson*'s holding that a stepparent is not a parent under the restitution statute. That, however, is not the holding that is relevant to this case. Rather, as an alternative theory in *Johnson*, the state proposed that the lost wages of the stepfather were directly recoverable in restitution *by the mother as marital property*. The legal issue, therefore, in *Johnson* was identical to this case, although the characters in the tragedy are different.

The state's five reasons to ignore *Johnson* are as follows. First, the state asserts that Tammy Kempf's daughters in this case are "victims" within the meaning of the restitution statute. The state does not elaborate on why

that matters, as the mother in *Johnson* was also a victim within the meaning of the statute, who was seeking to recover her non-victim spouse's lost earnings. The state's first distinction fails. Second, the state asserts that in *Johnson* the issue was whether the stepfather could directly collect his lost wages as a victim. This is a false understanding, as the court stated: "*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.*" So, the issue was not whether the stepfather had a direct claim, but rather whether the mother who was a victim could make a claim for the stepfather's wages. The state's second distinction is invalid. Third, the state argues that since that *Johnson* focused on the definition of "parent" under the restitution law, where there is no presumption in favor of the classification of marital property. Again, this argument is a *non sequitor*, as the relevant holding in *Johnson* is that the marital property law does not provide a vehicle for victims to claim the lost income of non-victim spouses. Fourth, the state argues that the "slippery slope" concerns expressed in *State v. Gribble*, 2001 Wi App, 248 Wis. 2d 409, and echoed in *Johnson* at pp. 23 (emphasis added) are inapplicable in this case. Again, the state confuses the issue of the definition of victim with the issue of whether the martial

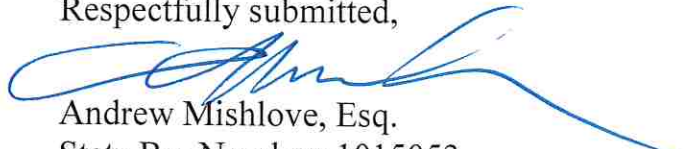
property statute allows compensation for losses to a non-victim. Moreover, contrary to the state's assertion, paragraph 23 in *Johnson*, (quoted above) neither mentions nor echoes *Gribble*. Rather, its holding is explicitly based on the plain language of the statute: "...*because there is no language in the restitution statute or in WIS. STAT. § 950.02(4)(a) suggesting that restitution be permitted through such an indirect route...*" (emphasis added). The state's fourth argument is a straw man, failing to address the real issue raised in paragraph 23. The state's fifth and final argument against *Johnson* is that it rejected an "undeveloped" argument by the state. The state's argument was undeveloped, and *Johnson's* holding was terse. However terse, *Johnson's* holding was well-reasoned and correct: the marital property law does not provide a vehicle for the lost income of non-victim spouses to be claimed directly by victim spouses. The state has now developed its argument; yet, it has failed to show that *Johnson's* interpretation of the statutory language was incorrect. *Johnson* was correctly decided.

Conclusion

The state's interpretation of the restitution statute is invalid, relying on inapplicable precedent, thin arguments about legislative intent, and strained statutory interpretation. While the state's policy arguments are attractive, these policy decisions are properly the purview of the legislature, not this court. The state would have this court dramatically expand restitution beyond that envisioned in the statute, with similar consequences for civil damages. The decision of the court of appeals as to the lost wages of the spouses of the crime victims should be affirmed.⁶

Dated this 28th day of February, 2020.

Respectfully submitted,



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⁶ The state contests the footnote in the court of appeals decision stating that the correct measure of the victim's marital property interest in her husband's wages would, in any event, be one-half of the wages. The state focuses on the statutory clause "undivided," arguing therefore, that the full amount of lost wages is the proper measure. We dispute this calculation, as the state's reasoning amounts to an award for a non-victim who has an interest in his own wages, and it ignores the statutory "1/2" clause.

**CERTIFICATION UNDER § 809.19(d) OF CONFORMITY
WITH § 809.19(8)(b) and (c)**

I, Andrew Mishlove, hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 3,231 words according to the word count function of the word processor available in Word.

Dated this 28th day of February, 2020.

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CERTIFICATION UNDER § 809.19(12)(f)

I, Andrew Mishlove, hereby certify that I have submitted an electronic copy of the brief which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed.

A copy of this certificate is served with the paper copies of this brief filed with the court and served on all opposing parties no later than March 2, 2020.

Dated this 28th day of February, 2020.

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