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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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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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.

As a direct result of Muth killing their mother, H.M. and K.M. lost income that, under Wisconsin law, belongs equally to them as it does to their husbands. Muth nevertheless maintains that his victims should not be able to recover their lost marital income as restitution.

Consider what Muth does not dispute: Muth does not dispute that H.M. and K.M. are victims of his crime, and accordingly able to recover restitution. Muth does not dispute that lost income is recoverable as restitution. And Muth does not dispute that—all other facts the same—if H.M. and K.M. were the sole breadwinners in their marriages, they would be able to recover *all* of the requested lost income as restitution.

So, according to Muth, division of labor within a victim's marriage should determine the lost income she may recover as restitution. This runs counter to the plain language and purposes of our restitution and marital property statutes.

Muth's responses are, in short: (1) the State's arguments are driven by policy instead of statutory language; (2) no such "body of law" exists in other community property states, and so holding here would expand the law; (3) the Court of Appeals' decision in *Johnson* is not as distinguishable as suggested; and (4) the restitution case law the State discusses involved distinct questions. The State replies to each argument in turn.

A. The plain language and purposes of the restitution and marital property statutes permit restitution for lost marital income.

First, Muth's claim that the State's argument "advances policy choices that are not in the legislation," (Muth's Response Br. 5), rests on the premise that because the restitution statute does not *explicitly* discuss marital income—i.e., because it does not use words such as "marital property"—it does not permit recovery for lost marital income. This argument fails.

It fails first and foremost under the plain language of the restitution statute. The restitution statute specifically provides that a defendant may be ordered to pay "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) (emphasis added).

Under this statutory provision, "income" includes marital income. Why? Because our marital property statutes establish a legal presumption that all property of spouses, including income, is marital property. Wis. Stat. § 766.31(2)–(3). So, when H.M. and K.M.'s husbands lost income, H.M. and K.M. lost income.

Notably, though Muth argues that the State improperly relies on policy arguments instead of the "legislative language," (Muth's Response Br. 4), Muth himself does not address the provision permitting a court to order restitution for "income lost," or respond to the State's arguments that this provision permitted recovery of the lost marital income here.

(*See generally* Muth's Response Br; Muth's Initial Br. at 21–23.)[1]

Insofar as his position suggests that the State improperly relies on policy to read "income" as including marital income, his argument encounters another problem: "Statutory purpose is important in discerning the plain meaning of a statute." *State v. Wiskerchen*, 2019 WI 1, ¶ 21, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted). This Court therefore "favors a [statutory] construction that fulfills the purpose of the statute over one that defeats statutory purpose." *Id.* Interpreting the "income lost" provision to include marital income serves to compensate crime victims. *Id.* ¶ 22. Interpreting it to *exclude* marital income does not. Instead, as this case demonstrates, interpreting "income" to exclude marital income means that some victims may recover lost income as restitution, and others may not, depending on division of labor within a victim's marriage.

Muth ultimately asks this Court to read "income" more narrowly in the restitution statute than it is read in our marital property statutes—to conclude that when the Legislature added the "income lost" restitution provision one year after our marital property laws took effect, it wished to provide a *less* inclusive definition. Both this Court and the Court of Appeals have, however, repeatedly held that the restitution statute should be interpreted broadly, recognizing that restitution is the rule, not the exception. *See, e.g., Wiskerchen*, 385 Wis. 2d 120, ¶ 22; *State v. Canady*, 2000 WI App 87, ¶ 12, 234 Wis. 2d 261, 610 N.W.2d 147. A broad and

[1] Muth neither confronts this statutory provision, nor cites to it directly. The only time it is referenced are when he quotes from *Johnson*. (Muth's Response Br. 12; Muth's Initial Br. 21–22) (quoting *State v. Johnson*, 2002 WI App 166, ¶¶ 22–23, 256 Wis. 2d 871, 649 N.W.2d 284).)

liberal reading of the "income lost" provision encompasses marital income.

Relatedly, in a response portion of his initial brief, Muth asserts that, pursuant to the cannon of statutory interpretation of *generalia specialibus non derogant*—the rule that the specific controls over the general—the specific restitution statute controls over the general marital property statute. (Muth's Initial Br. 22.) But that cannon concerns matters where "*conflicting* provisions cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (emphasis added). No conflict exists between the restitution and marital property statutes, and that cannon is therefore inapplicable. Only Muth asks this Court to read conflict into the statutes.

Muth misses that a court has a duty to pursue harmonization within two statutes that are alleged to conflict in a way that gives effect to the legislature's intent in both statutes. *See City of Madison v. State Dep't of Workforce Dev., Equal Rights Div.*, 2003 WI 76, ¶ 11, 262 Wis. 2d 652, 664 N.W.2d 584. Here no conflict exists, and the two statutes are easily harmonized by concluding income lost due to a crime has the same meaning as income earned in a marriage.

On top of the "income lost" provision, the restitution statute also provides that a court may order a criminal defendant to pay "all special 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). This is itself a significant, broad provision; it means a court may order restitution for a victim's "actual pecuniary losses." *State v. Rouse*, 2002 WI App 107, ¶¶ 7–8, 254 Wis. 2d 761, 647 N.W.2d 286.

Though he does not make clear why it matters here, in discussing the relevant statutes, Muth now also places weight on the "resided with" definition of "victim" where the "victim" is deceased. (Muth's Response Br. 3–4.) If he suggests that this is a requirement for a family member of a deceased person to constitute a "victim," he is wrong.

Wisconsin Stat. § 950.02(4)(a)4 provides that if a "victim" is deceased," then a "victim" is "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." So, that statute sets up alternative definitions, not one definition with multiple components. The statutory definition of "family member" does not require that the person resided with the deceased victim. Wis. Stat. § 950.02(3).

Muth continues to emphasize that Kempf's sons-in-law are not "victims." Kempf's sons-in-law were not seeking restitution—their wives, unquestionably victims, sought restitution. Muth also argues that even if marital income could be ordered as restitution, it should only be "one-half" of the total marital income, because the marital property statute gives each spouse a "present undivided one-half interest in each item of marital property." (Muth's Response Br. 15 n.6; Muth's Initial Br. 23 n.6); *see also* Wis. Stat. § 766.31(3). This misunderstands marital property.

Marital property means shared ownership; the "one-half interest" component of the "present undivided one-half interest in each item of marital property," Wis. Stat. § 766.31(3), becomes relevant when one spouse dies, or dissolution of the marriage occurs. *See* Wis. Stat. §§ 861.01, 766.76; *see also Matter of Estate of Lloyd*, 170 Wis. 2d 240, 252, 487 N.W.2d 647 (Ct. App. 1992) ("At death, a spouse may freely dispose of only the one-half interest he or she has in each item of marital property.")

Muth's victims sought restitution for income that, under the law, was as much a loss to them as it was to their husbands. This Court should conclude that a circuit court may order restitution the family member of a deceased victim for lost marital income.

B. A lack of analogous case law is unsurprising, and Muth's slippery slope concerns are unavailing.

Second, beyond his arguments about the State's interpretation of Wisconsin's restitution statute, Muth asserts that he has found no out-of-state "body of law" holding that a "crime victim can recover the lost earnings of her non-victim spouse under a marital property theory." (Muth's Response Br. 9–10.) Notably, however, Muth points to no out-of-state case law holding that a crime victim cannot so recover. The only case he identifies is an unpublished California decision that he acknowledges—albeit applying California law—*supports* the State's position. (Muth's Response Br. 9 n.4) (citing *People v. Burke IV*, No. D072802, 2018 WL 1939809 (Cal. Ct. App. Apr. 25, 2018).

It is no surprise that no ample out-of-state case law exists. Wisconsin is only one of nine states with laws presuming property is marital property. Loren E. Mulraine, *Collision Course: State Community Property Laws and Termination Rights Under the Federal Copyright Act—Who Should Have the Right of Way?* 100 Marq. L. Rev. 1193, 1212–13 (2017).[2] Additionally, of those nine—though others now have statutes addressing communal property—Wisconsin is the *only* state to become a marital property state through

[2] The others are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Id.*

legislation itself, instead of through common law. 1A Wis. Prac., Methods of Practice § 24:1 (5th ed.).

Muth also declares that 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 [sic] in tort actions." (Muth's Response Br. 10.) He provides no support for his proposition, and it misunderstands the State's argument.

The State does not argue that the "special damages" provision permits a victim to recover "damages suffered by the non-victim spouse"; the State argues that a crime victim may recover for her own losses, which includes her lost marital income. Lost income is a common special damage. *See, e.g. State v. Stowers*, 177 Wis. 2d 798, 805, 503 N.W.2d 8 (Ct. App 1993) (discussing "loss of time and earnings" as a special damage). And, for example, the marital property statute itself provides that where a married person receives recovery for personal injury, the amount of that recovery "attributable to loss of income during marriage" is *not* individual property. Wis. Stat. § 766.31(7)(f). Moreover, the "special damages" provision is only one provision in the restitution statute; the restitution statute also provides for the recovery of "income lost." Wis. Stat. § 973.20(5)(b). That provision has no bearing on the scope of Wisconsin tort law.

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

Third, Muth's arguments about *Johnson* are unpersuasive. Muth argues that the fact that *Johnson* concerned whether a stepfather constituted a "parent," and accordingly, a "victim," for restitution purposes, is irrelevant,

because that was a separate analysis from the Court's marital property analysis. (Muth's Response Br. 12–14.)

That *Johnson* and this case are different is the very point the State makes: *Johnson* concerned whether the victim's stepfather could recover restitution, including his lost wages. *State v. Johnson*, 2002 WI App 166, ¶ 1, 256 Wis. 2d 871, 649 N.W.2d 284. If the Court of Appeals had concluded that "parent" included a stepparent, such that the stepfather was a "victim," it presumably would not have needed to consider a marital property argument, because the stepfather would have been able to recover restitution as the "victim."

Because, however, it found no support for the idea that "parent" included a stepparent, it also considered whether restitution could be ordered to him under the provision permitting restitution to an "'*other person*' who has compensated a victim for a loss," and in turn, the undeveloped marital property argument the State made. *Id.* ¶¶ 20–23 (emphasis added) (citing Wis. Stat. § 973.20(5)(d)).

Here, however, Kempf's daughters *are* victims of Muth's crimes. They sought restitution for their lost marital income, and the court ordered that lost income paid to them—not to their husbands. (*See* R. 78:4, Pet-App. 116 (circuit court explaining that restitution was ordered to H.M. and K.M.); R. 78:14, Pet-App. 126 (re-affirming that order).)

Muth suggests that *Johnson* concerned "whether the mother who was a victim could make a claim for the stepfather's wages." (Muth's Response Br. 13). But *Johnson* involved the validity of an order to pay restitution based on a request submitted by the victim's stepfather for his own lost wages. *Johnson*, 256 Wis. 2d 871, ¶ 3. To be clear, the Court of Appeals' decision stated that the final restitution order (for multiple items, including the stepfather's lost wages) required the defendant to pay restitution to the victim's "mother and

stepfather, on behalf of [the victim]." *Id.* ¶ 6. But the Court of Appeals framed both the question and its analysis as whether the court had authority to "reimburse the victim's *stepfather* for the expenses he incurred. . .[and] his lost wages." *Id.* ¶¶ 1, 6 (emphasis added). Here, however, daughters of the deceased, who are unquestionably victims of Muth's crime, sought their lost marital income.

In the response portion of his initial brief, Muth also asserts that the Court of Appeals in *Johnson* "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." (Muth's Initial Br. 22.) He provides no citation or support for this premise, and *Johnson* did not so hold. In the single paragraph of *Johnson* addressing the undeveloped marital property argument, the Court of Appeals discussed the language of the restitution and crime victim rights statutes; it did not discuss any other instances of application of our marital property laws. *See Johnson*, 256 Wis. 2d 871, ¶ 23.

Ultimately, as Muth acknowledges, the Court of Appeals' decision in *Johnson* does not bind this Court. (Muth's Response Br. 11.) *Johnson* also does not provide compelling persuasive authority, because the Court of Appeals—through no fault of the Court—had before it only an undeveloped marital property argument.

D. Related case law further supports that lost marital income may be recovered as restitution.

Fourth, Muth points to distinctions between the facts and issues presented in the other restitution cases the State references, and the facts and issues here, and argues that those distinctions show the other cases are unhelpful. (Muth's Response Br. 5–8.) Muth misses the point.

Naturally, those cases involve different facts and questions. They are nevertheless important because they show that this Court and the Court of Appeals have repeatedly emphasized the need to interpret the restitution statute broadly and liberally. (State's Initial Br. 28–31.)

Without repeating all of those holdings, a final discussion of this Court's recent *Wiskerchen* decision bears mention: Muth argues that this Court took a "narrow view" of the restitution statute in *Wiskerchen*, as it "did not allow consideration of other, uncharged, not read-in offenses." (Muth's Response Br. 5.) But the plain language of the restitution statute explicitly defines and limits what may be considered a "[c]rime considered at sentencing" and a "[r]ead-in crime." Wis. Stat. § 973.20(1g)(a)–(b).

Contrary to Muth's suggestion, *Wiskerchen* shows this Court's recent reaffirmance that the restitution statute should be broadly and liberally construed. All justices agreed that the court properly awarded the restitution. *See generally* 385 Wis. 2d 120. The opinion of the Court emphasized that the restitution statute's purpose should be considered in discerning its plain meaning. *Id.* ¶¶ 21–23.

Justice Ann Walsh Bradley, joined by Justice Abrahamson, concurred; though her analysis differed from the majority's, she too stressed that courts should interpret the restitution statute "broadly and liberally." *Id.* ¶ 60 (Ann Walsh Bradley J., concurring) (citation omitted).

Justice Rebecca Bradley also concurred; she focused on a "textual interpretation of the restitution statute," emphasized that such an interpretation required consideration of context, and concluded that the circuit court had authority to order restitution under Wis. Stat. § 973.20(1r) (permitting restitution without discussion of a "crime considered at sentencing"), and Wis. Stat.

§ 973.20(13)(a)5. (permitting consideration of "[a]ny other factors which the court deems appropriate"). *Wiskerchen*, 385 Wis. 2d 120, ¶¶ 68–76 (Rebecca Grassl Bradley, J., concurring).

These analyses, and the lack of dissent, reflect the scope and breadth of the restitution statute. This Court should again apply a broad and liberal reading here.

As a result of Muth killing their mother, both of Kempf's daughters lost income. But under the Court of Appeals' holding, only one daughter may recover lost income as restitution. Under that holding, a victim like K.M.—whose husband is the breadwinner—has to choose between foregoing the support of her spouse at proceedings related to the death of her family member, or losing her family's only income during those times. The plan language and purposes of the restitution and marital property statutes show that this is not where the Legislature intended to draw the line.

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 16th day of March 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 2997 words.

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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 16th day of March 2020.

_____
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