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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-Respondent-Cross-Petitioner.

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

REPLY BRIEF OF THE DEFENDANT-APPELLANT-CROSS PETITIONER

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In a criminal restitution proceeding where the crime victims have accepted and received a prior civil settlement for damages including "lost wages, expenses…" and the defendant is asserting an accord and satisfaction of the subsequent restitution claim for lost wages and 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?

Summary of Argument

A restitution order may not provide for a double recovery. The restitution order in this case, however, does just that. There was a prior civil accord and satisfaction as to the lost wages and expenses, and a restitution order for the same items.[1]

When crime victims enter into a civil settlement that unambiguously encompasses "lost wages and expenses," there is an accord as to the amount of those lost wages and expenses. The accord obviates any further litigation as to the amount of the lost wages and expenses. A restitution order that requires payment of additional lost wages and expenses, thus, provides for a double recovery. The state agrees that a double recovery is prohibited. The state, however, ignores the accord as to the amount of damages, and places the burden on Muth to produce extrinsic evidence itemizing the special damages. The state describes this as proof of the

[1] Although the court of appeals characterized Muth's defense only as setoff, Muth also asserted the defense of accord and satisfaction. (R: 49).

"proportion" of the civil settlement earmarked for lost wages and expenses. The state, however, fails to address Muth's central assertions: double recovery is prohibited; there was a written accord specifically identifying lost wages and expenses, hence no itemization of those damages is required; and, extrinsic evidence is inadmissible as to the meaning of an unambiguous civil contract. The state agrees that a restitution order may not require a double recovery. The question is whether the order in this case violates that rule. The state argues, under *State v. Walters*, 224 Wis.2d 897, 591 N.W.2d 874 (Ct. App. 1999), that accord and satisfaction does not apply to restitution proceedings.

Accord and Satisfaction Applies to Restitution Proceedings

Wis. Stat. §973.20(14)(b)[2] provides that a criminal defendant "may assert any defense that he or she could raise in a civil action for the loss sought to be compensated…"

Thus, Muth asserted both setoff and accord and satisfaction as defenses. This case rests on the nature of accord and satisfaction in a restitution proceeding. Accord and satisfaction is not a defense based on the itemization of 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.

[2] Hereinafter, "the statute."

> *Chance, Principles of Mercantile Law* 101 (P.W. French ed., 13th ed. 1950). *Black's Law Dictionary* (online) 11th Ed. 2019.

In *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997) this court considered which of the civil defenses were intended to be available in a restitution proceeding. Thus, this court held that the statute of limitations was not a defense within the meaning of the "any defenses" language of the statute, but it specifically recognized accord and satisfaction as allowed by the statute. The principle was reiterated by this court in *Huml v. Vlazny 293* Wis.2d 169 716 N.W.2d 807 (2006).

After *Sweat,* but prior to *Huml*, the court of appeals considered *Walters*. *Walters* held that since the restitution cause of action belongs to the state, it cannot be waived or settled by the victims. *Walters* characterized accord and satisfaction as a complete bar to a civil action, and thus inapplicable to restitution proceedings, since victims cannot waive rights that belong to the state. As to restitution proceedings, *Walters* abrogated the defense of accord and satisfaction.

The state, in a hyperbolic slippery slope argument, illustrates the principle. The state argues that if Muth is correct that crime victims can settle interests that belong to the state, then crime victims would have the authority to bar homicide prosecutions. *State's Response Brief*, p.26, ¶ 3.

This slippery slope argument is absurd, as restitution is based upon the victim's specific pecuniary loss, whereas homicide is an offense against the peace and dignity of society at large. Although restitution is a right that belongs to the state, it is contingent upon the property interests of the victims. The state concedes

the point that victims can enter into contracts that take away the restitution rights of the state:

> Under Walters, if a victim entered an agreement to cover particular special damages in specific amounts, and the defendant can prove that the victims are then also seeking those specific damages in the same amounts as restitution, that could indeed prevent a circuit court from ordering restitution for those same special damages.
>
> *State's Response Brief*, p. 24, ¶2.

Accord and satisfaction does not entail a crime victim bargaining away the policy interests of the state in criminal restitution. Rather, the accord resolves any dispute as to the amount of damages, and it sets the damages as the amount that was paid, the satisfaction. The accord takes the place of an itemization of those damages. It is, in effect, no different than if the victims submitted an itemized statement of damages in a civil settlement, and then submitted the same statement of damages in a restitution proceeding. In both instances, the rights of the state are contingent upon the victims' property interests. The state's entire argument ignores the definition and purpose of the element of accord, which resolves the issue of "those specific damages in the same amounts as restitution." Accord and satisfaction is not a bar to restitution that infringes on the rights of the state. It is, rather, simply a contractual right of the victims to resolve the issue of the amount of damages. It is the amount of damages, as set by the accord, that defines the rights of the state.

Muth's argument is admittedly at odds with *Walters*. *Walters*, however, is distinguishable and requires clarification, as it should not have abrogated accord and satisfaction in restitution proceedings.

In an unfortunate *salvo*, the state maintains that this court should not address Muth's arguments regarding *Walters*, as Muth did not mention *Walters* in his petition for review. In support of this oblique attack, the state cites *State v. Sulla*, 2016 WI 46, ¶7 n.5, 369 Wis.2d 225, 880 N.W.2d 659, for the proposition that a party may not challenge an authority not also challenged in his petition for review. *Sulla*, of course, says nothing of the kind. The state confuses the distinction between issues raised in a petition for review and discreet arguments made regarding those issues. In *Sulla*, for example, this court considered the issue of whether a post-conviction motion could be denied without an evidentiary hearing. This court chose not to address the unrelated issues of ineffective assistance of counsel and judicial bias. *Sulla* cited *State v. Weber,* 164 Wis.2d 788, 476 N.W.2d 867 (1991), an instructive case. In *Weber*, the state petitioned for review of a decision of the court of appeals regarding the constitutionality of an automobile search. The petition asked this court to consider the general constitutionality of the search, although the parties' arguments were limited to the automobile search doctrine. This court, nevertheless, considered constitutional issues outside of the automobile search doctrine. In rejecting the motion for reconsideration, Chief Justice Heffernan stated,

> Defendant confuses legal issues with legal arguments. We write to clarify that the issues before the court are the issues presented in the petition for review and not discrete arguments that may be made, pro or con, in the disposition of an issue either by counsel or by the court.
>
> *Weber*, supra, at p.789.

The court also stated:

> Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court.
>
> *Weber, supr*a at p. 791.

In his petition for review, Muth asked this court to consider:

> In a criminal restitution proceeding where the crime victims have accepted and received a prior civil settlement for damages including "lost wages, expenses…" and the defendant is asserting an accord and satisfaction of the subsequent restitution claim for lost wages and 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?

Muth has not strayed an inch from this issue. The state's flanking attack is meritless and should be disregarded.

Now then, we consider *Walters.* Respectfully, *Walters* was mistaken in disallowing the accord and satisfaction defense in a restitution proceeding. First, the plain meaning of the "any defense" language of the statute allows the accord and satisfaction defense. This was explicitly recognized by *Sweat* and *Huml*. Second, the policy considerations relied on by *Walters* do not require abrogation of the defense in a restitution proceeding. Those considerations do, however, require that the accord agreement identify the specific items of damages. Third, in *Walters*, the agreement was vague, failing to identify any item of damages, thus leaving the court with no basis to determine if restitution was, in fact, redundant. The agreement in

this case is specific, identifying "lost wages" and "expenses."[3] *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 the defense. Thus, the state's glib assertion, that the distinction between *Walters* and this case is a "distinction without a difference," is invalid. The identification of an item of damages in the accord is a critical distinction. Fourth, *Walters* failed to consider that interests of the state in a restitution proceeding are contingent upon the property and contract rights of the crime victims. The only issue is whether the agreement must itemize the damages with exquisite particularity, or whether the victims' accord identifying the item of damages will apply. Finally, *Walters* did not recognize that the purpose of the accord element in accord and satisfaction is the resolution of any dispute as to the amount of damages. This court should clarify that accord and satisfaction is, as *Sweat* and *Huml* affirm, an available defense in a restitution proceeding, that the policies underlying the restitution statute require the language of the accord to identify the specific items of special damages, and that language to the contrary in *Walters* is withdrawn.

[3] Admittedly "expenses" is a somewhat vague term, but for more specific than the "all claims and damages" language of *Walters*.

Extrinsic Evidence is Not Required to Discern the Meaning of an Unambiguous Accord

The state's argument emphasizes that Muth elicited no evidence regarding the proportion of the lost wages and expenses that were paid in the civil settlement. The state necessarily implies that the extrinsic evidence rule does not apply to a restitution proceeding. Other than *Walters* (to the extent that it is applicable to the extrinsic evidence rule) the state has no authority for that proposition. Instead the state seeks to distinguish *Huml*, which reiterates the rule, since *Huml* related to post-probation civil proceedings. The state's distinction, however, does not relate to the issue at hand. *Huml* is still 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.

The state's rebuff of the applicability of the extrinsic evidence rule is really based on its position that the accord element of accord and satisfaction is not a factor in restitution proceedings. If we accept that accord and satisfaction applies to restitution proceedings, then the extrinsic evidence rule applies to interpretation of the accord. In this case, by specifying the items of damages, the accord was unambiguous. Extrinsic evidence was not only not required, it was inadmissible.

The Court of Appeals Decision Harms the Policy Favoring Settlements

The court of appeals decision will hamper the ability of crime victims to access insurance funds in civil settlements. Certainly, restitution law should not hamper crime victims in civil settlements, and such settlements are favored. *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.
>
> *Huml*, supra at paragraphs 47-49.

The state's position encourages defendants to instruct their insurers to require extensive itemization of all special damages in order to avoid a double recovery, or to delay settlement until such time as the special damages are itemized in a restitution proceeding. If a civil settlement may simply be re-litigated in a criminal restitution proceeding, the tortfeasor-defendant has no incentive to settle, and the victims will not be promptly compensated.

The state scoffs at these assertions in contradictory arguments. First, the state argues that a tortfeasor cannot instruct an insurer as to settlement of a civil claim. On the other hand, the state argues that a criminal defendant will, nevertheless, instruct the insurer to quickly settle the civil claim, in order to gain the

benefit of a mitigating factor at sentencing. Neither of these conflicting arguments is persuasive.

An insurer has an obligation to act in good faith to protect the interests of the insured pursuant to the terms of the insurance policy. Thus, if the policy undertakes to protect the insured from special damages arising from an accident, the insurer has to duty to do so. See, e.g. *Roehl Transport, Inc. v. Liberty Mutual Ins. Co*., 325 Wis.2d 56, 784 N.W.2d 542 (2010). An insurer that simply acquiesces to a double recovery of special damages is, arguably, acting in bad faith. An insured has a right to instruct the insurer to avoid such an outcome.

The state also proposes that, notwithstanding a potential double recovery for the victims, a defendant has incentive to use a civil settlement as mitigation at sentencing. If the state's position is followed to its conclusion, the court of appeals decision creates a situation that would require a defendant to acquiesce to a potential double recovery in order to gain favor with the sentencing court. Obviously, this creates due process issues. It is, however, the availability rather than the payment of insurance funds that is a mitigating factor at sentencing, the defendant having acquired the insurance coverage.

The state urges that Muth's arguments contemplate "(P)utting crime victims in the precarious position of having to preemptively decide whether to bargain away an ability to recover restitution for the convenience and benefit of criminal defendants who caused their harm." This rhetorical flourish is misleading. All that Muth is arguing is that crime victims may not recover the same damages twice.

Having settled their claims and received payment, they may not assert the exact same claims in a restitution proceeding.

The unstated, but obvious argument in this case is that the civil settlement was inadequate to compensate the victims, and therefore, they should have access to more funds. The problem with that argument is that it is the right of the victims to agree to the amount of their compensation in a civil settlement, in order to gain immediate and undisputed access to the available funds. They did so in this case, in an unambiguous accord that identified specific items of damages. They cannot later claim the same items in a restitution proceeding.

Conclusion

Ryan Muth, therefore, respectfully prays that this court reverse the decision of the court of appeals and vacate the restitution order of the circuit court.

Signed and dated this 16th day of March, 2020.

Respectfully submitted,

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s/Andrew Mishlove

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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 2,744 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 16th day of March, 2020.

Respectfully submitted,

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