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**STATE OF WISCONSIN  
COURT OF APPEALS**

DISTRICT 3

Case No. 2023AP001592 – CR and 2023AP001593 - CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

DAVID T. WAITS,  
Defendant-Appellant.

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*On Appeal from the Circuit Court for Marathon County, Branch III  
The Honorable LaMont Jacobson, presiding  
(Marathon County Case No.: 2019CF236 and 2018CF925)*

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**BRIEF OF PLAINTIFF-RESPONDENT**

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Kerri M. Puig, Assistant District Attorney  
State Bar No.: 1086256  
Marathon County District Attorney’s Office  
500 Forest Street  
Wausau, WI 54403  
(715)261-1111

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts, which are fully described in the parties' briefs.

### STANDARD OF REVIEW

A circuit court's decisions to award restitution and the amount of restitution awarded are discretionary decisions of the circuit court that the appellate court reviews under the erroneous exercise of discretion standard. *State v. Stone*, 2021 WI App 84, ¶ 9, 400 Wis. 2d 197, 968 N.W.2d 761.

### ARGUMENT

#### **I. The Circuit Court Properly Denied Mr. Waits from Arguing Contributory Negligence and Allowed Mr. Waits to Introduce Evidence of the Failure of the Victim to Have Medical Liability Insurance at the Restitution Hearing.**

Mr. Waits argues that the Court's refusal to allow him to introduce evidence of contributory negligence and evidence of the failure of the victim to have medical liability insurance violates Wis. Stat. 973.20(14)(b), and thus should be awarded a new hearing on the amount of restitution. However, Wisconsin courts have specifically addressed Mr. Waits' claim regarding contributory negligence.

Mr. Waits argues that Wis. Stat. § 973.20(14)(b) allows a defendant to assert any defense that he could raise in a civil action in a restitution hearing. However, the Wisconsin Supreme Court has addressed the limitations of Wis. Stat. § 973.20(14)(b). *See State v. Muth*, 2020 WI 65, 392 Wis. 2d 578, 945 N.W.2d 645 and *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997). “[D]efenses raised under Wis. Stat. § 973.20(14)(b) can go to the amount of restitution but not to whether there is liability for restitution.” *Muth*, 2020 WI 65, ¶ 19. The Wisconsin

Supreme Court concluded that Wis. Stat. § 973.20(14)(b) does not permit a defendant to “raise, after conviction, civil defenses to liability for financial loss.” *Sweat*, 208 Wis. 2d at 427. A defendant can only raise defenses related to the amount of restitution that can be ordered. *Id.* The Court found:

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. However, other civil defenses available in a civil action, such as contributory negligence, lack of jurisdiction, or lack of capacity to sue or be sued simply do not make sense in a restitution hearing.

*Id.* at 424. The Wisconsin Court of Appeals confirmed this reasoning in *State v. Knoll*, 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20.

To allow a defendant who has already been convicted of a crime to focus on the action of a victim to avoid restitution defeats this purpose because it permits him to evade responsibility for his own actions. The supreme court’s statement in *Sweat* that a defendant could not raise contributory negligence as a defense, while not essential to its decision, is consistent with the mandatory nature of restitution and its goals of rehabilitation and punishment, as well as those of compensating the victim.

*State v Knoll*, 2000 WI App 135, ¶16, 237 Wis. 2d 384, 614 N.W. 2d 20.

The Circuit Court specifically relied on *Knoll* in reaching its conclusion to exclude contributory negligence at the restitution hearing.<sup>1</sup> Therefore, the Circuit Court properly excluded contributory negligence at the restitution hearing.

Mr. Waits alleges that the Circuit Court failed to allow him to introduce evidence of the failure of the victim to have medical liability insurance. However, the Circuit Court did allow Mr. Waits to introduce evidence of the same.<sup>2</sup> The only question that counsel for Mr. Waits was not permitted to ask was whether the victim was aware that state law requires medical liability insurance because the Circuit Court found that was beyond the scope of the victim’s knowledge.<sup>3</sup> Therefore, Mr. Waits was not prevented from introducing evidence of the failure of the victim to have medical liability insurance.

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<sup>1</sup> R. 114 at 4: 3-8.

<sup>2</sup> R. 81 at 15: 22-25; 16: 1-9.

<sup>3</sup> R. 81 at 16: 10-14.

Mr. Waits, however, failed to prove that the victim was required to have medical liability insurance on her vehicle. Mr. Waits did not present any evidence of such requirement, other than asking the victim about it, which the Circuit Court found was outside the scope of her knowledge.

At a restitution hearing, the victim has the burden to prove the amount of loss sustained as a result of a crime considered at sentencing. Wis. Stat. § 973.20(14)(a). Once the victim's burden is satisfied, "the burden shifts to the defendant to explain why the circuit court should not impose restitution or why the amount thereof should be lower than the loss that was proved." *Muth*, 2020 WI 65, ¶ 16. Mr. Waits failed to prove why restitution should not be imposed or lowered due to the victim not having medical liability insurance, and that was his burden.

However, even if the victim had had medical liability insurance that covered her expenses or Mr. Waits' insurance company covered her expenses, Mr. Waits still could have been required to reimburse the insurance company as part of the restitution order. Wis. Stat. § 973.20(5)(d) says that the restitution order may require the defendant to reimburse any insurer who compensated a victim for a loss, if justice so requires. Therefore, any argument that an insurance company, whether the victim's or Mr. Waits', should have paid these bills is irrelevant because Mr. Waits could have been required to reimburse the insurance company, resulting in the same amount of restitution being ordered.

In conclusion, the Circuit Court properly denied Mr. Waits from arguing contributory negligence and Mr. Waits failed to prove that either insurance company should be responsible for restitution. Therefore, his request for a new restitution hearing should be denied.

## **II. Restitution is Not a Fine Under the Excessive Fines Clause.**

Mr. Waits argues that the restitution amount set amounts to an excessive fine. Mr. Waits cites the Eighth Amendment to the U.S. Constitution and Article 1,

Section 6 of the Wisconsin Constitution that both say excessive fines should not be imposed. Mr. Waits argues that the restitution ordered in this case is a fine. Restitution is not a fine.

“[A]t the time of the drafting and ratification of the Amendment, the word “fine” was understood to mean a payment to a sovereign as punishment for some offense.” *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). “[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government. *Id.* at 268.

Restitution is not payable to the government. Rather, it’s paid to the victim. “The restitution statute reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution.” *State v. Dziuba*, 148 Wis. 2d 108, 112-13, 435 N.W.2d 258 (1989).

Further, Wis. Stat. § 973.20(12) specifies that if the court orders restitution in addition to the payment of fines, costs, fees, and surcharges, that payments shall be applied first to restitution, then to pay fines, etc. The statute, by its plain language, clearly delineates that restitution is something entirely separate from a fine.

Because the restitution ordered in this case is not a fine, the excessive fines clause is inapplicable. Therefore, the Mr. Waits’ request for a new restitution hearing or modification of the restitution amount ordered should be denied.

### **III. The Circuit Court Properly Exercised its Discretion at the Restitution Hearing by Awarding Restitution for all the Medical Expenses and Lost Wages of the Victim.**

A victim has a state constitutional and statutory right to restitution, as stated in Wis. Const. Art. I, § 9m(2)(m) and Wis. Stat. § 950.04(1v)(q). The restitution statute should be read “to say that restitution is the rule and not the exception and that restitution should be ordered whenever warranted.” *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). “The victim needs to show

that there is a ‘causal nexus’ between the crime and the victim’s losses, such that the defendant’s criminal activity was a ‘substantial factor’ in causing the losses.” *State v. Wiskerchen*, 2019 WI 1, ¶ 25, 385 Wis. 2d 120, 921 N.W.2d 730 (quoting *State v. Canady*, 2000 WI App 87, ¶ 9, 234 Wis. 2d 261, 610 N.W.2d 147). To prove a causal nexus that the defendant’s action was a substantial factor, a victim must show: (1) the defendant’s conduct was a precipitating cause of the restitution requested; and (2) the restitution was the natural consequence of the conduct. *Madlock*, 230 Wis. 2d at 333.

The Circuit Court found there was a causal nexus between the Mr. Waits’ actions and the victim’s loss. At the restitution hearings, the victim testified that the injuries she sought treatment for began after the car accident involving Mr. Waits.<sup>4</sup> Addressing the causal nexus, the circuit court found that there was no question that there is a causal connection between hitting a car and what Mr. Waits was convicted of – hit and run.<sup>5</sup> Further, based on the testimony and the review of the medical records, the Court found that the origin of the victim’s injuries was the motor vehicle accident.<sup>6</sup> The Court specifically found that the crash triggered the lengthy period of treatment for which the victim was seeking restitution.<sup>7</sup> The Court found that the treatment the victim sought was appropriately attributed to the car crash.<sup>8</sup> Therefore, the Circuit Court properly found a causal nexus to award restitution.

Mr. Waits further argues that the Court should not have granted the victim the entirety of her restitution request because she had pre-existing conditions. However, pre-existing conditions do not foreclose restitution. *State v. Behnke*, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996). “[I]f the defendant’s actions were the precipitating cause of the injury complained of, and such injury was the

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<sup>4</sup> R. 81 at 6: 19-25, 7: 1- 25; 8: 1 -13.

<sup>5</sup> R. 114 at 6: 13-17.

<sup>6</sup> R. 112 at 2: 17-25; 3: 1-16.

<sup>7</sup> R. 112 at 3: 8-11.

<sup>8</sup> R. 112 at 3: 14-16.

natural consequence of the actions, the defendant is liable, although the victim's preexisting condition may have aggravated the injury." *Behnke*, 203 Wis. 2d at 59, citing *Anderson v. Milwaukee Ins.*, 161 Wis. 2d 766, 769, 468 N.W.2d 766 (Ct. App. 1991).

At the restitution hearing, the Circuit Court properly found that the victim's pre-existing conditions were not relevant.<sup>9</sup> Further, the Court found that despite the victim's pre-existing conditions, the car crash aggravated that pre-existing condition, and found there was no reason to negate or diminish the restitution because of the pre-existing condition.<sup>10</sup>

Therefore, the Court properly awarded the victim the entirety of her restitution request. Therefore, Mr. Waits' request for a reduction in the restitution should be denied.

#### **IV. The Circuit Court Considered Mr. Waits' Ability to Pay When Setting Restitution.**

At a restitution hearing, the Court must consider "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." Wis. Stat. § 973.20(14). The defendant has the burden to prove each of these criteria by preponderance of the evidence. *Id.*

At the restitution hearing, Mr. Waits presented evidence regarding each of these considerations.<sup>11</sup> The Circuit Court properly considered Mr. Waits' ability to pay when rendering its decision.<sup>12</sup> The Circuit Court found that Mr. Waits has an ability to find employment, at minimum, a minimum wage job.<sup>13</sup> The Court considered Mr. Waits' testimony regarding difficulties finding employment

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<sup>9</sup> R. 81 at 22: 23-24.

<sup>10</sup> R. 112 at 3: 17-20.

<sup>11</sup> R. 114 at 42-50.

<sup>12</sup> R. 112 at 4: 3-19.

<sup>13</sup> R. 112 at 4: 13-15.

because of his felony conviction, but ultimately determined he would still be able to find a job.<sup>14</sup> In fact, at the restitution hearing, evidence was presented that Mr. Waits had recently been employed, despite being an African American felon.<sup>15</sup> Further, Mr. Waits does not suffer from any physical disabilities that would prevent him from working in the future.<sup>16</sup>

The Circuit Court also considered the fact that Mr. Waits provides for his child.<sup>17</sup> At the restitution hearing, Mr. Waits conceded he was aware he could seek state assistance, including child support, to assist with his expenses related to his child, but was not doing so.<sup>18</sup>

Because the Circuit Court properly considered Mr. Waits' ability to pay at the time of setting restitution, Mr. Waits' request for a reversal and a new restitution hearing should be denied.

### CONCLUSION

In conclusion, the Circuit Court properly exercised its discretion in setting restitution in this matter, and therefore Mr. Waits' motion should be denied.

Dated this 11<sup>th</sup> day of December, 2023.

Respectfully Submitted,

Electronically signed by Kerri M. Puig

Kerri M. Puig

Assistant District Attorney

State Bar No. 1086256

Attorney for Petitioner-Respondent

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<sup>14</sup> R. 112 at 4: 7-12.

<sup>15</sup> R. 114 at 40: 17-20.

<sup>16</sup> R. 114 at 50: 14-15.

<sup>17</sup> R. 112 at 4: 15-16.

<sup>18</sup> R. 114 at 53.

### FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,536 words.

Dated: December 11, 2023

Marathon County District Attorney's Office

Electronically signed by Kerri M. Puig

Kerri M. Puig

Assistant District Attorney

State Bar No. 1086256

Attorney for Petitioner-Respondent