Appeal No. 2004AP36 **Cir. Ct. No. 1995CV291**

WISCONSIN COURT OF APPEALS
DISTRICT II

THERESA HUML,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. VLAZNY,

DEFENDANT-APPELLANT,

TODD J. CECCHI, ROY CECCHI, THE ST. PAUL COMPANIES, INC., A/K/A ST. PAUL FIRE & MARINE INSURANCE COMPANY, AND ST. PAUL INSURANCE COMPANY OF ILLINOIS,

DEFENDANTS.

FILED

SEP 14, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Brown and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether a written settlement agreement and release discharging a defendant from civil liability for all past, present and future claims arising out of his or her criminal conduct precludes the crime victim from enforcing a

subsequent judgment for unpaid restitution entered after the defendant has been released from probation.

FACTS

In June 1993, Theresa Huml was severely injured in an automobile accident caused by Robert W. Vlazny. In November 1993, Vlazny was convicted of operating while intoxicated. The court imposed and stayed a two-year prison sentence and placed Vlazny on three years' probation. The court approved a stipulation reached by the parties requiring Vlazny to pay restitution in the amount of $140,000, which was payable in monthly installments of $425. At the hearing, the court noted that Vlazny would not be able to pay $140,000 at $425 per month over the three-year probation period. The State responded that "[t]here's a civil action that's going to be running parallel to this, and so whatever is paid on this will be set off in the civil action."

In May 1995, Huml filed a civil action against Vlazny and the relevant insurance companies, among others. In December 1996, Vlazny, two co-defendants and Vlazny's insurance company entered into a structured "Settlement Agreement and Release with Assignment." Pursuant to the agreement, Vlazny's insurer promised to pay Huml $548,000 immediately and then to pay Huml various amounts over the next several decades pursuant to a schedule of monthly and other periodic lump sum payments. In exchange, Huml agreed to "completely release[] and forever discharge[] Defendants, Insurer … from any or all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever … resulting from the accident …." The agreement stated that it "shall apply to all claims, whether known or unknown, on the part of all parties to this Agreement."

On August 20, 2002, Vlazny's probation officer wrote to the criminal court informing the court that Vlazny was scheduled to be discharged from probation in December of that year and asking the court to convert the remaining unpaid restitution to a civil judgment.[1] Over the course of his probation, Vlazny had paid Huml approximately $32,100, leaving a restitution balance of approximately $107,900. On August 27, 2002, the court reduced the unpaid restitution balance to a judgment.

Vlazny then sought an order from the criminal court vacating the amended criminal judgment and reducing his restitution obligation to zero. The criminal court declined to act, deferring to the civil court. Thereafter, Vlazny filed a motion with the civil court to enforce the terms of the settlement agreement. He argued that the terms of the settlement agreement discharged him from any obligation under the restitution judgment. The court denied Vlazny's motion and he now appeals.

DISCUSSION

This appeal presents the supreme court with the opportunity to resolve the question of whether a crime victim's settlement and release of all claims in an independent civil action prevents the victim from enforcing a judgment for unpaid restitution entered after the defendant is released from probation, an important issue of first impression in Wisconsin. Resolution of the

[1] Vlazny's probation had been extended due to "unpaid court obligations."

issue requires the interpretation and application of WIS. STAT. §§ 973.09(3)(b) and 973.20(1r) (2003-04).[2] Section 973.09(3)(b) provides in pertinent part:

> *If the court does not extend probation, it shall issue a judgment for the unpaid restitution* and direct the clerk of circuit court to file and enter the judgment in the judgment and lien docket, without fee, unless it finds that the victim has already recovered a judgment against the probationer for the damages covered by the restitution order…. *The judgment has the same force and effect as judgments entered under s. 806.10.* (Emphases added.)

Section 973.20(1r) states in part:

> Restitution ordered under this section is a condition of probation, extended supervision, or parole served by the defendant for a crime for which the defendant was convicted. After the termination of probation, extended supervision, or parole, or if the defendant is not placed on probation, extended supervision, or parole, *restitution ordered under this section is enforceable in the same manner as a judgment in a civil action* by the victim named in the order to receive restitution or enforced under ch. 785. (Emphasis added.)

These statutory provisions are ambiguous, and both parties and the attorney general, who accepted our invitation to file an amicus brief, have presented reasonable interpretations of the meaning of a "judgment" for unpaid restitution. Because the statutory provisions are open to multiple reasonable interpretations, after walking through the parties' arguments, we will address the legislative history, context and purpose of the provisions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶46-48, 271 Wis. 2d 633, 681 N.W.2d 110 (where the statute is open to multiple reasonable interpretations, we

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

may look to extrinsic evidence of legislative intent—such as the scope, context, history, and purpose of the statute—to resolve the ambiguity).

Vlazny argues that because WIS. STAT. §§ 973.09(3)(b) and 973.20(1r) provide that a restitution order reduced to a judgment is to have the "same force and effect" as a civil judgment and is "enforceable in the same manner" as a civil judgment, the legislature intended to convert the criminal restitution order into a civil judgment that is governed by the same civil action rules applicable to tort and contract claims. He argues that the legislature's intent to transform the restitution order into a civil judgment means that a crime victim cannot pursue enforcement of such a judgment after accepting settlement and executing a release of civil liability.[3]

Huml and the attorney general, on the other hand, argue that WIS. STAT. §§ 973.09(3)(b) and 973.20(1r) do not convert the restitution order into a civil judgment; rather, they simply provide that the enforcement mechanisms for judgments for unpaid restitution are civil in nature. They point out that instead of expressly stating that judgments for unpaid restitution *are* "civil judgments," the statutes provide that the judgments are enforceable "*in the same manner as*" and have "*the same force and effect as*" typical civil judgments. *See* §§ 973.09(3)(b), 973.20(1r). They further remind the court that, unlike a typical civil judgment, a judgment for unpaid restitution is enforceable under the contempt provisions of WIS. STAT. ch. 785. *See* § 973.20(1r). They conclude that because a judgment for unpaid restitution is not a typical civil judgment, the statutes do not allow a

[3] We note that Vlazny does not argue that he is entitled to a setoff. *See* WIS. STAT. § 973.20(8). Rather, he maintains that the settlement agreement and release bar any claim at all to the judgment for unpaid restitution.

settlement agreement and release of civil liability to operate as a satisfaction of a judgment for unpaid restitution.

Vlazny finds some support for his argument in the legislative history of the statutory provisions at issue. In 1989, the legislature inserted the language requiring courts to issue a "judgment" for the unpaid restitution, directing courts to give such judgments the same "force and effect" as typical civil judgments, and permitting victims to enforce the judgments "in the same manner as" civil judgments. *See* 1989 Wis. Act 188, § 12. Prior to 1989, if a defendant did not pay court-ordered restitution in full before termination of probation, the statutes permitted the victim to "start a civil action, obtain a judgment for the unpaid restitution and proceed with collection procedures on the judgment." Legislative Reference Bureau Analysis of 1989 A.B. 316. The drafting record demonstrates that the legislature intended for the 1989 amendments to simplify the enforcement process for crime victims by permitting them to pursue collection "on the judgment without starting a civil action." *See* ***id.*** Thus, the language added in 1989 can fairly be read as indicating legislative intent to ensure that judgments for unpaid restitution, even when entered without the filing of a separate civil action, retain the full force and character of a typical civil judgment. If the judgment for unpaid restitution is in fact a typical civil judgment, then a settlement agreement and release of all claims would likely preclude a crime victim from enforcing that judgment.

On the other hand, the legislative history also reveals that the drafting committee looked to the federal law governing restitution for assistance in amending Wisconsin's restitution laws. *See* Legislative Reference Bureau Drafting File for 1987 A.B. 190. The federal laws governing restitution were entitled, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat.

1248 (1982) (codified as amended in scattered sections of 18 U.S.C., with the restitution provisions at 18 U.S.C. §§ 3663-64). The then-existing federal laws provided that a victim could enforce "an order of restitution … in the same manner as a judgment in a civil action." *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5. As Huml points out, courts interpreting this provision have held that the fact that a restitution order is enforceable in the same manner as a civil judgment does not transform the former into the latter. *See, e.g.*, ***United States v. Johnson***, 983 F.2d 216, 220 (11th Cir. 1993) (citing other cases supporting this interpretation), *superceded by statute on other grounds*, Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1214, *as recognized by* ***United States v. Perry***, 360 F.3d 519 (6th Cir. 2004). Rather, Congress simply intended to make a civil enforcement mechanism available to the beneficiaries of a criminal order of restitution. *See, e.g.,* ***Lyndonville Sav. Bank & Trust Co. v. Lussier***, 211 F.3d 697, 702 (2d Cir. 2000) (citing several cases supporting this interpretation). Under this analysis, a civil settlement agreement and release of all claims would not extinguish a defendant's obligation to satisfy a restitution award. ***United States v. Cloud***, 872 F.2d 846, 854 (9th Cir. 1989).

Applying Wisconsin's restitution laws, we came to a conclusion similar to that of the federal courts in ***State v. Walters***, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999). There, the defendant argued that the crime victim was not entitled to restitution because he had accepted a settlement payment and agreed to release all claims prior to the restitution hearing. ***Id.*** at 899. We concluded that a previous settlement in a civil case did not release a defendant from his or her obligation to pay restitution. ***Id.*** We recognized, however, that WIS. STAT. § 973.20 enables a defendant to try to reduce the amount he or she owes because of a restitution award during a settlement negotiation in the

companion civil case. ***Walters***, 224 Wis. 2d at 906 (citing ***Olson v. Kaprelian***, 202 Wis. 2d 377, 383, 550 N.W.2d 712 (Ct. App. 1996)).

Vlazny persuasively argues that the federal cases Huml references, ***Walters***, and ***Olson*** are all readily distinguished. The language in the Victim and Witness Protection Act of 1982, as amended, as far as we can tell, did not mirror the language in WIS. STAT. § 973.09(3)(b). Further, Vlazny submits that unlike here, the restitution orders in ***Walters*** and ***Olson*** had not been docketed as judgments in the manner envisioned by § 973.09(3)(b); therefore, the nature of the outstanding restitution awards was not called into question.

Of great concern to this court is the application of the public policy underpinning restitution to the question presented in this case. We worry that if we held that a civil settlement agreement and release of all claims precluded enforcement of a judgment for unpaid restitution, we would be permitting a privately negotiated "end run" around the criminal justice system.

Settlements of civil claims promote the public interest of resolving disputes informally and without litigation. *See* ***Walters***, 224 Wis. 2d at 904. However, the efficient resolution of civil disputes is not the policy on which restitution in a criminal proceeding is based. ***Id.*** A condition of restitution is part of the judgment of conviction. ***State v. Foley***, 142 Wis. 2d 331, 338, 417 N.W.2d 920 (Ct. App. 1987). It does not create a debt or a debtor-creditor relationship between the persons making and receiving restitution. ***Id.*** It is a remedy that belongs to the State. ***Walters***, 224 Wis. 2d at 904. The victim has no control over the amount of restitution awarded or over the decision to award restitution. ***Foley***, 142 Wis. 2d at 341. This is because the State's goals in imposing restitution are broader than merely compensating the victim. *See* ***Walters***, 224 Wis. 2d at

904-05. Restitution imposed by trial courts is also a criminal penalty intended to have deterrent and rehabilitative effects. ***Id.*** A civil settlement agreement and release ignores these rehabilitative and deterrent purposes. Thus, while a civil settlement agreement with a defendant may reflect a victim's willingness to accept the amount paid in full satisfaction for all civil liability, it does not necessarily reflect the willingness of the State to accept that sum in satisfaction of the defendant's rehabilitative and deterrent debt to society. *See* ***People v. Bernal***, 123 Cal. Rptr. 2d 622, 627 (Ct. App. 2002).

Furthermore, the amount ordered as restitution need not echo what a victim might obtain in a civil action. *See* ***Walters***, 224 Wis. 2d at 905-06 (noting that a court may order restitution only for special damages, but not the general damages a victim could obtain in a civil action). Since the categories of loss recoverable by restitution and the dollar amounts ordered are not identical to a defendant's civil liability, there is no reason that a release of civil liability should release a judgment for unpaid restitution. *See* ***Bernal***, 123 Cal. Rptr. 2d at 627-28. Also, the statute ensures that a victim will not be able to be twice compensated for the same injury. *See* WIS. STAT. § 973.20(8) ("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."); WIS. STAT. § 973.09(3)(b) (directing the court to enter the restitution order as a judgment, "unless it finds that the victim has already recovered a judgment against the probationer for the damages covered by the restitution order.")

On the other hand, Vlazny observes that restitution is a condition of probation, extended supervision or parole. *See* ***State v. Loutsch***, 2003 WI App 16, ¶24, 259 Wis. 2d 901, 656 N.W.2d 781. As such, according to Vlazny, it is to be

paid *before* the completion of a defendant's sentence. *See* ***id.*** Furthermore, once the sentence is complete and the defendant is released from probation, the judgment for unpaid restitution is no longer enforceable by the State. *See* WIS. STAT. §§ 973.20(1r) and 973.09(3)(b) (indicating that the victim may enforce the judgment). For these reasons, Vlazny maintains that, as a matter of policy, a judgment for unpaid restitution must be considered a typical civil judgment, which a victim can release in a separate civil action, and not a criminal restitution order or the type of hybrid judgment he claims Huml and the attorney general advance.

CONCLUSION

The question of whether a written settlement agreement and release discharging a defendant from civil liability for all claims arising out of his or her criminal conduct precludes the crime victim from enforcing a subsequent judgment for unpaid restitution is a question of statutory interpretation that raises important public policy concerns. The supreme court is the law-declaring and law-defining court and, as such, is the proper judicial authority to resolve these legal and policy considerations. We respectfully ask the supreme court to provide definitive guidance, which will be of great assistance to the bench and bar as both continue to negotiate the relationship between civil liability and criminal restitution.