

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2431

Cir. Ct. No. 2004CM129

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE RESTITUTION IN STATE OF WISCONSIN
V. CASEY D. ROELLI:**

NORMAN HAMILTON,

APPELLANT,

V.

CASEY D. ROELLI,

RESPONDENT.

APPEAL from an order of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Reversed.*

¶1 DYKMAN, J.¹ Norman Hamilton appeals from an order for reimbursement of the restitution Casey Roelli paid to him following Roelli's conviction for a hit and run that caused injury to Hamilton. Hamilton contends that the circuit court erred in ordering the reimbursement based on the parties' civil settlement because the court did not hold a hearing to determine Hamilton's total damages. Because Roelli has failed to file a response brief contrary to several orders by this court, we reverse.

Background

¶2 In April 2004, Casey Roelli crashed the vehicle he was driving into the vehicle driven by Norman Hamilton, causing injury to Hamilton. Roelli did not stop at the scene of the accident, and was later convicted of hit and run contrary to WIS. STAT. § 346.67(1). In February 2005, the parties entered into a stipulation regarding restitution. The stipulation stated that Roelli would pay \$10,783.64 to Hamilton, which an attached exhibit detailed as medical expenses, lost wages, car rental, and gas expenses. The stipulation also stated that “[a]ny restitution payment is subject to the setoff requirements of [WIS. STAT.] § 973.20(8).”

¶3 Subsequently, Hamilton settled his civil claim against Roelli for \$34,950. Roelli then moved the court for restitution credit for the amount Hamilton received in the civil settlement. The court granted Roelli's motion and ordered Hamilton to repay Roelli the \$4,311.32 that Roelli had already paid Hamilton in restitution.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Hamilton appealed, and Roelli failed to file a response brief within the time required by WIS. STAT. § 809.19(3). On March 2, 2007, we ordered Roelli to file his brief or request an extension within five days, stating that if he failed to do so “the judgment or order appealed from will be disposed of summarily and may be summarily reversed.” After receiving no response from Roelli, on March 26, 2007, we ordered Roelli to file a respondent’s brief within twenty days, stating that “[i]f a respondent’s brief is not filed within that time period, we will impose sanctions, which may include summarily reversing the judgment or order from which this appeal is taken.” Roelli did not respond to that order, and on July 23, 2007, we issued an order for the case to be submitted for decision, stating that we would decide whether to address the merits of the appeal or summarily reverse based on Roelli’s failure to respond.

Discussion

¶5 “[A] common sense abandonment of an appeal provides sufficient reason for imposing the drastic sanction of summary reversal” under WIS. STAT. RULE 809.83(2). *Raz v. Brown*, 2003 WI 29, ¶32, 260 Wis. 2d 614, 660 N.W.2d 647. Thus, summary reversal is appropriate where a party “abandon[s] its position on appeal by not responding to numerous requests by the court of appeals to file a brief.” See *id.*, ¶¶28-32 (approving summary reversal on those grounds in *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 500 N.W.2d 339 (Ct. App. 1993)). The supreme court has directed that we may “impose the drastic sanction of summary reversal for failure to file a response brief ... only after unequivocally ordering the filing of a brief and clearly stating the consequences for failure to comply.” *Id.*, ¶36. We have issued two orders to Roelli to file his response brief, stating that sanctions, including possible summary reversal, will be imposed for

failure to comply. We have received no response from Roelli. We therefore conclude that summary reversal is appropriate.

¶6 While we summarily reverse based on Roelli's failure to respond, we do not issue the relief Hamilton requests. Hamilton asks that we remand for a *Rimes*² hearing to determine the total amount that would make him whole, which he argues is necessary to determine the amount that the \$10,783.64 of restitution should be offset by the civil settlement of \$34,950. The circuit court stated that a *Rimes* hearing would be appropriate but for the statement in the restitution stipulation that "[a]ny restitution payment is subject to the setoff requirements of [WIS. STAT. §] 973.20(8)."³

¶7 A restitution order may include only special damages as established by the record; it may not include the victim's general damages. *State v. Walters*, 224 Wis. 2d 897, 905, 591 N.W.2d 874 (Ct. App. 1999). "This limitation restrains the circuit court from assessing restitution for damages intended to generally compensate the victim for such things as pain and suffering, anguish or humiliation." *Id.* at 905-06. In *Walters*, we addressed "whether a payment in a civil case can be a setoff against ... the amount of restitution ordered." *Id.* at 906. We concluded that the legislative purpose behind restitution "will be best served

² *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 316 N.W.2d 348 (1982). The *Rimes* court approved a hearing following a civil settlement to determine the plaintiff's total damages to resolve whether his insurance company was entitled to subrogation, based on whether he had been made whole. Although this case arises in a different context, it concerns the need for the same type of hearing in which Hamilton's total damages would be assessed.

³ WISCONSIN STAT. § 973.20(8) provides that "[a]ny restitution made by payment ... 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."

by applying any setoff which a circuit court determines is appropriate to the total amount of special damages which the victim has sustained.” *Id.* We explained that the defendant has the burden in a restitution proceeding to prove the defense of setoff. *Id.* at 907-08. Thus, the defendant bears the burden to prove what portion of a civil settlement was paid for special damages. *Id.* at 908.

¶8 Here, as the circuit court acknowledged, there was no evidence as to whether any portion of the civil settlement was for the special damages calculated in the restitution stipulation. Therefore there was no way to assess whether the civil settlement included only general damages, thus having no effect on the restitution order, or whether it included both special and general damages and, if so, the amount attributable to each. In an ordinary case, this would require remand for a *Rimes* hearing to determine the victim’s total amount of special and general damages. However, as we have explained, Roelli has abandoned his position in this appeal, and a remand for a hearing would be a waste of judicial resources. Instead, we summarily reverse the order for reimbursement based on Roelli’s failure to file a response brief. *See* WIS. STAT. § 809.83(2).

By the Court.—Order reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

