

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2010

A. John Voelker
Acting 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. 2010AP555-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CT1107

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THERESA E. PALUBICKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Theresa Palubicki appeals a judgment of conviction for leaving the scene of an accident resulting in injury. Palubicki

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

argues that the circuit court erred when it ordered her to pay Ernest Heath restitution because a settlement fully compensated him for his losses. We affirm.

BACKGROUND

¶2 On October 13, 2008, Palubicki was convicted, upon her no contest plea, of one count of leaving the scene of an accident resulting in injury. Heath, the motorcyclist who was injured in the accident, requested that Palubicki's judgment of conviction include a restitution order for medical bills, accident repairs, and loss of income. At a hearing, Palubicki argued that the circuit court should deny restitution because Heath signed a settlement agreement on July 10, 2008 releasing Palubicki and her insurer "from any and all actions, causes of action, claims and demands, damages, costs, loss of services, expenses and compensation ... personal injuries and property damage resulting or to result from [the accident]." Palubicki contended that this settlement, for which Heath received \$100,000, compensated him for all of the expenses he claimed in his restitution request.

¶3 The circuit court disagreed. It found that "the [settlement] agreement ... covers all medical and all punitive damages," but did not compensate Heath for lost income. It therefore ordered Palubicki to pay Heath \$17,351.56 in restitution for lost income.

DISCUSSION

¶4 The issue in this appeal is whether the circuit court erred when it concluded Heath was entitled to restitution for lost income in addition to the

settlement he received from Palubicki's insurer.² We review the terms of a restitution order for the erroneous exercise of discretion. *State v. Walters*, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999).

¶5 Restitution is directed by WIS. STAT. § 973.20(1r). As relevant here, that statute provides:

When imposing sentence or ordering probation for any crime ... for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing ... unless the court finds substantial reason to do so and states the reason on the record.

“In determining the amount of restitution, a court may require a defendant to pay only special damages sustained by the victim,” such as medical expenses and lost earnings. *Walters*, 224 Wis. 2d at 905. Therefore, “the amount of restitution ... in a criminal proceeding may be setoff against a like amount in a companion civil case” if the victim recovered those damages in the civil proceeding. *Id.* at 906. The burden of proving whether a “setoff should be afforded during a restitution proceeding ... lie[s] with the defendant.” *Id.* at 907.

¶6 Palubicki acknowledges she has the burden of proving Heath recovered, through the settlement, the expenses for which he sought restitution. But her appellate argument lacks any citation to evidence in the record that controverts the circuit court's conclusion the settlement did not compensate Heath for lost income.

² Palubicki does not challenge the circuit court's calculation of how much income Heath lost, only his right to restitution for that income.

¶7 Instead, she contends, without citation to legal authority, that she met her burden of proving Heath was fully compensated because:

During the restitution hearing, [Heath] stated that there was money paid to the attorney and for medical bills and that he had received some payment, but did not specify. His lack of specificity, with direct questioning about what amount paid for what satisfied the defendant's burden and therefore, it was up to the victim to testify or provide sufficient documentation explaining why he is entitled to additional recovery.

Or, to put it plainly, Palubicki contends that she met her burden because Heath did not prove what the settlement covered. Despite Palubicki's assertion to the contrary, this does not prove she met her burden; it attempts to shift her burden to Heath.

¶8 At the restitution hearing, Heath testified that eighty percent of his settlement went to pay medical bills, and that he had to pay attorney fees and other expenses in addition to these bills. The court found his testimony credible: "He indicated that 80 percent of the settlement went for out-of-pocket medical expenses, which [is not] surprising given the nature of his injuries." The court also concluded the settlement agreement "apparently [included compensation] for pain and suffering," but not for loss of income. Because Palubicki failed to present any evidence to the contrary, she failed to meet her burden of proof.³

³ Palubicki also seems to argue that she was entitled to raise civil defenses in the restitution hearing, which the circuit court refused to consider. Although it appears Palubicki's argument may be referring to setoff, she never explicitly identifies what defenses the court allegedly improperly rejected. If setoff is what she is referring to, the court considered the argument when it concluded the settlement did not compensate Heath for lost earnings. In any event, we will not abandon our neutrality to address this inadequately developed argument. *See MCI, Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

