1-25-2013

State v. Hurles Appellant's Brief 2 Dckt. 39219

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39219
	)	
v.	)	ADA COUNTY NO. CR 2010-17155
	)	
KRISTI L. HURLES,	)	REVISED APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

REVISED BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DARLA S. WILLIAMSON
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SHAWN F. WILKERSON
Deputy State Appellate Public Defender
I.S.B. #8210
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

Kristi L. Hurles timely appeals from the district court's judgment of conviction. On appeal, Ms. Hurles argues that the district court erred when it concluded that the alleged victims did not waive the accountant-client privilege, and that the district court's restitution calculation was not supported by substantial and competent evidence. Ms. Hurles also argues that the district court abused its discretion when it awarded civil attorney fees as part of the restitution order.

Statement of the Facts and Course of Proceedings

Ms. Hurles was employed by Jody and Butch Morrison at the Crescent No Lawyers Bar and Grill (*hereinafter*, "No Lawyers Bar"), and was responsible for the business' bookkeeping. (Presentence Investigation Report (*hereinafter,* PSI), pp.2, 4.) In 2010, the Morrisons noticed that they were losing money from the proceeds of their lottery account. (PSI, p.2.) The Idaho Lottery helped the Morrisons investigate the cause of their losses and determined that Ms. Hurls was stealing a portion of the lottery proceeds. (PSI, p.2.) Ms. Morrison testified that the amount of money Ms. Hurles stole from the lottery pull tab scheme was approximately $10,000.00.[1] (05/19/11 Tr., p.14, L.5-16, p.18, L.9-18.)

As a result of that investigation and a subsequent alteration in the No Lawyers Bar's bookkeeping procedures, it was determined that Ms. Hurles was also responsible for stealing money from the Morrisons' petty cash, which was supposed to be placed in the ATM machine located in the entrance of the No Lawyers Bar. (PSI, pp.3-4.)

[1] Ms. Hurles is not challenging this portion of the restitution award on appeal.

The No Lawyers Bar, as opposed to the Bank which owned the ATM, provided the funds for the ATM, and the bank would send the Bar a check with the fees it collected when a patron of the Bar took money out of the ATM. (05/19/11 Tr., p.45, L.19 – p.46, L.25.) The Morrisons had a bookkeeping process whereby money was taken out of the safe which held petty cash and placed into the ATM. (05/19/11 Tr., p.40, L.24 – p.42, L.10, p.44, L.4 – p.51, L.25.) The person who took the petty cash out of the safe and placed it into the ATM would write an IOU, to keep record of the amount of money taken out of the petty cash. (05/19/11 Tr., p.47, Ls.6-14.) To cover the amount of the IOU, Ms. Morrison would write a check which was drawn from proceeds which were generated from the previous day of business. (05/19/11 Tr., p.47, L.25 – p.48, L.5, p.74, L.15 – p.75, L.4, p.76, Ls.5-8.) This bookkeeping process was done in order to maintain a steady balance of money in the petty cash and to track how much money was taken from the petty cash and placed into the ATM. (05/19/11 Tr., p.48, Ls.6-22.)

Ms. Hurles was one of two people, other than the Morrisons, who would replenish the cash in the ATM. (05/19/11 Tr., p.47, Ls.15-18.) However, Ms. Morrison did not keep track of the actual IOUs because they were thrown away. (05/19/11 Tr., p.65, L.21 – p.66, L.25, p.70, Ls.12-14.)

As a result of an investigation into the ATM machine, Ms. Hurles eventually admitted to stealing funds from the ATM to compensate for the loss of her husband's job. (PSI, pp.3-4.) In order to accomplish the theft, Ms. Hurles would steal money by cashing a check and then placing only a portion of the proceeds into the ATM. (05/19/11 Tr., p.78, Ls.10-17.)

Ms. Hurles was charged, by Information, with two counts of grand theft. (R., pp.28-29.) Pursuant to a plea agreement, Ms. Hurles pleaded guilty to one count of grand theft and, in return, the State dismissed the remaining count. (02/17/11 Tr., p.1, L.19 – p.3, L.14; R., pp.33-34.)

The amount of restitution Ms. Hurles owed the Morrisons became a highly contested issue in this case. Ms. Hurles estimated that the amount of money she stole from the ATM was approximately $20,000.00, while the Morrisons initially estimated the amount to be approximately $100,000.00. (PSI, p.4.) The Morrisons' restitution estimates oscillated from $284,000.00 to $90,000.00. (05/19/11 Tr., p.79, Ls.20-25.)

In order to calculate that amount of restitution Ms. Hurles owed the Morrisons, they relied on a spreadsheet created by the law firm Givens Pursley, which the Morrisons hired to litigate civil issues related to Ms. Hurles' theft. (05/19/11 Tr., p.24, L.16 – p.25, L.15.) Alison Berriochoa, a paralegal at Givens Pursley, was given the responsibility of creating the spreadsheet. (05/19/11 Tr., p.24, L.16 – p.26, L.12.) Ms. Berriochoa relied on documents provided to her by the Morrisons' accountant, James Warr, to create the spreadsheet. (05/19/11 Tr., p.71, L.3 – p.73, L.19.) Ms. Berriochoa concluded that Ms. Hurles stole $153,920.00. (05/19/11 Tr., p.32, Ls.9-17.) On cross examination, Ms. Berriochoa testified that the $153,920.00 was based on the total amount of the checks, but that total did not take into account the fact that Ms. Hurles deposited between eighty to ninety percent of the checks' proceeds into the ATM. (05/19/11 Tr., p.34, Ls.7-18.) Ms. Berriochoa also testified that many of the checks were accidentally categorized as ones Ms. Hurles cashed, when in reality they were endorsed and, therefore, probably cashed, by either of the Morrisons and not Ms. Hurles. (05/19/11 Tr., p.34, L.19 – p.36, L.14.) Ms. Morrison also testified that

the checks Ms. Berriochoa accidentally accredited to Ms. Hurles' restitution total were in fact cashed by the Morrisons. (05/19/11 Tr., p.50, L.18 – p.51, L.20.)

Ms. Morrison testified that two people with initials W.B. and D.B. also endorsed checks, but she does not know of any employees that had those initials. (05/19/11 Tr., p.60, L.12 – p.61, L.14.) Ms. Morrison also testified that Ms. Hurles stole $99,110.00 from the petty cash. (05/19/11 Tr., p.56, L.23 – p.58, L.11.) However, Ms. Hurles only endorsed a number of checks that totaled $39,000.00. (05/19/11 Tr., p.56, Ls.23 – p.57, L.4.)

At the end of the first restitution hearing, defense counsel stated that "what Ms. Hurles is telling me -- and it makes practical sense . . . [s]he would cash [a] check, but bring back . . . $900 of $1,000 . . . " and place the $900.00 into the ATM. (05/19/11 Tr., p.86, L.19 – p.87, L.3.) Defense counsel asserted, in the form of a question to Ms. Morrison, that their restitution figure was based on the entire amount of the check and did not take into account that Ms. Hurles was only taking ten to twenty percent of the proceeds of the cashed checks. (05/19/11 Tr., p.78, Ls.10-21.) When Ms. Morrison was asked how she proved the actual amount of money Ms. Hurles took from petty cash, she stated that she relied on her accountant's documents and calculations. (05/19/11 Tr., p.71, L.21 – p.73, L.10.) Defense counsel also stated that upon his review of the records it appears that the Morrisons were taking money out of the ATM in the same manner as Ms. Hurles. (05/19/11 Tr., p.75, Ls.12-15.) Ms. Morrison then testified that she never told Mr. Warr that either she or Mr. Morrison took money out of the ATM. (05/19/11 Tr., p.75, Ls.20-23.) Defense counsel then stated he wanted to call Mr. Warr to testify and made an offer of proof that he would testify that the Morrisons could not even establish that Ms. Hurles stole $90,000.00.

(05/19/11 Tr., p.79, Ls.20-25.) He also stated that he and Mr. Warr looked over the spreadsheet produced by Givens Pursley and they noticed that a lot of the information contained therein was incorrect. (05/19/11 Tr., p.80, L.23 – p.81, L.2.)

Do to time constraints, the first restitution hearing was continued and Mr. Warr did not testify. (05/19/11 Tr., p.80, L.1 – p.81, L.4, p.90, Ls.4-14.) The district court stated that the State should provide what additional information is necessary to defense counsel or "[w]hat ever you think you need to make sure your client has had a fair ability to show the amount of restitution that's due and owing." (05/19/11 Tr., p.89, L.23 – p.90, L.12.)

At the second restitution hearing, Mr. Warr was sworn in and began to testify. (08/04/11 Tr., p.10, L.13 – p.12, L.3.) When asked the first question pertaining to the restitution issue, Ms. Morrison, through the State, invoked the accountant-client privilege. (08/04/11 Tr., p.12, Ls.4-12.) Defense counsel implicitly stated he needed the testimony from Mr. Warr because the Morrisons' restitution estimate was unreliable as it kept changing and had ranged from $400,000.00 to $100,000.00.[2] (08/04/11 Tr., p.15, Ls.15-17.) The State then argued that Mr. Warr already provided his restitution calculations during the presentence investigation and it established that Ms. Hurles stole $100,000.00. (08/04/11 Tr., p.16, L.14 -p.17, L.11.) The State then argued that Mr. Warr's reports were already in the record, they could be relied on by the court, but the Morrisons could prevent him from testifying about those reports because they controlled the accountant-client privilege. (08/04/11 Tr., p.16, L.14 – p.17, L.11.) Defense counsel argued that the Morrisons waived the privilege because

[2] The amount of restitution being sought changed again at that hearing as the State noted that it had come up with $6,600.00 in additional corrections, which reduced the amount of restitution to $155,444. (08/04/11 Tr., p.16, Ls.14-18.)

they used the documents created by Mr. Warr for the presentence investigation to establish the amount of restitution. (08/04/11 Tr., p.17, Ls.12-16.) Defense counsel also asserted that he needed Mr. Warr to testify in order to impeach Ms. Morrison with admissions she made to Mr. Warr. (08/04/11 Tr., p.21, L.24 – p.22, L.13.) The district court did not rule on the privilege issue and continued the restitution hearing. (08/04/11 Tr., p.23, L.19 – p.24, L.19.)

At a consolidated restitution/sentencing hearing, the district court began by noting that the victims were asking for $240,174.00 in restitution. (08/11/11 Tr., p.95, Ls.15-17.) The issue of the accountant-client privilege was addressed and defense counsel argued that Ms. Morrison waived the privilege by discussing conversations she had with her accountant at the first restitution hearing. (08/11/11 Tr., p.96, L.5 – p.97, L.22.) Defense counsel also argued that the privilege was waived because Mr. Warr was the State's witness and it was the State which told defense counsel to speak with Mr. Warr about the amount of restitution Ms. Hurles owed the Morrisons. (08/11/11 Tr., p.99, Ls.5-25.) The State also pointed out that Ms. Hurles' husband alleged in the PSI that the Morrisons lied to the district court about the amount of restitution in order to get revenge. (08/11/11 Tr., p.109, Ls.13-16.)

As mentioned above, the Morrisons also hired the firm Givens Pursley to litigate issues associated with the criminal case. (05/19/11 Tr., p.84, Ls.5-10.) One of those lawsuits was against Mr. Warr, and the other was against U.S. Bank.[3] (08/11/11 Tr., p.118, Ls.18-24; PSI, p.52.) The district court stated that Ms. Hurles would have to pay the attorneys fees for all of this litigation. (05/19/11 Tr., p.84, Ls.11-17.) Ms. Hurles

[3] Defense counsel erroneously stated that the lawsuit was against Bank of American as the Morrisons sued U.S. Bank. (PSI, p.52.)

objected to the attorneys' fees being included in the criminal restitution. (05/19/11 Tr., p.84, Ls.18-19.) At the second restitution hearing, the State requested $48,734.61 in civil attorneys' fees, all of which were awarded by the district court. (08/04/11 Tr., p.16, Ls.14-24; 08/11/11 Tr., p.132, Ls.4-6, p.135, Ls.17-25; R, pp.67-72.) The district court also imposed a unified sentence of 14 years, with two years fixed. (R., pp.67-68.) Ms. Hurles timely appealed. (R., pp.73-76.)

ISSUES

1. Did the district court err when it concluded that the Morrisons did not implicitly waive the accountant-client privilege?

2. Was the district court's restitution calculation supported by substantial and competent evidence?

3. Did the district court abuse its discretion when it included civil attorneys' fees as part of the restitution awarded in the criminal proceedings?

ARGUMENT

I.

The District Court Erred When It Concluded That The Morrisons Did Not Implicitly Waive The Accountant-Client Privilege

A. Introduction

In Idaho, the holders of a privilege can waive that privilege if they disclose the nature of the confidential information or consent to the disclosure of the confidential information. In this case, Ms. Hurles argues that the Morrisons waived their accountant-client privilege when they relied on Mr. Warr's documents to establish the amount of restitution. Ms. Hurles also argues that Ms. Morrison's decision to testify as to the contents of her conversations with Mr. Warr waived the privilege. Additionally, Ms. Hurles argues that the Morrisons waived privilege when the prosecutor consented to allow defense counsel to discuss the amount of restitution with Mr. Warr.

B. The District Court Erred When It Concluded That The Morrisons Did Not Implicitly Waive The Accountant-Client Privilege

The accountant-client privilege is set forth in Idaho Rule of Evidence 515 and Idaho Code Section 9-203A. Idaho Rule of Evidence 510 sets forth circumstances under which a privilege is implicitly waived in Idaho, which follows:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

While not directly dealing with I.R.E. 510, the Idaho Supreme Court has also provided guidance over the implicit waiver of a privilege. In *Skelton v. Spencer*, 98 Idaho 417, 418 (1977), the plaintiff brought an action against the defendants seeking specific

performance of certain settlement agreements. When the settlement agreements were first executed, the defendants were initially satisfied with them. *Id.* However, one of the defendants, Louise Spencer, changed her mind and refused to perform her contractual obligations. *Id.* The plaintiffs then sued Ms. Spencer for specific performance of the settlement agreements. *Id.* As part of her defense, Ms. Spencer filed an affidavit wherein she asserted that the settlement agreement was the result of fraud and duress perpetrated by, among other people, her former attorneys, who represented her during the negotiations over the settlement agreement. *Id.* At trial, and over Ms. Spencer's invocation of the attorney-client privilege, her former attorneys testified as to the content of their conversations with Ms. Spencer. *Id.* at 418-419. The trial court ultimately concluded that the former attorneys did not engage in fraud or duress during those conversations. *Id.* Ms. Spencer appealed. *Id.*

On appeal, Ms. Spencer's primary argument was that the district court erred when it concluded that she implicitly waived her attorney-client privilege. *Id.* at 419. While interpreting the applicable statue, I.C § 9-203, the Idaho Supreme Court first reasoned that consent under the statue could be either express or implied, and when consent is found, the privilege is waived. *Id.* The Supreme Court then held as follows:

> This Court has also recognized that the attorney-client privilege is a defensive shield and not an offensive sword. Here, in support of her defense to the action for specific performance, Mrs. Spencer "testified" both to her communications with her attorneys throughout the settlement process and to the nature of their relation with her while discharging their duties as her attorneys. Having attacked the settlement agreements by this evidence, appellants then sought to prevent respondents from asking certain questions of appellant Louise Spencer's former attorneys, who were the other participants to the conversations so exposed and whose reputation and professional integrity were impugned.
>
> In these circumstances, appellant Louise Spencer's testimony impliedly consented to the disclosure of information she was otherwise privileged to withhold. Fairness requires that what she had disclosed could

> not later be withheld. Moreover, having herself disclosed communications and conduct otherwise privileged from disclosure, the rationale behind the privilege would no longer be served by recognizing appellant Louise Spencer's efforts to invoke it as a bar to the testimony of her former attorneys.
>
> . . . .
>
> By testifying to privileged communications, and by making an issue of her defense the privileged matter of her relation with her former attorneys, appellant Louise Spencer waived the attorney-client privilege for all communications relevant to the settlement process and the conduct of her former attorneys.

Id. at 420-421 (citation omitted).

Ms. Hurles recognizes that the *Skelton* opinion was based in the context of the attorney-client privilege and not the accountant-client privilege. However, I.R.E. 510 applies to all privileges. While Ms. Hurles is not aware of any controlling Idaho authority, there is persuasive authority from other jurisdictions that address implicit waivers in the context of the account-client privilege. For example, in *Wolfington ex rel. Wolfington v. Wolfington Body Co., Inc.*, 2000 WL 33158566, at 236-239* (Pa. Com. Pl. 2000), it was held as follows:

> The accountant-client privilege in Pennsylvania did not exist at common law and there are few Pennsylvania cases which address it. As stated by the Pennsylvania Superior Court, "[t]he relationship between an accountant and his client has been held to be one of confidentiality ...; however, the statute makes only a limited change in the common law, and it does not extend the common-law attorney-client privilege to the accountant-client relationships." *Agra Enterprises Inc. v. Brunozzi,* 302 Pa. Super. 166, 171, 448 A.2d 579, 582 (1982) (citations omitted) (holding that former accountant did not betray type of confidence protected by the accountant-client privilege). See also, *Bowman,* 358 F.2d at 423 (stating that "[s]ince the statute is in derogation of the common law which does not accord an accountant-client privilege, the privilege which it accords must be strictly construed.").
>
> . . .
>
> In discussing the privilege, the federal courts have given it a narrow interpretation and have refused to apply it in certain situations. For

example, in *Detroit Coke Corporation v. NKK Chemical USA Inc.,* 1993 WL 367060 at *1 (W.D.N.Y.), the court granted the defendant's motion for an order directing plaintiff's accountants to comply with a subpoena. The *Detroit* court stated that "[t]he accountant-client privilege is designed to encourage full divulgence to the accountant; it should not be used offensively to prevent a sued party's access to relevant and potentially vital information in challenging claims made against such party by the accountant's client." *Id.* at *2. In *Emtec Inc. v. Condor Technology Solutions Inc,* 1998 WL 242603 at **2-3 (E.D.Pa.), the court held that Pennsylvania's accountant-client privilege did not bar discovery of documents from the accountant's audit of plaintiff where the information sought was relevant to defendants' affirmative defenses in a breach of contract case. The court reasoned that "the client may waive the accountant-client privilege through conduct inconsistent with its assertion." *Id.* at *2. Likewise, in *Samson Refining Co. v. Bache Halsey Stuart Shields Inc.,* 92 F.R.D. 440, 441 (E.D.Pa. 1981), the court stated the following:

> "When the client commences a lawsuit the allegations of which make relevant information and knowledge in the possession of the accountant and when the information or knowledge would be discoverable from the client if it was in his possession, then the client should be deemed to have waived the privilege by initiating the suit. The privilege could not have been intended to cloak material that would be discoverable from the client if it was in the client's possession." *Id.* at 441. See also, *In re Oxford Royal Mushroom Products Inc.,* 41 B.R. 863, 864-65 (E.D.Pa. 1984) (holding that trustee was entitled to financial records to establish the size of the debtor's bankruptcy estate and that Pennsylvania's accountant-client privilege did not apply in bankruptcy).

The Supreme Court of Florida has also commented on implicit waivers in the context of the accountant-client privilege. In *Savino v. Luciano*, 92 So.2d 817, 818-819 (Fla. 1957), a litigant invoked the accountant-client privilege during discovery to prevent the other party from gaining access to documents created by the accountant which would be necessary to prove the litigant's case at trial. In dealing with this issue, Florida Supreme Court first noted that, "The anomaly of his position is immediately apparent: for the purpose of barring the discovery procedure, the audit and report is

confidential and privileged; for the purpose of proving his case, it is not." *Id.* at 819.

The Florida Supreme Court then ruled as follows:

> As in the case of all personal privileges, the accountant-client privilege may be waived by the client. And, as in all confidential and privileged communications, '[t]he justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public.' Judge Learned Hand speaking in *United States v. Krulewitch*, 2 Cir., 145 F.2d 76, 79, 156 A.L.R. 337. When a party himself ceases to treat a matter as confidential, it loses its confidential character. *Cf. Ludwig v. Montana Bank & Trsut Co.*, 1940, 109 Mont. 477, 98 P.2d 377, 388; *Wise v. Haynes*, Tex.Civ.App.1937, 103 S.W.2d 477, 481. And when a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist, in pretrial discovery proceedings, that the matter is privileged. *See Van Heuverzwyn v. State*, 206 Misc. 896, 134 N.Y.S.2d 922, 924.
>
> We hold, therefore, that the defendant in the instant case has either expressly or impliedly waived the right to insist upon the privileged nature, if any, of the audit and report. The provision of Sec. 473.15, supra, that 'no such certified public accountant or public accountant shall be permitted to testify with respect to any of said matters, except with the consent writing of such client or his legal representative' is not applicable to the factual situation here.

Maryland's Court of Appeals has also made the following comments about implicit waiver of the accountant client privilege:

> The accountant-client privilege, like all other personal privileges, may be waived by the client's conduct. *See, e.g., Tofani,* 297 Md. at 173, 465 A.2d at 417 (holding that reporter shield law, § 9-112 of the Courts & Judicial Proceedings Article, may be waived when reporter acts in a manner inconsistent with the statutory privilege or the intention to rely on it); *Harrison,* 276 Md. at 137-38, 345 A.2d at 839 (recognizing waiver by implication for attorney-client privilege); *see also In re Matthew R.,* 113 Md.App. 701, 707-09, 688 A.2d 955, 957-58 (1997) (addressing argument regarding waiver by implication for psychiatrist-patient privilege); LYNN MCLAIN, MARYLAND EVIDENCE § 501.1, at 464 (1987) ("All privileges may be waived, but only by their holder...."). For example, the privilege may be waived by the client's disclosure to third parties. The accountant-client privilege may also be waived by issue injection by the client in a lawsuit, when the client injects the professional activity or the advice of an accountant as an issue in a particular case. *See In re Hillsborough Holdings Corp.,* 176 B.R. 223, 238-40 (M.D.Fla.1994).

Sears, Roebuck & Co. v. Gussin, 350 Md. 552, 565 (Md. 1998). According to the foregoing authorities, the accountant-client privilege is implicitly waived when the holder of the privilege injects the contents of the privileged communications into a lawsuit.

In this case, the Morrisons implicitly waived the accountant client privilege by issue injection and reliance on Mr. Warr's documents to calculate the amount of restitution. At the second restitution hearing, defense counsel made the following objection to Ms. Morrison's invocation of the accountant-client privilege, "here is my problem. They're going to use Mr. Warr's documents for the presentence investigation, they can't claim privilege and turn around and say, okay, he can't testify as to what those documents are." (08/04/11 Tr., p.17, Ls.12-16.) Defense counsel also objected on the basis that Ms. Morrison's decision to discuss the contents of Mr. Warr's work product constitutes a waiver. (08/11/11 Tr., p.97, Ls.14-16.)

The Morrisons' reliance on Mr. Warr's work product during the presentence process also waived the accountant-client privilege. The presentence investigator stated that the Morrisons did not keep a log of the amount of money that went into the ATM "but they had their accountant come up with an amount of loss from the ATM the spreadsheet showed a substantial loss each year going back to 2004." (PSI, p.3.) Ms. Morrison told the presentence investigator that "[b]ased on further investigation, her confession and in depth accounting we had proof [that Ms. Hurles stole money from the ATM]." (PSI, p.5 (emphasis added).)

At the first restitution hearing, before the accountant-client privilege was invoked, Ms. Morrison relied solely on Mr. Warr's work product to establish the amount

of restitution for the money taken from the petty cash. When asked how she calculated the amount of money Ms. Hurles stole, Ms. Morrison replied as follows:

> I have records from my then accountant, James Warr, who showed an imbalance in the credits and the debits of the ATM of checks written to the ATM; credits meaning the money that was dispensed and paid back to my bank account from the ATM company. And those differences are what you see in column 4, I believe it is, a total of 154-some-thousand-dollars.
>
> I don't know if I am in the right column. But those differences between what he tracked as being what was supposed to be money in and money out is $139,000, I think it is.
>
> Q [Trial Counsel]. Okay. Just for our purposes, what am I talking about here is what he tracked to you is that the ATM figures were inflated?
>
> A [Ms. Morrison]. Correct. They were not correct.
>
> . . . .
>
> Q [Trial Counsel]. You say that you have got records to show where the cash went once it was cashed at the bank; is that right?
>
> A [Ms. Morrison]. I have accounting records from my accountant that show that the checks that were written to – supposed to be deposited into the ATM are short – are short by about $139,000.

(05/19/11 Tr., p.71, L.21 – p.73, L.10.) When asked about her records of cash transactions she stated "I have records of them. I have – we have daily cash recordings that we do every day. We have a monthly spreadsheet that is provided to my accountant." (05/19/11 Tr., p.77, L.23 – p.78, L.1.)

Even after invoking the accountant-client privilege the Morrisons still relied on Mr. Warr's work product:

> And again, Your Honor, the figures that Mr. Warr did give that were reflected in the police reports, have already been provided in the form of the presentence investigation, and so part of the invocation there, that's their privilege, that's their right to invoke it, but from the state's perspective, his view that there was a theft, and the fact that it was over $100,000 is already documented in the police reports, and so I think we can go forward, from the state's view, with that as background that has

already been provided by that witness and is attached to the presentence report and that's part of the original police reports.

(08/04/11 Tr., p.16, L.25 – p.17, L.11.)

Defense counsel also argued that Ms. Morrison waived the privilege because she disclosed communications between herself and Mr. Warr. Defense counsel made the following objection at the second restitution hearing, "When Ms. Morrison testified, my recollection is that she had a – she spoke on – in either direct examination or on cross examination, about conversations she had with her accountant, which I think, waives the accountant/client privilege." (08/11/11 Tr., p.96, Ls.5-10.) During the initial investigation concerning the ATM, Mr. Warr participated in the investigation of the Boise Police Department and explained how the internal bookkeeping operations of the No Lawyers Bar functioned. (PSI, p.214.) During the first restitution hearing Ms. Morrison also testified that Mr. Warr told her about a $1,300.00 accounting discrepancy, and that he had created new booking procedures for the No Lawyers Bar after discovering various accounting problems and Ms. Hurles theft. (05/19/11 Tr., p.62, L.24 — p.70, L.11.)

Additionally, the Morrisons waived the accountant-client privilege when they had defense counsel speak with Mr. Warr about the amount of restitution. Defense counsel also objected the invocation of privilege on the following bases, "Your Honor, this is a witness given to me by the state, subpoenaed by the State to the original restitution hearing. No privilege was ever requested." (08/11/11 Tr., p.97, Ls.17-20.) At the original restitution hearing, the following dialogue occurred:

Q [Trial Counsel]. Okay. And through this process, were you able to detect this amount of loss?

A [Ms. Morrison]. No, because that's not where the amount of loss was coming from.

Q [Trial Counsel]. So what I'm saying is, isn't it possible that Ms. Hurles wasn't cashing all of these checks but, instead, returning a significant portion back to the bar?

A [Ms. Morrison]. I think that she's already admitted in her PSI that she would take checks to the bank and cash them, and a portion of that proceeds would go into the ATM. So I think that's pretty clear.

Q [Trial Counsel]. Okay. So essentially what we are doing here today, then, we are just cataloging every single check and saying that she is responsible for that full amount; is that right?

. . .

MR. CRAFTS:[4] Well, everyone agrees that she didn't take the full amount of these checks.

THE COURT: I don't think everyone agrees to that.

MR. CRAFTS: The problem is – and your going to hear from the accountant – is that we just don't have the records to establish that. They say that. . . . [T]his figure has gone from $90 to $284,000 back down to $160,000. And the amount—

THE COURT: Okay. So your're going to call an accountant yet today?

. . . .

MR. CRAFTS: I apologize for that. I can tell the court, too, that there is a lot of layers to this thing. And as I went and met with Givens Pursley, as I went and met with the accountant . . . .

(05/19/11 Tr., p.78, L.6 – p.80, L.16.) The district court initiated the following dialogue at the second restitution hearing:

Looks to me like the only thing that – that stands between the restitution figure being requested and the client paying that amount is potentially whether or not the – you can impeach the victim through the accountant.

A [Trial Counsel]. Correct.

Q [The Court]. Is that what you want to do?

[4] Charles Crafts is Ms. Hurles' defense counsel.

A [Trial Counsel]. Correct.

Q [The Court]. And I'm just curious; why is it – how did you gain knowledge that the accountant may have information that would be impeaching?

A [Trial Counsel]. Judge, like I said, Mr. Warr was originally – he is the state's witness.

Q [The Court]. Did you talk to him?

A [Trial Counsel]. He was subpoenaed by – he was subpoenaed.

Q [The Court]. You talked to him?

A [Trial Counsel]. I did talk to him.

Q [The Court]. So he potentially breached client relationship at that point.

(08/11/11 Tr., p.98, L.22 – p.99, L.17.) The decision to have defense counsel speak with Mr. Warr over the amount of restitution and how he calculated that amount is a waiver of privilege. This position is also consistent with I.R.E. 510 which states that the holder of a privilege waives the privilege if s/he "consents to disclosure of any significant part of the matter or communication." The Morrisons put Mr. Warr's work product at issue when they had him participate in the police investigation, relied on his work during the presentence investigation, testified about his work product and confidential conversations at the original restitution hearing, and had defense counsel contact him to discuss his restitution calculations.

Mr. Warr's testimony is necessary because it is the only means by which the district court and Ms. Hurles could get an accurate restitution estimate. The Morrisons indicated that there was no log of the amount of money that went into the ATM each day, but they had their accountant come up with an amount of loss from the ATM. (PSI, p.3; 05/19/11 Tr., p.65, L.21 – p.66, L.9, R., p.70, Ls.12-14.) Since Ms. Hurles

was cashing checks, then returning a portion of the proceeds into the ATM, there is no way of calculating the restitution without the Mr. Warr's testimony.

Mr. Warr's testimony was also necessary to impeach Ms. Morrison. Defense counsel also alleged that the Morrisons were taking money from the petty cash in the same manner as Ms. Hurles. (05/19/11 Tr., p.75, Ls.12-15.) The implication is that the Morrisons were asking for money they took from the ATM to be included in the restitution. However, Ms. Morrison testified that neither she nor her husband borrowed money from the ATM. (05/19/11 Tr., p.62, Ls.2-23., p.67, L.16 – p.68, L.7, p.75, Ls.20-23.) When Ms. Morrison was asked "Didn't your accountant actually confront you with the checks signed and endorsed by [Mr. Morrison], and you denied it for five months," Ms. Morrison answered no. (05/19/11 Tr., p.69, Ls.22-25.) As such, Ms. Hurles needs the testimony of Mr. Warr to impeach Ms. Morrison over her assertion that the Morrisons were not taking money out of the ATM. If defense counsel's position is true, then Ms. Morrison knowingly lied to the court by inflating the amount of money Ms. Hurles stole from them. According to defense counsel "[E]even hiring a CPA is not going to be able to get us to the admissions made by the alleged victims in this case, which is really what we needed from Mr. Warr anyway . . . ." (08/04/11 Tr., p.22, Ls.7-10.)

In sum, the Morrisons implicitly waived the accountant-client privilege as to the documents and conversations used to establish the amount of restitution Ms. Hurles owes the Morrisons. If defense counsel's assertions are correct, the current amount of restitution was intentionally inflated by the Morrisons and Mr. Warr's testimony is the best means to establish the amount of restitution. Moreover, there was no reason for the Morrisons to invoke the accountant-client privilege if they were telling the truth. As

such, the district court erred when it determined that the Morrisons did not waive the accountant-client privilege and, in doing so, might have enabled the Morrisons to get away with lying to the court.

II.

The District Court's Restitution Calculation Was Not Supported By Substantial And Competent Evidence

A. Introduction

At the first restitution hearing, defense counsel established various problems with the spreadsheet created by Givens Pursley to establish the amount of restitution. Many of the checks should not have been included in the restitution, as they were endorsed by the Morrisons, W.B., and D.B. Additionally, the spreadsheet included the total amount of the cashed checks and did not consider the fact that Ms. Hurles was only keeping between ten and twenty percent of the checks. The decision to prevent Mr. Warr from testifying precluded Ms. Hurles from correcting these errors.

Additionally, the restitution statute, I.C. § 19-5304, requires that there be a causal relationship between a defendant's criminal acts and the victim's injuries in order for a court to order restitution. In this case, Ms. Hurles was charged with thefts that occurred between December of 2008 and December of 2009, and Ms. Hurles pleaded guilty to thefts which occurred during the same period of time. However, Ms. Hurles' restitution order includes the losses which began in 2005. Ms. Hurles argues that she was not charged with, and did not plead guilty to, any thefts between 2005 and November of 2008. As such, the restitution should not have included loss for any events which allegedly occurred between 2005 and November of 2008, as those

alleged losses are not causally related to the criminal acts for which Ms. Hurles was convicted.

B. The District Court's Restitution Calculation Was Not Supported By Substantial And Competent Evidence

1. The Restitution Award Included The Full Amount Of The Checks Ms. Hurles Cashed, Even Though She Only Took Ten To Twenty Percent Of The Cashed Checks

The decision whether to order restitution, and in what amount, is within the discretion of a district court, guided by consideration of the factors set forth in I.C. § 19–5304(7) and by the policy favoring full compensation to crime victims who suffer economic loss. *State v. Lombard*, 149 Idaho 819, 822 (Ct. App. 2010). In reviewing the trial court's exercise of discretion, this Court must determine whether the trial court: (1) correctly perceived the issue as one involving the exercise of discretion; (2) acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices it had; and (3) reached its decision by an exercise of reason. *State v. Olpin*, 140 Idaho 377, 378 (Ct. App. 2004). The trial court is directed by statute to base the amount of economic loss to be awarded upon the preponderance of evidence submitted to the trial court by the prosecutor, defendant, victim, or presentence investigator. *Lombard*, 149 Idaho at 822 (citing I.C. § 19–5304(6)). The determination of the amount of restitution is a question of fact for the trial court whose findings will not be disturbed if supported by substantial evidence. *Id.* The State has the burden of proving the amount of restitution. *State v. Nienburg*, 153 Idaho 491, 497-498 (Ct. App. 2012).

In determining the amount of restitution for a crime victim, the trial court, "shall consider the amount of economic loss sustained by the victim as a result of the

offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate." *Lombard*, 149 Idaho at 822-823 (quoting I.C. § 19–5304(7)). "Restitution may only be awarded for actual economic loss suffered by the victim." *Id.* at 823 (citing I.C. § 19–5304(1)(a)(2)).

At the original restitution hearing, various problems were identified in the spreadsheet created by Givens Pursley and the State's restitution calculation, which were never resolved. At the final restitution/sentencing hearing, defense counsel made the following argument about the amount of restitution:

> In terms of what the actual figure was, I requested tax records. Tax records, they opposed on obtaining tax records. And if you take a look at this spreadsheet that's given -- I know we are not talking about restitution . . . [at this point in the hearing], but I think I need to make a record of it -- it really has no value whatsoever in an accounting. All you really have in that column on the spreadsheet is just a log of checks. We don't have what their profits were, we don't know what their losses were. We don't know if they are claiming losses on these things. I know they say that are claiming losses. I don't know that information, and my job my circle of responsibility here for Ms. Hurles is to figure out what were the profits, what were the losses. All I have is a window of checks that were cashed.
>
> If I could from my understanding -- this is basically how Ms. Hurles was stealing money. She would takes these checks; this money was supposed to go into the ATM machine. By their account -- this is why I personally struggle with this particular case -- by their account, if we take that restitution figure, that means that every single check that she cashed she took for herself. By logical extension, what that means is that [the] ATM would never have any money in it. She would literally take every single penny that was supposed to go into the ATM.
>
> Ms. Hurles says what she would do was, she would go cash these checks. She would get . . . $1,500. She would keep [$200 to $300] for herself and she would put [$1,200 to $1,300] in the ATM machine. What we don't have is . . . records from the ATM machine.
> . . . .
>
> And it's very difficult for me to just say there is a figure out there that represents what was taken from the ATM when we don't have that information.

> Once again, we are bound by the accountant/client privilege, and I can't pursue that. So it's their choice not to reveal this information.

(08/11/11 Tr., p.119, L.25 - p.122, L.21.) Defense counsel then stated that twenty to thirty percent of the restitution requested by the Morrisons matches the $20,000.00 to $50,000.00 amount that Ms. Hurles admitted she stole. (08/11/11 Tr., p.122, L.20 - p.123, L.1.) The district court then said that "[t]here is an approximate additional $100,000 . . . they believe was taken by her . . . ."[5] (08/11/11 Tr., p.123, Ls.2-5.) Defense counsel then pointed out that those "checks are . . . signed by the Morrisons." (08/11/11 Tr., p.123, Ls.6-7.) Defense counsel then stated:

> [She] may wish to file an appeal. I think I need to make a record of this last issue, and that is, from my perspective and the problem that we have here, basically, is that the Morrisons were doing the exact same thing. They were taking money that was supposed to go to the ATM account and they were cashing these checks. We have checks made out to the ATM that were signed by [the Morrisons].

(08/11/11 Tr., p.124, Ls.2-10.) The implication is that the Morrisons were requesting restitution from Ms. Hurles for money they removed from the ATM account and they used it for their own purposes.

Additionally, Ms. Berriochoa, the paralegal from Givens Pursley who created the spreadsheet testified that her total did not take into account the fact that Ms. Hurles deposited between eighty to ninety percent of the checks' proceeds into the ATM. (05/19/11 Tr., p.34, Ls.7-18.) Ms. Berriochoa also testified that many of the checks were accidentally categorized as ones Ms. Hurles cashed, when in reality they were endorsed by either of the Morrisons and not Ms. Hurles. (05/19/11 Tr., p.34, L.19 – p.36, L.14.) Ms. Morrison also testified that the checks Ms. Berriochoa accidentally

[5] The Morrisons agreed to not seek restitution for the $100,000.00 which was related to checks they endorsed. (08/11/11 Tr., p.123, Ls.2 - p.124, Ls.10.)

accredited to Ms. Hurles' restitution total were in fact cashed by the Morrisons. (05/19/11 Tr., p.50, L.18 – p.51, L.20.) Some of the checks had the initials W.B. and D.B., and Ms. Morrison could not identify those people. (05/19/11 Tr., p.60, L.12 – p.61, L.14.) Ms. Berriochoa also testified that she has no accounting background, she only had a small degree of familiarization with the Morrisons' bookkeeping procedures, she had no idea what happened to any of the checks after they were cashed, and she had no idea who cashed $114,000.00 of the checks. (05/19/11 Tr., p.33, L.23 - p.36, L.25.)

The restitution amount requested by the Morrisons was not credible, as there were significant ranges of restitution estimates. The Morrisons told the presentence investigator that the amount of restitution they were requesting was $149,220.00. (PSI, p.6.) The attorney from Givens Pursley concluded that the restitution was $284, 830.00. (PSI, p.187.) The Boise Police Department concluded that the amount of money taken from the ATM was $108,500.00. (PSI, p.214.) However, Ms. Hurles only endorsed a number of checks that totaled $39,000.00. (05/19/11 Tr., p.56, Ls.23 – p.57, L.4.)

Additionally, the restitution figure should have been offset by an insurance payment the Morrisons received. The Morrisons received an insurance payment of $2,500.00, and the insurance company was requesting reimbursement from Ms. Hurles.[6] (PSI, p.6, 310.) This money should have offset the amount of restitution awarded to the Morrison because that $2,500.00 for compensation for Ms. Hurles theft. Without such an offset, the Morrisons are getting double recovery.

[6] Ms. Hurles recognizes that she is liable to the insurance company for the $2,500.00.

In sum, there are many problems with the restitution estimates provided by the Morrisons. The main problem is that Ms. Hurles was only taking ten to twenty percent of the checks she cashed, but Ms. Berriochoa said she did not take that into consideration. Additionally, many of the checks were endorsed by the Morrisons, W.B., and D.B. but were included into the restitution total. As argued in Section I, *supra*, many of these issues could have been resolved if the Morrisons' accountant, Mr. Warr, would have testified, but the Morrisons used the accountant-client privilege as a means to prevent him from clarifying the errors in the restitution total. Since none of these issues were resolved, the restitution ordered by the district court is not supported by substantial and competent evidence.

2. The District Court Abused Its Discretion When It Included Restitution For Checks Which Were Cashed Between 2005 And November Of 2008

Statutory interpretation is a question of law over which an appellate court exercises free review. *Fields v. State*, 149 Idaho 399, 401 (2010). Idaho Code § 19-5304(2) permits a court to order restitution for any person who suffers an economic loss that results from a defendant's criminal activities. *State v. Corbus*, 150 Idaho 599, 602 (2011). "The statute defines victim as 'a person or entity, who suffers economic loss or injury *as a result of the defendant's criminal conduct.*'" *Id.* (quoting I.C.-19-5304(1)(e)(i) (original emphasis)). "The term economic loss includes 'the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses *resulting from the criminal conduct.*'" *Id.* (quoting I.C. § 19–5304(1)(a) (original emphasis)). A causal connection between the defendant's criminal conduct and the injuries suffered by the victim must exist in order for the district court to order restitution. *Id.* The question of causation is

one fact for the district court to decide and the decision on whether to order restitution is left to the sound discretion of the district court. *Id.* The district court's factual findings will not be disturbed on appeal provided they are supported by substantial evidence. *Id.*

The remaining standard of review was articulated in Section II(B)(1), *supra*, and is incorporated herein by reference thereto.

In this case, the Information in this matter charged Ms. Hurles with grand theft and alleged that she stole money from the No Lawyers Bar from December 2008 to December 2009. (R., pp.26-27.) At the change of plea hearing, Ms. Hurles admitted to stealing money from the No Lawyers Bar during the same period of time. (02/17/11 Tr., p.6, L.22 - p.7, L.3.) At the final restitution/sentencing hearing, Ms. Hurles stated that she only took money for fourteen months, not for five years as the Morrisons claimed. (08/11/11 Tr., p.128, Ls.18-22.) At the first restitution hearing, the State was requested restitution for alleged thefts which occurred from 2005 to 2010. (05/19/11 Tr., p.73, L.11 - p.74, L.6.) It appears that the district court ordered restitution based on the State's request. (R., pp.71-72.)

Ms. Hurles argues that I.C. § 19-5304 only allows the district court to award restitution for the alleged thefts that occurred from December of 2008 to December of 2009, and any restitution which was based on thefts which occurred outside of that period should not have been included in the restitution order. As stated above, I.C. § 19-5304 requires a causal relationship between the criminal act and the damages resulting in restitution. Idaho Code Section 19-5304(1)(b) states that, "'Found guilty of any crime'" shall mean a finding by a court that a defendant has committed a criminal act and shall include an entry of a plea of guilty, an order

withholding judgment, suspending sentence, or entry of judgment of conviction for a misdemeanor or felony." When I.C. § 19-5304(1)(b) is read in light of I.C. § 19-5403(1)(a) and I.C. § 19-5403 (1)(e)(i), it indicates that the causal relationship must be with the actual crime to which the defendant was convicted. That proposition it borne out of the fact I.C. § 19-5403(1)(b), defines "found guilty of any crime" to mean the actual crime to which the defendant pleaded guilty. Since Ms. Hurles pleaded guilty to thefts which occurred from December 2008 to December 2009, those are the only thefts for which restitution can be ordered. However, the district court ordered restitution for alleged thefts which were not charged in the information and to which Ms. Hurles never pleaded guilty. Thus, the district court's restitution order runs afoul I.C. § 19-5304 and should be recalculated to only include the alleged thefts from December of 2008 to December of 2009. Further support for Ms. Hurles position is found in *State v. Hargas*, 126 Idaho 727, 730 (Ct. App. 1995), where it was held that in the event multiple charges are brought and then some are dismissed, absent an agreement to the contrary, restitution cannot be ordered for injuries or damages caused by the dismissed charges.

As a final note, Ms. Hurles consistently stated that she did not start stealing money until her husband lost his job in 2008. (PSI, pp.6-7.; 08/11/11 Tr., p.128, Ls.18-22.) More importantly, Ms. Morrison primarily based her belief that Ms. Hurles began stealing in 2004 on nothing more than admitted speculation. Specifically, Ms. Morrison told the presentence investigator "her theft over the last 6 years (we have to assume it has been going on her whole length of employment in one way or another) . . . ." (PSI, p.5.) Even though the No Lawyers Bar had accounting discrepancies that went back to 2004, many of those could be explained by the fact that the Morrisons might have been

taking money out of the petty cash in the same manner as Ms. Hurles. (08/11/11 Tr., p.124, Ls.2-10.) This position is further supported by the fact that the Morrisons were willing to forgo approximately $100,000.00 of their original restitution estimate after defense counsel pointed out that the Morrisons were the ones who endorsed those checks. (08/11/11 Tr., p.122, L.10 - p.124, L.10.) As argued in Section I, *supra*, this could have been cleared up had the Morrisons allowed their accountant, Mr. Warr, to testify as to his restitution estimate.

In sum, I.C § 19-5304 requires that there be a causal relationship between the charged offense and the injuries suffered by the victim in order for restitution be awarded to cover the cost of those injuries. In this case, the district court ordered restitution for uncharged conduct in contravention of I.C. § 19-5304. As such, a new restitution hearing should be ordered in order for restitution to be calculated in compliance with I.C. § 19-5304.

III.

The District Court Abused Its Discretion When It Included Civil Attorney Fees As Part Of The Restitution Awarded In The Criminal Proceedings

A. Introduction

The Morrisons, owners of the No Lawyers Bar, hired a civil law firm, Givens Pursley, to litigate issues related to Ms. Hurles theft. It appears that the Morrisons sued their accountant, Mr. Warr, U.S. Bank, and intervened in Ms. Hurles Bankruptcy. (PSI, p.52.) Additionally, Givens Pursley helped the Morrisons prepare for the criminal restitution hearing in this case and billed $14,876.73 for its efforts. (PSI, p.52.) Givens Pursley's total bill for this ligation was $48,734.61, which was included in the restitution

award over Ms. Hurles objection.[7] Ms. Hurles argues that the district Court erred when it included the civil attorneys fees in the restitution order as civil attorney fees have been characterized by the Idaho Court of Appeals as non-economic damages which are not awardable pursuant to Idaho's criminal restitution statute I.C. §19-5304.

B. The District Court Abused Its Discretion When It Included Civil Attorney Fees As Part Of The Restitution Awarded In The Criminal Proceedings

As a preliminary note, the applicable standards of review has been articulated in Sections II (B)(1) and II(B)(2), *supra*, and are incorporated herein by reference thereto.

Idaho Code Section 19-5403(11), states that "[a]n order of restitution shall not preclude the victim from seeking any other legal remedy." However, "[o]ne of the purposes of restitution is to obviate the need for victims to incur the cost and inconvenience of a separate civil action in order to gain compensation for their losses." *State v. Higley*, 151 Idaho 76, 78 (Ct. App. 2010). Additionally, I.C. § 19-5304(1)(a) "disallows restitution for noneconomic damages that might be available in a civil lawsuit, such as pain and suffering, wrongful death, emotional distress, and the like." *Id.*

The issue of the availability for civil attorneys fees under I.C. § 19-5304 was addressed in *State v. Parker*, 143 Idaho 165 (Ct. App. 2006). In that case, the defendant, Ms. Parker, was working as a bookkeeper for the victims and cashed approximately $18,000.00 of unauthorized checks. *Id.* at 166. Ms. Parker was charged with ten counts of forgery and, in addition, the victim filed a civil action against Ms. Parker and others. *Id.* Ms. Parker then pleaded guilty to one count of forgery and

[7] The district court entered a restitution order separately listing the amounts of restitution for the stolen money and the attorney fees. (R., pp.71-72.)

the remaining counts were dismissed. *Id.* The district court then entered a withheld judgment and placed Ms. Parker on probation. *Id.* As a term of her probation, Ms. Parker was required to pay restitution for the forged checks and she was required to pay $16,133.75 for attorney fees the victim incurred in the civil case. *Id.* at 166-167. Ms. Parker appealed and argued that the victim's attorney fees "were not a direct economic loss resulting from her criminal conduct, and therefore not appropriate as restitution or as a condition of probation." *Id.* at 167.

In resolving this issue the Court of Appeals first noted that I.C. § 19-5304(2) only allows restitution to be ordered for economic loss. *Id.* The Court then noted that a victimized business could recover, as restitution, salaries it paid its employees to "for investigating the extent of the defendant's theft." *Id.* However, the Court reasoned that "[i]t does not follow, however, that restitution may be ordered pursuant to I.C. § 19–5304 for *any* out-of-pocket expense that the victim would not have incurred but for the defendant's crime." *Id.* (original emphasis). In fact, the Court had previously held that in some instances the expense of preventing future harm "was not compensable through a restitution order . . . [as] a victim's own assessment of actions necessary to respond to a crime is not the correct measure for restitution under section 19-5304." *Id.* (citing *State v. Waidelich*, 140 Idaho 622, 624 (Ct. App. 2004)). The Court of Appeals then ruled as follows:

> With these authorities in mind, we conclude that the principal question in assessing the restitution award for attorney fees in the present case is whether the attorney fees for filing the civil lawsuit were an expense that was necessary in order for the victim to recover the losses caused by Parker's forgeries. It is apparent that they were not. The only claim alleged in the civil complaint relating to the forged checks was for the amount of the forged checks, which is precisely what the victim was clearly entitled to receive and did receive in the restitution order. The victim's civil complaint also claimed damages for overpayment of wages that resulted from Parker submitting false time sheets, and for conspiracy

> and unjust enrichment related to two other defendants. None of these additional damages are alleged to have resulted from the forgeries. Under these circumstances, the lawsuit and the associated attorney fees were unnecessary to recover the victim's direct loss caused by the forgeries, for that loss was entirely compensable through the restitution order in the criminal case. Any judgment that the victim might have recovered in the civil litigation for the forged checks would have been duplicative of the restitution ordered in the criminal case. Therefore, the attorney fees related to the lawsuit are not an economic loss compensable through a restitution order under I.C. § 19–5304(1)(a).

Id. at 168. The Court of Appeals also addressed a separate issue dealing with the question of whether the victim's same civil attorney fees could be ordered as a term of the defendant's probation. *Id.* The Court of Appeals' holding on that issue follows:

> [W]e conclude that the ordered payment of the victim's attorney fees was not a permissible condition of probation. As explained above, the victim's civil action encompassed several claims that were not based upon the charged forgeries and also encompassed claims against third persons. It therefore is not clear whether or to what extent the attorney fees represent "resulting harm" from the crime to which Parker pleaded guilty. Of equal importance, the validity of the victim's civil claims against Parker, other than the claim for the forgery, have not been adjudicated. Parker's guilty plea in the criminal case did not include an admission of the other alleged wrongdoing delineated in the victim's civil complaint, and there has been no judicial determination that Parker bears liability on those claims. It was premature, therefore, for the trial court to order Parker's payment of attorney fees incurred by the victim to pursue claims of unknown validity. The merits of the underlying claims, and of the victim's request for an award of attorney fees incurred in pursuing those claims, must be determined in the civil action.

Id. at 168-169.

In this case, Ms. Hurles did object to the inclusion of the attorney fees at the original restitution hearing. (05/19/11 Tr., p.84, Ls.18-19.) The district court ultimely ordered Ms. Hurles to pay $48,734.61 for attorneys' fees. (R., pp.71-72.)

The nature of the civil lawsuits in this matter are somewhat unclear, however, the lawsuit against Mr. Warr was filed and based on a breach of duty he owed as an accountant to the Morrisons. (08/04/11 Tr., p.12, L.16 - p.14, L.5.) Under the holdings

in *Parker*, this is not compensable because it is a not based Ms. Hurles' thefts, but Mr. Warr's alleged breach of his duty to the Morrisons. Further, it is a lawsuit against a third party which was also a reason to deny the restitution award in *Parker*. The basis for the lawsuit against U.S. Bank is unclear from the record, but at a minimum the attorney fees for that lawsuit are not compensable under the reasoning in *Parker* because, as with the lawsuit against Mr. Warr, it is against a third party. Finally, neither of these lawsuits were final at the time of the restitution/sentencing hearings, and that same lack of finality was another reason why restitution could not be ordered for the civil lawsuits in *Parker*. (08/11/11 Tr., p.118, L.24 - p.119, L.5, 125, L.25 - p.126, L.4.)

The intervention in Ms. Hurles' bankruptcy was not compensable because the only logical reason for the Morrisons to intervene in the Hurles bankruptcy proceeds would be to secure funds from the bankruptcy estate. Such an action is a means to prevent a future harm, and the *Parker* case stated that preventing future harm "was not compensable through a restitution order . . . [as] a victim's own assessment of actions necessary to respond to a crime is not the correct measure for restitution under section 19-5304." *Id.* at 167 (citing *State v. Waidelich*, 140 Idaho 622, 624 (Ct. App. 2004)). As such, the attorney fees associated with the intervention in Ms. Hurles' bankruptcy proceedings are not compensable under I.C. § 19-5304.

Further, Ms. Hurles argues that the award of civil attorneys' fees in the amount of $14,876.73 for a paralegal to create a spreadsheet constitutes an abuse of discretion as those fees are unreasonable. It is hard to fathom how Givens Pursley accumulated $14,876.73 in fees to create a spreadsheet, especially since Mr. Warr, an accountant, had already created a spreadsheet showing the Morrisons' losses. (PSI, p.3.) The work appears somewhat duplicative as Mr. Warr's work product was used in

the presentence investigation and, as argued in Section I, *supra*, was heavily relied on to establish the Morrisons' restitution estimate. (PSI, p.3.) Moreover, this work should have been performed by an accountant as the $14,876.73 spreadsheet was replete with errors and only caused confusion. [8] *See* Section II(B)(1), *supra*. In fact, Givens Pursley estimated that the amount of restitution was $284,839.00 (PSI, p.188), and that estimate was so unreliable the restitution ultimately ordered was $155,440.00. (R., pp.71-72.) As such, the district court abused its discretion when it ordered unreasonable attorney fees.

In the event this Court grants relief based on the argument set forth in Section II(B)(2), *supra*, Ms. Hurles also argues that the $14,876.73 figure should be recalculated to exclude time billed for cataloguing checks falling outside of the December 2008 to December 2009 time period, as restitution based on that work is not causally related to the actions for which Ms. Hurles was convicted.

In sum, the attorneys fees for the third party lawsuits are not compensable economic damages under I.C. § 19-5304 and the *Parker* holding because those lawsuits were against third parties and were not final at the time of the restitution/sentencing hearings. Additionally, the lawsuit against Mr. Warr was based on an alleged breach of a duty he owed to the Morrisons and were, therefore, not based on the Ms. Hurles' charged thefts. The attorney fees for the intervention into the Hurles' bankruptcy are not compensable as they represent the prevention of a

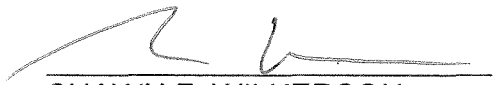
[8] Ms. Berriochoa, the paralegal that created the spreadsheet, testified that she has no accounting background, she only had a small degree of familiarization with the Morrisons' bookkeeping procedures, she miscategorized some of the checks in the spreadsheet, she had no idea what happened to any of the checks' proceeds after they were cashed, and she had no idea who cashed $114,000.00 of the checks. (05/19/11 Tr., p.24, L.16 - p.26, L.22, p.33, L.23 - p.36, L.25.)

future harm which is not awardable as restitution. As such, the district court abused its discretion when it ordered civil attorney fees as part of the criminal restitution because that decision did not comport with the applicable legal standards. Additionally, the district court abused its discretion when it ordered civil attorneys' fees for the work performed in preparation of the restitution hearing as that work was unreliable, duplicative, and therefore, unreasonable.

CONCLUSION

Ms. Hurles respectfully requests that this case be remanded for another restitution hearing with instructions that the district court allow Mr. Warr to testify and that restitution only be ordered for the thefts which occurred from December 2008 to December of 2009. Ms. Hurles also requests an instruction consistent with this Court's rulings on the issues relating to the civil attorneys' fees. In the event this Court determines that the Morrisons did not waive the accountant-client privilege, or any other claim of error is deemed meritless, Ms. Hurles alternatively requests that this case be remanded for new restitution hearing with applicable instructions as to any of Ms. Hurles' prevailing claims of error.

DATED this 25th day of January, 2013.



SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KRISTI L HURLES
INMATE #99604
EAST BOISE COMMUNITY WORK CENTER
2366 E OLD PENITENTIARY RD
BOISE ID 83712

DARLA S WILLIAMSON
ADA COUNTY DISTRICT COURT
E-MAILED BRIEF

CHARLES CRAFTS
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Hand delivered to Attorney General's mailbox at Supreme Court.

NANCY SANDOVAL
Administrative Assistant

SFW/ns