

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 47241-2019
 Plaintiff-Respondent,)
) Kootenai County Case No.
 v.) CR28-18-11511
)
 ZOE RENEE BARHAM,)
)
 Defendant-Appellant.)
)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Zoe Renee Barham appeals the district court's award of restitution following her conviction for insurance fraud, arguing that the court improperly awarded \$144.66 to an insurer for time spent by an employee investigating the fraudulent insurance claim.

Statement Of The Facts And Course Of The Proceedings

Zoe Renee Barham was charged with felony insurance fraud under I.C. § 41-293(1)(c). (R., pp. 54-55.) According to the probable cause affidavit, she was not insured when she was involved in a car accident, but she immediately thereafter purchased an insurance policy from Progressive Casualty Insurance Company and, when the other driver filed a claim against that policy, represented to Progressive that she purchased the policy before the accident. (R., pp. 14-16.) Barham was convicted after a three-day jury trial. (R., p. 177.)

The state moved for restitution under I.C. § 41-293(4). (R., pp. 179-81.) In support, it submitted an affidavit stating that the Department of Insurance incurred \$1,402.80 to investigate and prosecute the offense, and that Progressive incurred \$2,400.60, including travel expenses for a witness, Phillip Carey, to attend the preliminary hearing and trial, as well as \$144.66 in investigation costs. (R., pp. 182-83.)

At sentencing, Barham stated that she was not objecting to the \$1,402.80 as restitution to the Department of Insurance, but that she was objecting to the \$2,400.60 requested for Progressive. (Tr. Vol. I, p. 17, L. 13 – p. 18, L. 7.¹) The district court imposed a sentence of five

¹ The file titled "Transcripts – Appeal Volume 1" contains three transcripts: from the preliminary hearing, from the sentencing hearing, and from the restitution hearing. While that file is continuously paginated, each of those individual transcripts is individually paginated as well.

years with two years fixed, but suspended that sentence, placed Barham on three years of probation, and required her to spend twenty-four days in jail. (Tr. Vol. I, p. 21, L. 18 – p. 22, L. 11; p. 25, Ls. 1-8; R., pp. 224-28.) The court ordered her to pay \$1,402.80 in restitution to the Department of Insurance, but reserved the question of restitution to Progressive until after a restitution hearing. (Tr. Vol. I, p. 23, Ls. 2-9; R., pp. 234-35.)

Prior to that restitution hearing, the state submitted an additional affidavit, this time from Phillip Carey, the Progressive employee who investigated Barham’s fraudulent claim and traveled twice to Idaho to testify both at the preliminary hearing and trial, stating that Progressive had incurred \$2,400.60 in expenses. (R., pp. 238-48.) That amount was comprised of \$1,266.73 to travel to the preliminary hearing, \$989.21 to travel to trial, and \$144.66 associated with the six hours Mr. Carey spent investigating the claim. (R., pp. 239.) Attached were expenses reports (R., pp. 240-47) and a letter from a claims support specialist stating that six hours, valued at \$144.66, were spent by Mr. Carey investigating the claim (R., p. 248).

At the restitution hearing, the parties stipulated that Mr. Carey’s affidavit was admissible and the court accepted it. (Tr. Vol. II, p. 5, L. 25 – p. 7, L. 11.) Rather than objecting to the admissibility of the evidence, Barham argued that the expenses reflected by the evidence were not compensable under I.C. § 41-293(4). (Tr. Vol. II, p. 11, L. 19 – p. 15, L. 7.²) With respect to

Following Barham (Appellant’s brief, p. 2 n. 1), the state will use “Tr. Vol. I” to refer to the sentencing transcript and its individual pagination, and “Tr. Vol. II” to refer to the transcript of the restitution hearing and its individual pagination.

² Barham did suggest below that there was nothing submitted to show that the expenses were actually paid by Progressive. (Vol. II Tr., p. 14, Ls. 5-11.) To the extent that she intended to argue that the evidence was therefore insufficient to show that the expenses had been incurred, she has abandoned that argument on appeal.

the \$144.66 for investigative costs, she argued that Mr. Carey was an employee and would have been paid the same amount by Progressive even if Barham had not made a fraudulent claim. (Tr. Vol II, p. 12, L. 16 – p. 13, L. 2.) With respect to the travel expenses, she argued that it was the state, and not Barham, that chose to subpoena Mr. Carey to testify and so the state, and not Barham, was responsible for incurring the expenses associated with his attendance. (Tr. Vol. II, p.13, Ls. 3-17.)

The district court awarded restitution to Progressive in the amount requested—\$2,400.60. (R., pp. 255-61.) Barham timely appealed. (R., pp. 262-65.)

ISSUE

Barham states the issue on appeal as:

Did the district court abuse its discretion by ordering Ms. Barham to pay restitution to Progressive for its investigation costs?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Barham established that the district court abused its discretion by ordering that Barham pay \$144.66 to Progressive as restitution for six hours of time spent by its employee investigating Barham's fraudulent insurance claim?

ARGUMENT

The District Court Did Not Abuse Its Discretion By Awarding Restitution For Time Spent By A Progressive Employee Investigating Barham's Fraudulent Insurance Claim

A. Introduction

Barham's only claim on appeal is that the district court abused its discretion by awarding \$144.66 as restitution for the time spent by a Progressive employee on the fraudulent insurance claim.³ (Appellant's brief, p. 6.) Her only argument is that that amount does not constitute a "financial loss" because Progressive would have paid that employee for his time even if Barham had not filed the fraudulent claim. (Id.) That argument fails. As the state argued below, though it is true that Progressive would have paid its employee even if Barham had not filed a fraudulent claim, it is also true that the resource for which Progressive paid—that employee's time—could have been used more productively and would not have been wasted on that fraudulent claim had Barham not filed it. (Tr. Vol. II, p. 16, Ls. 13-22.) That wasted resource constituted a financial loss for which the district court properly awarded Progressive restitution.

B. Standard Of Review

"The district court's factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence." State v. Straub, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013) (quoting State v. Corbus, 150 Idaho 599, 602, 249 P. 3d 398, 401 (2011)).

³ On appeal, Barham has apparently abandoned her argument, made below, that Progressive was not entitled to the costs associated with its employee traveling to and from Idaho to participate in the proceedings. (Tr. Vol. II, p. 13, Ls. 3-17.) That issue is therefore waived. See State v. Baxter, 163 Idaho 231, 235, 409 P.3d 811, 815 (2018) (explaining that issues not raised and argued in the opening brief are waived on appeal).

“Additionally, statutory interpretation is a question of law over which this Court exercises free review.” Id. (internal quotation marks and alterations omitted).

C. Progressive Suffered A Financial Loss Under I.C. § 41-293(4) When It Was Forced To Devote An Employee’s Time To Processing And Resolving Barham’s Fraudulent Claim

Anyone convicted of felony insurance fraud “shall be ordered to make restitution to the insurer or any other person for any financial loss sustained as a result of a violation of this section.” I.C. § 41-293(4). “‘Financial loss’ includes, but is not limited to, loss of earnings, out-of-pocket and other expenses, repair and replacement costs and claims payments.” I.C. § 41-291(8). The dispositive question on appeal is whether the value of the time spent by an insurer’s employee processing and resolving a fraudulent claim constitutes a “financial loss sustained as a result” of the fraud. The district court properly determined that it did.

According to Barham, Progressive would have paid its employee, Mr. Carey, whether or not Barham filed a fraudulent claim and, as a result, Mr. Carey’s pay is not a financial loss sustained as a result of her fraud. (Appellant’s brief, pp. 7-8.) That argument fails. Though Progressive would have paid Mr. Carey regardless, it nevertheless suffered a financial loss. Because of Barham’s fraud, Mr. Carey was forced to spend six hours resolving a fraudulent claim. While “it cannot be said that, but for Ms. Barham’s claim, Progressive would not have had to pay its employee,” (Appellant’s brief, p. 8), it can be said that, but for Barham’s claim, Mr. Carey would not have wasted his time—for which Progressive paid—on her fraudulent claim. But for Barham’s fraud, Mr. Carey would have been available to perform other tasks and his unavailability as a result of Barham’s fraud constitutes a financial loss to Progressive.

Barham’s argument has been addressed and rejected by the Idaho Court of Appeals, though in the context of a different but very similarly worded statute. In State v. Olpin, 140

Idaho 377, 93 P.3d 708 (Ct. App. 2004), the defendant was convicted of grand theft after she was accused of taking deposits from her employer's bank account. Id. at 378, 93 P.3d at 709. She was ordered to pay restitution under the victim restitution statute, I.C. § 19-5304, including for "wages for the time that the company's administrative employees spent researching the missing deposits." Id. The Court of Appeals rejected the argument that that award did not reflect a compensable "economic loss" under I.C. § 19-5304(1)(a). According to the court, the employees were diverted from other tasks to address Olpin's criminal conduct and "[t]he resulting loss of productivity is closely analogous to 'lost wages,' listed in I.C. § 19-5304(1)(a) as an example of economic loss appropriately included in a restitution award because, during the time that employees were diverted, the victim business lost the benefit of its employees' labor for other tasks." Id. at 379, 93 P.3d at 710. In addition, though these were regular employees, the court concluded that "[t]he salary portions that the victim paid for its employees' accounting work are 'direct out-of-pocket expenses,' also listed in I.C. § 19-5304(1)(a) as an example of economic loss, because the victim here paid for labor it would not have needed but for Olpin's theft." Id. (footnote omitted).

Nor is Idaho unique in holding that "[t]he inclusion of investigation costs [associated with existing employees' time spent investigating] in victim restitution awards is consistent with other state courts' interpretations of similar statutes." Id. n. 1 (collecting cases). See also In re Johnny M., 123 Cal. Rptr. 2d 316, 318-21 (Cal. Ct. App. 2002) (holding that where school district was forced to task regular employees to clean up vandalism, that task diverted the employees from other tasks, resulting in a loss of productivity, and constituted an economic loss resulting from the vandalism); State v. Birkeland, 258 P.3d 662, 664 (Utah Ct. App. 2011) ("The value of labor necessitated by another's culpable conduct has been recognized as a form of economic injury that

is amenable to inclusion in a restitution award.”), overruled on other grounds by State v. Ogden, 416 P.3d 1132 (Utah 2018).

Barham’s argument turns on the fact that Mr. Carey was already employed by Progressive and so would have been paid anyway. What Olpin and like cases from other states correctly recognize is that, where a victim like Progressive pays someone to perform a task necessitated only by the defendant’s criminal conduct, it makes little sense to suppose that whether that expense is compensable in restitution turns on whether that person was already employed by the victim or was hired specifically to perform that task. Either way, the employer is deprived of a resource. In the case of a victim required to assign an existing employee to respond to the defendant’s criminal conduct, the resource is the employee’s time and expertise, for which the victim paid.

Contrary to Barham’s claim on appeal, this common-sense result is supported by the plain language of the definition of ‘financial loss’ in I.C. § 41-291(8). The statute includes the same or relevantly similar language to that relied on by the Court of Appeals in Olpin. I.C. § 19-5304(1)(a), the statute at issue in Olpin, provides that “lost wages” constitutes an “economic loss,” while I.C. § 41-291(8) provides that “loss of earnings” constitutes a “financial loss.” Both statutes provide that out-of-pocket expenses are compensable in restitution. I.C. §§ 19-5304(1)(a) & 41-291(8). In fact, I.C. § 41-291(8) is more inclusive, as it expressly provides that expenses that are not out-of-pocket are also compensable through restitution. I.C. § 41-291(8) (providing that “out-of-pocket *and other* expenses” constitute financial losses) (emphasis added)). Thus, to the extent that Barham is suggesting that the loss here is not compensable because it is not “out-of-pocket,” the statute explicitly provides that restitution is available for expenses that are not.

Barham's arguments for the claim that the definition of "financial loss" in I.C. § 41-291(8) preclude the disputed award fail. She suggests first that that definition "contemplates reimbursement for the insurer's payment of the fraudulent claim or other payments, such as repair or replacement costs, to fulfill or resolve the false claim." (Appellant's brief, p. 7.) While it certainly does contemplate that such payments constitute a financial loss, it does not suggest in any way that the disputed amount here was not also a financial loss. As Barham notes, apparently in an attempt to distinguish them from the loss at issue here, the losses she identifies as indisputably compensable through restitution were incurred "to fulfill or resolve the false claim." (Id.) But the disputed loss here fits that description perfectly. The reason that Mr. Carey wasted his six hours on Barham's false claim was to "fulfill or resolve the false claim." In addition, the definition explicitly contemplates that it will apply to varieties of financial loss other than those listed as examples. See I.C. § 41-291(8) (providing that the definition of 'financial loss' "includes, but is not limited to" the examples mentioned). Because the list of examples is non-inclusive, even if the loss here did not fit into a category included as an example on that list, that fact would provide no reason to think the loss was not a financial loss under the statute. But, in addition, the examples listed in the statute include "loss of earnings" and "out-of-pocket and other expenses," which the Court of Appeals in Olpin has determined are applicable to losses like that here.

Finally, Barham suggests that "financial loss" is defined by terms referring to expenses or payments resulting directly from the criminal conduct, such as the insurer paying a false claim. The definition is silent on investigation or prosecution costs *after* the violation." (Appellant's brief, pp. 8-9.)

This argument is strange in light of Barham’s decision not to appeal the district court’s determination to award Mr. Carey’s expenses to travel to and from the preliminary hearing and trial for prosecution of this case. If she thought the statute categorically forbids restitution to anyone but the Idaho Department of Insurance for costs associated with investigating and prosecuting the criminal charges, she would have appealed that amount too. She did not, presumably, because of the large number of Idaho cases applying similar or identical statutory language to conclude that victims are entitled to restitution for costs associated with attending criminal proceedings, even if they are not participating. See, e.g., State v. Reale, 158 Idaho 20, 26, 343 P.3d 49, 55 (Ct. App. 2014) (“Court proceedings are obvious consequences of criminal conduct. Thus, a victim is entitled to lost wages for time off that was reasonably necessary to enable him or her to attend court proceedings, even if that time off does not coincide with the actual court proceeding.”). Those cases contradict the suggestion that I.C. § 41-291(8) draws a distinction—not articulated clearly by Barham—between financial losses resulting “directly from the criminal conduct” and financial losses associated somehow with the investigation and prosecution of the conduct. Even if it did draw that distinction, though, Mr. Carey’s time spent resolving the fraudulent claim is about as direct a result as anything could be to the fraudulent claim.

In addition, it is contradicted by the clear language of I.C. § 41-291(8), which is not remotely limited in the way Barham suggests, but defines ‘financial loss’ quite broadly. I.C. § 41-291(8) (defining ‘financial loss’ as “including” but “not [being] limited to,” e.g., “loss of earnings” and “out-of-pocket and other expenses”). See also I.C. § 41-291(4) (providing that restitution is available for “any financial loss sustained as a result of a violation of this section,” without excepting losses associated with responding to the fraud).

Finally, it is directly contradicted by Olpin, which applied language from another statute but that is also contained in I.C. § 41-291(8) to determine that time spent by employees investigating criminal conduct was compensable through restitution. Olpin, 140 Idaho at 378-79; 93 P.3d at 709-10.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order for restitution to Progressive Insurance.

DATED this 14th day of January, 2020.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of January, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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