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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47241-2019
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY
v.)	NO. CR28-18-11511
)	
ZOE RENEE BARHAM,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
<hr/>		

BRIEF OF APPELLANT

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

**HONORABLE CYNTHIA K.C. MEYER
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Zoe R. Barham appeals from the district court's restitution order to Progressive Insurance ("Progressive") after the jury found her guilty of insurance fraud. She argues the district court abused its discretion by ordering her to pay restitution to Progressive for its investigation costs. Therefore, she respectfully requests this Court vacate the district court's restitution order in part and remand this case to the district court to remove the investigation costs from its order.

Statement of Facts and Course of Proceedings

According to the probable cause affidavit, in January 2017, Ms. Barham purchased an auto insurance policy from Progressive after her car hit another car, but she told Progressive that she purchased the policy before the accident. (R., p.15.) After Progressive's investigation, it denied the other car owner's claim because it determined Ms. Barham obtained the policy after the accident. (R., p.15.) Progressive referred the claim to Idaho Department of Insurance ("IDOI") for a fraud investigation. (R., p.15.) In July 2018, the State filed a Criminal Complaint alleging Ms. Barham committed one count of insurance fraud, in violation of I.C. § 41-293(1)(c), for providing a false statement to Progressive. (R., pp.12-13.)

The magistrate held a preliminary hearing, and a Progressive employee testified. (R., pp.43-49.) After the hearing, the magistrate found probable cause for the offense and bound Ms. Barham over to district court. (R., pp.49, 50.) The State filed an Information charging Ms. Barham with one count of insurance fraud. (R., pp.54-55.)

Ms. Barham pled not guilty and went to trial. (R., pp.64, 111-44.) The Progressive employee testified again. (*See* R., pp.112-20.) The jury found Ms. Barham guilty. (R., pp.144, 177.)

Before sentencing, the State moved for restitution to IDOI and Progressive. (R., pp.179–81.) Relevant here, the State requested \$2,400.60 for Progressive for its employee’s investigation costs and travel expenses for the preliminary hearing and trial. (R., pp.179–81.) The State included an affidavit from an IDOI fraud investigator that stated Progressive incurred \$144.66 in investigation costs and \$2,255.94 in travel expenses. (R., pp.182–83.) Attached to the affidavit were two documents from Progressive, one stating that the employee’s six hours of investigation cost \$144.66, and the other detailing the employee’s travel expenses. (R., pp.209, 210–17.)

At sentencing, Ms. Barham had no objection to IDOI’s investigation costs. (Tr. Vol. I,¹ p.17, Ls.13–23.) She objected, however, to the restitution for Progressive and requested a hearing. (Tr. Vol. I, p.17, L.24–p.18, L.3.) The district court ordered restitution to IDOI and agreed to set a hearing for Progressive’s restitution. (Tr. Vol. I, p.23, Ls.4–9; R., pp.234–24 (IDOI restitution order).) The district court sentenced Ms. Barham to five years, with two years fixed, suspended her sentence, and placed her on probation for three years. (Tr. Vol. I, p.21, Ls.18–23; *see also* R., p.219.) The district court entered the judgment of conviction in May 2019. (R., pp.224–27.)

In June 2019, the State filed an affidavit from the Progressive employee that stated:

I, Philip Carey, being first duly sworn, state that I am an employee with [Progressive], and attest that Progressive incurred the following expenses and losses as a result Zoe Barham’s criminal offense:

Progressive expenses:

¹ The electronic document on appeal titled “Trascripts- Appeal Volume 1 9-12-2019 13.23.9 28449721 3089131B-0157-437B-A555-FECE724A35A8.pdf” contains three transcripts: the preliminary hearing (pages 1 to 58 of overall document), sentencing hearing (pages 59 to 95), and restitution hearing (pages 96 to 114.) However, each transcript contains its own internal pagination. Citations to “Tr. Vol. I” will refer to the transcript of sentencing hearing and reference the transcript’s internal pagination. Citations to “Tr. Vol. II” will refer to the transcript of the restitution hearing and reference its internal pagination as well. The preliminary hearing transcript is not cited herein.

Travel Expenses Preliminary Hearing	\$1,266.73
Travel Expense Jury Trial	\$989.21
Investigation Costs	\$144.66
Total expense	\$2,400.60

(R., pp.238–39.) Attached to the affidavit were the same two documents from Progressive with the employee’s investigation costs and travel expenses. (R., pp.240–48.)

In early July 2019, the district court held a restitution hearing. (R., pp.253–54.) Upon the State’s request, the district court accepted the Progressive employee’s affidavit. (Tr. Vol. II, p.7, Ls.5–8.) The State argued Progressive was entitled to restitution to investigation costs and travel expenses under the insurance fraud restitution statutes. (Tr. Vol. II, p.7, L.16–p.8, L.20.) The State also argued Progressive’s expenses were the actual and proximate cause of Ms. Barham’s criminal activity. (Tr. Vol. II, p.8, L.21–p.11, L.16.) Ms. Barham argued against both investigation costs and travel expenses. (*See* Tr. Vol. II, p.11, L.19–p.15, L.6.) For investigation costs, Ms. Barham asserted those costs were not financial losses because Progressive would have to pay its employee regardless of his time spent on Ms. Barham’s case. (Tr. Vol. II, p.12, L.16–p.13, L.2.) The State agreed that Progressive would have paid its employee regardless, but argued “those six hours could have been spent on other matters” if Ms. Barham had not committed the offense. (Tr. Vol. II, p.16, Ls.13–22.) The district court took the matter under advisement. (Tr. Vol. II, p.17, L.25–p.18, L.1.)

On July 24, 2019, the district court issued a memorandum decision and order on Progressive’s restitution request. (R., pp.255–58.) The district court determined Ms. Barham’s criminal conduct was the actual and proximate cause of Progressive’s investigation costs and travel expenses. (R., p.258.) The district court explained: “It is foreseeable that when one

commits a crime, the state will call witnesses to prove the crime. That is what happened here. Progressive incurred investigative and travel expenses and should be reimbursed for the same.” (R., p.258.) The district court also determined substantial and competent evidence supported the restitution request. (R., p.258.) Therefore, the district court denied Ms. Barham’s objections and ordered her to pay \$2,400.60 to Progressive. (R., pp.258–59.) On July 30, 2019, the district court entered an order for restitution to Progressive, and Ms. Barham filed a notice of appeal later that day. (R., pp.260–61, 262–64.)

ISSUE

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

ARGUMENT

The District Court Abused Its Discretion By Ordering Ms. Barham To Pay Restitution To Progressive For Its Investigation Costs

A. Introduction

Ms. Barham asserts the district court abused its discretion by ordering her to pay \$144.66 in restitution to Progressive for its investigation costs. She contends the insurance fraud statutes do not allow restitution for investigation costs because those costs do not meet the statutory requirement of “financial loss sustained as a result of the violation.” Therefore, Ms. Barham argues the district court did not act consistently with the applicable legal standards by awarding restitution to Progressive for its investigation costs. She respectfully requests this Court vacate the district court’s restitution order for Progressive in part and remand for a new restitution order.

B. Standard Of Review

To review an alleged abuse of discretion, the Court considers whether the district court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). The last three considerations “require the district court to ‘base the amount of restitution upon the preponderance of evidence submitted by the prosecutor, defendant, victim, or presentence investigator.’” *State v. Cunningham*, 161 Idaho 698, 700 (2017) (quoting *State v. Weaver*, 158 Idaho 167, 170 (Ct. App. 2014)). “The district court’s factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence.” *State v. Corbus*, 150 Idaho 599, 602 (2011) (citing *State v. Lombard*, 149

Idaho 819, 822 (Ct. App. 2010)). “The interpretation of a statute is a question of law this Court reviews de novo.” *State v. Smalley*, 164 Idaho 780, 783 (2019).

C. The District Court Did Not Act Consistently With The Legal Standards Because The Insurance Fraud Statutes Do Not Allow Restitution For Progressive’s Investigation Costs

Two statutory provisions govern restitution in insurance fraud cases. The first provision, contained in statute criminalizing insurance fraud, states in relevant part: “Any violator of this section is guilty of a felony . . . and 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) (emphasis added). The second provision defines “financial loss”: “‘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). Ms. Barham asserts the district court’s restitution order was in error because Progressive’s investigation costs were not a “financial loss sustained as a result of the violation.”

“Statutory interpretation begins with the statute’s plain language. This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings.” *State v. Owens*, 158 Idaho 1, 3 (2015) (citation omitted). “A statute is ambiguous where the language is capable of more than one reasonable construction. Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.” *State v. Kraly*, 164 Idaho 67, 70 (2018) (citations and quotation marks omitted).

Here, Progressive’s investigation costs do not fit the plain language meaning of “financial loss.” Idaho Code § 41-291(8)’s definition of financial loss 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. I.C. § 41-291. It also includes loss of earnings and out-of-pocket or other expenses. Progressive’s compensation to its employees, however, is not a

“financial loss” “as a result of” Ms. Barham’s false statement. Progressive’s compensation to its employees occurs notwithstanding the particular claim subject to investigation, and thus Progressive does not suffer any financial loss from the violation by paying its employees to do their jobs. Thus, employee compensation does not fit within the statutory definition of “financial loss.”

Relatedly, there is no actual cause between Ms. Barham’s false statement and Progressive’s “loss,” *i.e.*, its compensation to its employee to investigate the claim. Like the general restitution statute, the insurance fraud restitution statute has a causation requirement: the loss must be “sustained as a result of the violation.” I.C. § 41-293(4). *See* I.C. § 19-5304(2) (general restitution statute requiring restitution for “any crime which results in an economic loss to the victim”); *Corbus*, 150 Idaho at 602 (“[I]n order for restitution to be appropriate, there must be a causal connection between the conduct for which the defendant is convicted and the injuries suffered by the victim.”). “Actual cause refers to whether “a particular event produced a particular consequence” and is a ‘but for’ test.” *State v. McNeil*, 158 Idaho 280, 284 (Ct. App. 2014) (citing *State v. Lampien*, 148 Idaho 367, 374 (2009)). Here, Ms. Barham’s false statement did not produce the consequence of Progressive paying its employee to investigate the claim because, again, Progressive would have paid its employee anyway. In other words, it cannot be said that, but for Ms. Barham’s claim, Progressive would not have had to pay its employee. Therefore, Ms. Barham’s false statement was not the actual cause of Progressive’s compensation to its employee.

Finally, if “financial loss” is ambiguous, this Court should apply “the maxim *noscitur a sociis*, which means ‘a word is known by the company it keeps.’” *State v. Schulz*, 151 Idaho 863, 867 (2011) (quoting *State v. Hammersley*, 134 Idaho 816, 821 (2000)). “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. This silence notably contrasts with other restitution statutes that expressly include such costs. *See* I.C. § 41-295(6) (investigation costs for the IDOI in insurance fraud causes); *see also* I.C. § 37-2732(k) (investigation and prosecution costs in drug cases). Accordingly, if “financial loss” is ambiguous, this Court should exclude an insurer’s investigation costs as part of its loss from the violation.

In summary, Progressive’s compensation for its employee’s six hours of work to investigate Ms. Barham’s claim is not a “financial loss sustained as a result of the violation.” Ms. Barham maintains the district court did not apply the correct legal standards by ordering her to pay \$144.66 in restitution to Progressive.

CONCLUSION

Ms. Barham respectfully requests this Court vacate the district court’s restitution order for Progressive in part and remand this case for a new restitution order without \$144.66 to Progressive for investigation costs.

DATED this 19th day of November, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JCS/eas