

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYLER CHASE NIED,

Appellant.

v.

STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 78147

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**APPELLANT'S REPLY BRIEF**

**APPEAL FROM JUDGMENT OF CONVICTION AND  
SENTENCING RESTITUTION AMOUNT**

**SECOND JUDICIAL DISTRICT**

**STATE OF NEVADA**

***THE HONORABLE BARRY L. BRESLOW, PRESIDING***

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**I. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION IN THE AMOUNT OF \$463,825.59 WITHOUT ESTABLISHING A SUFFICIENT BASIS FOR THE RESTITUTION AMOUNT AND BY FAILING TO RELY ON RELIABLE AND ACCURATE INFORMATION IN SETTING RESTITUTION.**

NRS 176.033 (1) provides in pertinent part

1. If a sentence of imprisonment is required or permitted by statute, the court shall: (c) If restitution is appropriate, set an amount of restitution for each victim of the offense....

The purpose of restitution in the context of a criminal case is to compensate the victim for costs arising from a defendant's criminal act. *Martinez v. State*, 120 Nev. 200, 202-203, 88 P.3d. 825, 827 (2004). A defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution. *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). A victim's medical costs for the treatment of their **injuries directly resulting from the crime** are the proper subject of restitution. *Norwood v. State*, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996) (Emphasis added). Crime victims' unpaid medical bills are debts of those victims. *Id.*, 112 Nev. at 441, 915 P.2d at 279.

However, medical care providers who treat crime victims are not victims of crime as defined in NRS 176.015. *Martinez v. State*, 115 Nev. 9, 11, 974 P.2d

133, 134 (1999). Similarly, when an insurance company pays for the victim's medical expenses, the insurance company is not a victim as defined in NRS 176.015(5)(b) and a sentencing court may not order a defendant to pay restitution to an insurance company for the company's payment of a claim by or on behalf of a crime victim. *Martinez*, 115 Nev. at 11-12, 974 P.2d at 134-35, citing to *Hewitt v. State*, 113 Nev. 387, 390, 936 P.2d 330, 332 (1997). This Court has stated, "[s]entencing courts are cautioned to rely on reliable and accurate evidence in setting restitution. *Martinez*, 115 Nev. at 13, 974 P.2d at 135. A defendant's obligation to pay restitution to a victim may not be reduced because a victim is reimbursed by the [victim's] insurance company. *Id.*, 115 Nev. at 12, 974 P.2d at 134-35 (victim's added, see Footnote 5 of *Martinez*).

However, consistent with *Norwood* when an insurance company has already paid the medical bills and the victim is not awaiting reimbursement, the victim is not entitled to a double recovery, but only the amount of unpaid medical debts or actual out of pocket expenses. Under the double recovery doctrine, there can be only one recovery of damages for one wrong or injury. *Elyousef v. Oreilly & Ferrario, LLC*, 126 Nev. 441, 443, 245 P.3d 547, 549 (2010); see also *Major v. State*, 130 Nev. 657, 333 P.3d 235 (2014) (allowing a District Court in a criminal case to order restitution to social services to the extent that the district court's order did not overlap with the existing [child]

support obligation imposed by the family court).

In the present case, Mr. Holt unlike *Martinez*, 115 Nev. At 12, 974 P.2d at 134-135 was not waiting to be reimbursed by his insurance company, his insurance company already paid the bills.

Furthermore, the restitution amount must not be based upon the consideration of information or accusations founded on facts supported by impalpable or highly suspect evidence. Accord, *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 545 P.2d 1159, 1161 (1976).

In the present case, the State claims the District Court relied on accurate evidence in determining the restitution amount of \$463,835.59 and a defendant's restitution amount cannot be reduced because an insurance company has made payments to the victim. See Respondent's Answering Brief, (hereinafter "RAB"), p. 5. This assertion ignores the evidence adduced at the Sentencing Hearing.

In the present case, the trial court's order of restitution in the amount of \$463,825.59 is not based on reliable and accurate information. The record demonstrates there is no basis for the amount ordered. None of the underlying medical bills were provided. Instead, the trial court relied upon the Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary spreadsheet, the summary attached to the PSI and Exhibit 1 at the Sentencing Hearing in

ordering restitution in the amount of \$463,825.59 for the benefit of Patrick Holt (Victim 2). AA: 126.

The division of parole and probation in the Presentence Investigation Report claims Victim 2 [Patrick Holt] suffered a loss of \$538,825.59 relying in part upon the medical bills summary totaling \$459,147.26 in the Victim Impact Statement both of which were attached to the report. AA: 14; AA: 19- 21. Mr. Holt alleged in his Victim Impact Statement that his medical bills were just about \$600,000 for the first hospitalization. AA: 20. This assertion is not supported by the Summary of medical expenses in page 2 of Exhibit 1 (AA: 33) or the testimony of Maria Holt (AA: 99-105) and conflicts with the Medical Bills Summary (AA: 21) which was attached to the PSI showing a total of \$459,147.26.

Page 2 of Exhibit 1 (AA: 33) shows the amount billed by medical providers directly related to the May 13, 2017 crime in the amount of \$51,323.26. Mr. Holt's health insurance paid \$50,076.29. His deductible was \$250, his co-pay was \$425 and he owed a balance of \$2,521.80.

Ms. Holt testified in error that while she was not familiar with the Medical Bills Summary (AA: 21) which was attached to the PSI, she believed the \$459,147.26 reflected in the Medical Bills Summary (AA: 21) was the total

amount billed for the treatment related to Patrick Holts accident related injuries he suffered. AA: 21; AA: 96; and AA:99.

Ms. Holt clarified the actual allowed amount billed to Mr. Holt's health insurance company after his health insurance plan discount and deducting the billed portion that was not allowed under his health plan was \$90,555.83. See AA: 100-101.

However, the \$90,555.83 billed to Mr. Holts insurance includes both the treatment costs directly related to the May 13, 2017 accident caused by the defendant and the unrelated medical costs incurred a year after the crime related to Mr. Holt's depression and suicide on May 13, 2018.

An examination of Page 2 of Exhibit 1 (AA: 033) reveals the amount billed by medical providers to Mr. Holt's insurance for the May 13, 2017 accident related treatment as a result of Mr. Nied's criminal conduct was only \$51,323.26.

The additional \$39,232.57 billed by medical providers to Mr. Holt's health insurance is related to Mr. Holt's unrelated second hospitalization as a result of his depression and suicide attempt on May 13, 2018. There is no competent evidence in the record that Mr. Holt's second unrelated hospitalization directly resulted from the criminal conduct of Mr. Nied.

Moreover, a careful examination of the six (6) page spreadsheet



contained in Pages 3-8 of Exhibit 1 (AA: 34-39) reveals the actual information relating to the medical expenses directly caused by the defendant as a result of the May 13, 2017 crime if the math is added correctly reflects: Amount [billed] \$220,985.93; Pr. Discount \$43,597.54; Allowed [amount under the health plan] \$51,323.22; Not Payable [under the health plan] \$126,068.18; Deductible \$250; Paid [by Mr. Holt's health insurance] \$50,176.34; Copay \$425; and Pt. [Patient] Owes \$2,521.80. These amounts do not include the unrelated medical expenses for treatment for Patrick Holt as a result of his attempted suicide resulting from depression beginning with the Renown Hospitalization on May 13, 2018 and treatment continuing through September 18, 2018.

Thus, the most Mr. Nied should have been ordered to pay in restitution to Mr. Holt for medical expenses to Mr. Holt is the actual amount billed by medical providers to Mr. Holt's health insurance company of \$51,323.22.

**II. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION IN THE AMOUNT OF \$463,825.59 WHEN THE RECORD FAILS TO DEMONSTRATE IF SUCH AMOUNT WAS BASED ON THE AMOUNT MEDICAL PROVIDERS BILLED MR. HOLT'S HEALTH INSURANCE, NOT THE AMOUNT ACTUALLY PAID AND INCLUDED UNRELATED MEDICAL EXPENSES WHICH IS IMPALABLE OR HIGHLY SUSPECT EVIDENCE**

The purpose of restitution in the context of a criminal case is to

compensate the victim for costs arising from a defendant's criminal act. *Martinez v. State*, 120 Nev. 200, 202-203, 88 P.3d. 825, 827 (2004). A defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution. *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). A victim's medical costs for the treatment of their **injuries directly resulting from the crime** are the proper subject of restitution. *Norwood v. State*, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996) (Emphasis added). Crime victims' unpaid medical bills are debts of those victims. *Id.*, 112 Nev. at 441, 915 P.2d at 279.

However, medical care providers who treat crime victims are not victims of crime as defined in NRS 176.015. *Martinez v. State*, 115 Nev. 9, 11, 974 P.2d 133, 134 (1999). Similarly, when an insurance company pays for the victim's medical expenses, the insurance company is not a victim as defined in NRS 176.015(5)(b) and a sentencing court may not order a defendant to pay restitution to an insurance company for the company's payment of a claim by or on behalf of a crime victim. *Martinez*, 115 Nev. at 11-12, 974 P.2d at 134-35, citing to *Hewitt v. State*, 113 Nev. 387, 390, 936 P.2d 330, 332 (1997). The restitution amount must not be based upon the consideration of information or

accusations founded on facts supported by impalpable or highly suspect evidence. Accord, *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 545 P.2d 1159, 1161 (1976).

There is no rational basis for the trial court's restitution award of \$463,825.59 and the same can only be based upon impalpable and highly suspect evidence somehow considered by the trial court. The trial court stated in reaching this amount that a mathematical certainty is not required and the court did not need every receipt, or bill, but on the other hand remarked it's clear the restitution amount has to be accurate and cannot be based on highly unreliable or unpalpable (sic) [impalpable] evidence. AA: 126.

The trial court then pronounced judgment stating based upon the information in the Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary embedded in the PSI and Exhibit 1 ordered restitution to Patrick Holt (Victim 2) in the amount of \$463,825.59. AA: 126.

The PSI indicated Mr. Holt's restitution amount was \$538,825.97. AA: 14. There is absolutely nothing in the record to support this amount. Patrick Holt in his Victim Impact Statement attached to the PSI claimed he lost income. AA: 20. However, his mother testified that his employer continued to pay him while he was unable to work and that is why there was no wage

loss. AA: 105. Mr. Holt also claimed his medical expenses were about \$600,000. AA: 20. This assertion is not accurate when one considers the total amount billed to Mr. Holt's health insurance for the May 13, 2017 accident directly caused by the defendant is only \$51,323.26.

The very same expenses reflected in Pages 3-8 of Exhibit 1 (AA: 34-39) are in the one page Summary prepared by Ms. Holt in page 2 of Exhibit 1.

AA: 33. The one page Summary in AA: 33 references Pages 1-6 of AA: 34-39 of Exhibit 1. The one page summary shows Totals- UMR Claims Report for Patrick Holt (2nd Hospitalization-severe depression, Attempted Suicide) and Totals- UMR Claims Report for Patrick Holt (Hospitalization Accident) and lists the total by each page of the six (6) pages of Exhibit 1. AA: 33. However, Ms. Holt made some math errors when putting together her Summary in AA: 33.

A careful examination of the six (6) page spreadsheet AA: 34-39 reveals the following medical expenses directly caused by the defendant as a result of the May 13, 2017 crime: Amount [billed by medical providers] \$220,985.93; Pr. Discount \$43,597.54; Allowed [amount under the health plan] \$51,323.22; Not Payable[under the plan] \$126,068.18; Deductible \$250; Paid [by Mr. Holt's health insurance] \$50,176.34; Copay \$425; and Pt. [Patient] Owes

\$2,521.80.

Thus, the most Mr. Nied should have been ordered to pay in restitution to Mr. Holt for medical expenses is the actual amount billed by medical providers to his health insurance in the sum of \$51,323.22, less the amount paid by his health insurance of \$50,176.34 which equals \$1,146.88, plus his deductible of \$250, his Co-pay of \$425 and his Pt. [Patient] Owes of \$2,512.80 for a total proper restitution Order in the amount of \$4,343.68.

It is unknown if the trial court used the amounts initially billed by the medical providers to Mr. Holt's health insurance, instead of the amount that was actually paid in awarding \$463,825.59. It is unknown if the trial court included some lost wage amount even though Mr. Holt did not suffer any wage loss. It is unknown if the trial court awarded the medical expenses billed as reflected in Medical Bills Summary attached to the PSI (APP: 21) in the amount of \$459,147.26 and awarded the very same medical expenses reflected in Exhibit 1 resulting in a double recovery of improper amounts.

In addition, it appears the trial court and the State desire to include the unrelated hospitalization a year after the crime on May 13, 2018 and the resulting treatment.

The trial court based the restitution order upon the information in the Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary

embedded in the PSI and Exhibit 1 ordered restitution to Patrick Holt (Victim 2) in the amount of \$463,825.59. AA: 126. This information as relied upon by the trial court was impalpable and highly suspect given an examination of the record only supports a restitution award only \$51,323.26 for medical expenses if no offset is applied. Because the trial court failed to make a record of how it determined restitution of \$463,825.59 and relied upon inaccurate and impalpable suspect evidence the Judgment of Conviction should be reversed and the matter should be remanded to a different trial Judge to determine Mr. Nied's proper restitution obligation.

**III. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION AND FAILING TO OFFSET THE \$50,000 PREVIOUSLY PAID BY THE DEFENDANT'S INSURANCE COMPANY TO PATRICK HOLT TO THE EXTENT THE PRIOR PAYMENT WAS FOR ITEMS INCLUDED IN THE RESTITUTION ORDER.**

Settlement payments made to crime victim by the defendant's insurance carrier require an offset to the defendant's restitution obligation to the extent the settlement payments were for items of loss included in the restitution order. *People v. Bernal*, 101 Cal. App. 4th 155, 165-169, 123 Cal. Rptr. 2d 622, 629-632 (2002).

Mr. Nied should have received the benefit of an offset for the \$50,000 paid by his insurance company, Progressive Insurance to Patrick Holt. The trial court was required to determine how much of the \$50,000 paid to Mr.

Holt was for the same items of loss included in the restitution order. If the offset amount is applied less the 33.333 percent paid by Mr. Holt to his civil attorneys for attorney's fees in the amount of \$16,650.00, then the remaining amount of \$33,350 should have been treated as an offset if it included the same items of loss. Otherwise, the victim was awarded a double recovery.

The amount of medical bills actually billed by medical treatment providers to Mr. Holt's health insurance for the May 13, 2017 crime is \$51,323.26, less the off-set amount of \$33,350, plus the deductible of \$250 and the co-pay of \$425, plus the amount Mr. Holt owed of \$2,521.80, plus the amount paid by Mr. Holt's health insurance of \$50,174.34 results in Mr. Holt netting \$28,829.94 as a result of \$50,000 Progressive Insurance Payment. See AA: 33-39.

As such, the trial court should have ordered Mr. Nied pay restitution to Mr. Holt in the amount of \$21,170.06 for medical expenses directly related to the crime. (Amount of Medical Bills billed in the amount of \$51,323.26, less the off-set amount of \$33,350 plus the deductible of \$250 and the co-pay of \$425, plus the amount Mr. Holt owed of \$2,521.80). See AA: 33. Because the trial court failed to address the \$50,000 payment, the judgment ordering restitution of \$463,825.59 should be set aside and the cause remanded to a different trial Judge to determine Mr. Nied's proper restitution obligation.

## CONCLUSION

Although the plea agreement required Mr. Nied to make full restitution, the trial court abused its discretion by: 1) failing to establish a sufficient basis for the restitution; 2) failing to rely on reliable and accurate evidence in setting restitution; 3) failing to make findings on how the trial court determined a restitution amount of \$463,825.59; 4) relying upon the PSI, the attachments thereto and Exhibit 1 which included impalpable and highly suspect evidence; and 5) failing to make any findings relating to the \$50,000 payment made by Mr. Nied's insurance company and whether this amount was offset. Accordingly, the judgment ordering restitution must be set aside and the cause remanded before a new trial Judge for a sentencing hearing to determine the proper amount of restitution.

DATED this 23<sup>rd</sup> day of August, 2019.

Respectfully submitted,

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By: 

THOMAS E. VILORIA



**ATTORNEY'S CERTIFICATE OF COMPLIANCE**

I, THOMAS E. VILORIA, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Reply Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman 14-point; it is in a plain style; and all the margins on all four sides are at least one (1) inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 14,000 words, to wit: 3185 words.

DATED this 23<sup>rd</sup> day of August, 2019.



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Thomas E. Vilorio, Esq., #003833

**CERTIFICATE OF MAILING**

The undersigned certifies that they are an employee of Thomas E. Vilorio, Esq., and that on the 23<sup>rd</sup> day of August, 2019, they served a true and correct copy of the foregoing document upon opposing counsel, as set forth below, by way of the court's E-flex filing system and U.S. mail:

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