

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0775

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CYNTHIA HENDERSON,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, The Honorable Michael Menahan, Presiding

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## STATEMENT OF THE ISSUE

Did the district court impose a legal sentence when it ordered the Appellant to pay restitution to her insurance company after she pled guilty to insurance fraud/theft?

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

Appellant Cynthia Henderson moved out of her home at 1239 Montana Highway 282, Clancy, Montana, in 2005, allegedly leaving her personal property behind. Henderson moved out of state and has not lived in the Clancy residence since 2005. (D.C. Doc. 2 at 2.) Henderson had the Clancy dwelling insured by a Special Form Homeowner's Policy issued by Fire Insurance Exchange (FIE). FIE is a member company of Farmers Insurance Group of Companies. (*Id.*)

On May 1, 2007, Henderson called FIE to initiate a claim based on her report of two alleged break-ins and theft of personal property. Henderson maintained that on both occasions, her relatives discovered the alleged thefts. Henderson reported that the first alleged break-in and theft occurred sometime prior to October 21, 2006, and the second alleged break-in and theft occurred

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<sup>1</sup>Since Henderson pled guilty, the State has taken some of the facts from the Affidavit in Support of the Information.

some time prior to April 23, 2007. (D.C. Doc. 2 at 2-3.) An associate of Henderson's apparently reported the first alleged theft to the Jefferson County Sheriff's Department. There is only an incident report documenting this report because the investigating deputy could not establish that a theft had occurred. Henderson never reported the second alleged theft to law enforcement. (D.C. Doc. 2 at 3.)

On May 2, 2007, FIE claims adjuster Gary Rankin (Rankin) took a statement from Henderson over the telephone. (D.C. Doc. 2 at 3.) On May 3, 2007, Rankin conducted an inspection of Henderson's property. On May 4, 2007, Rankin contacted Henderson and asked her to provide him with copies of the law enforcement reports related to the thefts, and the names and addresses of Henderson's relatives who reportedly had discovered the thefts. On August 13, 2007, Henderson faxed to Rankin completed proof of loss forms and content worksheets. Henderson did not include, however, the names and addresses of the relatives who purportedly discovered the thefts, nor did she include any law enforcement reports as Rankin previously requested. (*Id.*)

During an August 17, 2007 telephone conversation, Rankin again asked Henderson to provide the names of Henderson's relatives who supposedly discovered the thefts, along with the law enforcement reports. (D.C. Doc. 2 at 3.) By September 27, 2007, Henderson had still not provided the requested

information, and during a telephone conversation, Rankin questioned Henderson about her claimed losses. Rankin requested that Henderson provide him with documentation and proof of her claimed losses and asked to re-inspect the Clancy property. Henderson promised to provide documentation and stated that she no longer owned the house, because she had lost it in a foreclosure. On the same date, Rankin contacted the FIE Special Investigative Unit (SIU.) (*Id.*)

The SIU concluded that Henderson's insurance claims warranted further investigation because of the following circumstances: (1) Henderson's delay in reporting the alleged thefts; (2) Henderson's claim she sustained losses from two separate theft incidents; (3) Henderson had not lived in the residence where the alleged thefts occurred since February 2005; (4) Henderson seemed to be suffering financial distress as evidenced by her loss of her business and of her Clancy home to foreclosure; and (5) Henderson did not contact law enforcement to even report the alleged second theft. (D.C. Doc. 2 at 3-4.) FIE also decided to examine Henderson about her alleged losses under oath. (*Id.* at 4.)

FIE's processing of Henderson's claim was delayed for several months due to her failure to provide documentation supporting her alleged losses such as law enforcement reports, photographs, and witness statements. Henderson also delayed her examination under oath twice. (D.C. Doc. 2 at 4.) Finally, FIE requested a copy of the law enforcement report concerning Henderson's alleged

first theft directly from the Jefferson County Sheriff's Department. FIE received only an incident report on June 26, 2008. (*Id.*)

Henderson's FIE policy provided for replacement cost settlement on certain property related to Henderson's theft claim. The policy further provided, however, that until Henderson repaired or replaced the damaged or stolen property, FIE would reimburse the loss at its actual cash value (ACV), subject to coverage limits and the policy deductible. ACV is determined by the total estimate of damages, which was \$47,684.78, less recoverable depreciation in the amount of \$23,422.72, less the amount over the policy limit in the amount of \$1,829.82, for an ACV of \$22,432.24. (D.C. Doc. 2 at 4.)

On July 21, 2008, pursuant to a reservation of rights letter,<sup>2</sup> FIE paid Henderson \$170 for alleged property damage to the Clancy dwelling. On August 26, 2008, again pursuant to a reservation of rights letter, FIE paid Henderson \$22,432.24--the ACV payment for the alleged loss due to the alleged theft. One of the rights FIE reserved under the policy was a provision that rendered the entire policy voidable against Henderson in the event that Henderson knowingly or

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<sup>2</sup> A reservation of rights is "[a]n insurer's notification to an insured that coverage for a claim may not apply. Such notification allows an insurer to investigate (or even defend) a claim to determine whether coverage applies (in whole or in part) without waiving its right to later deny coverage based on information revealed by the investigation." Glossary of Insurance Risk Management Terms: Reservation of Rights International Risk Management, Inc. (September 2, 2014), <http://www.irmi.com/online/insurance-glossary/terms/r/reservation-of-rights.aspx>.

willfully concealed or misrepresented any material fact or circumstance relating to the insurance claims either before or after the alleged loss. (D.C. Doc. 2 at 4.)

Under Henderson's policy she could replace any of the items she alleged were stolen from her Clancy dwelling and make an additional claim for the replacement cost of the items. Pursuant to this policy provision, Henderson was entitled to recover the amount of the withheld depreciation or the cost incurred, whichever was less. FIE set a one-year deadline for Henderson to make such a supplemental claim. (D.C. Doc. 2 at 5.)

On June 26, 2009, Henderson submitted a supplemental claim for items of personal property she claimed to have replaced. Henderson's supplemental claim totaled \$23,102.72. (D.C. Doc. 2 at 5.) Henderson provided several receipts for the allegedly replaced personal property. Rankin submitted these receipts to the SIU for review. The SIU concluded that the receipts appeared to be fraudulent and submitted the matter to the National Insurance Crime Bureau (NICB.) The NICB in turn referred the matter to the Office of the Commissioner of Securities and Insurance (CSI), Montana State Auditor's Office. (*Id.*)

The CSI concluded the receipts Henderson submitted were fabricated for several reasons including that: (1) Henderson appeared to have produced 11 of the 13 receipts in standard Word format; (2) only two of the receipts appeared to be from recognized retailers; (3) several of the businesses did not exist at the address

listed on the receipts; and (4) two of the Montana individuals who allegedly sold items to Henderson provided sworn affidavits that they did not sell items to Henderson and did not prepare the receipts Henderson submitted. (D.C. Doc. 2 at 5.)

On May 2, 2012, the State charged Henderson with Insurance Fraud, a felony. (D.C. Doc. 3.) Subsequently, Henderson requested that the district court vacate the final pretrial conference and set her case for a change-of-plea hearing. (D.C. Doc. 15.) On May 29, 2013, Henderson filed an executed Acknowledgement of Waiver of Rights by Plea of Guilty. (D.C. Doc. 24.) The same day, Henderson pled guilty to Insurance Fraud. (D.C. Doc. 25.) The district court ordered both parties to brief the issue of restitution. (*Id.*) Henderson and the State submitted briefs addressing the issue of restitution prior to the sentencing hearing. (D.C. Docs. 26, 27.)

Henderson urged that since FIE only reimbursed her for the ACV of the items she reported to be stolen from her dwelling, but not on the replacement value, for which she admittedly submitted fraudulent receipts, she did not owe FIE any restitution. (D.C. Doc. 26.) The State, on the other hand, argued that Henderson is not entitled to the \$22,602.24 FIE paid her for the alleged stolen property because under the “Concealment of Fraud” provision of the general conditions applying to the entire insurance policy, Henderson’s fraudulent conduct

voided the policy. *See* Henderson's Insurance Policy attached as Ex. 1 to D.C. Doc 27, at 17. Since FIE was entitled to the civil remedy of restitution under the terms of the contract and the doctrine of unjust enrichment, FIE is entitled to be reimbursed for the \$22,602.24 it paid to Henderson. (D.C. Doc. 27.)

On September 25, 2013, the district court conducted a hearing on the matter of restitution prior to imposing sentence. (9/25/13 Transcript of Sentencing Hearing [Tr.].) At the hearing, Rankin explained that several concerns emerged after his investigation into Henderson's claim of loss and request for reimbursement from FIE. (Tr. at 9.) Rankin's first concern was Henderson's delay in making her claim. The date of loss was October 21, 2006, but Henderson did not file a claim until seven months later on May 1, 2007. (*Id.*)

After receiving Henderson's claim, Rankin spoke with her agent, Brian Coleman, (Coleman) because he could not reach Henderson. Coleman told Rankin that he felt Henderson had actually sold the missing items and moved to California. Coleman did not believe that Henderson had reported a legitimate theft. (Tr. at 10.) After Rankin received this information, Henderson filed a second claim alleging that she had been the victim of yet another break-in and theft. (*Id.*) Henderson never made a report to law enforcement on the alleged second theft. (*Id.* at 15.) Rankin spoke with Jefferson County Sheriff Doolittle who explained

that Henderson needed to make a report with a list of missing property before he could create any type of investigative report. (Tr. at 15.)

Rankin also learned from Sheriff Doolittle that Henderson had outstanding arrest warrants in both Jefferson and Lewis and Clark Counties for issuing bad checks. (Tr. at 15.) Moreover, Sheriff Doolittle had sent his deputy out to inspect Henderson's property, and the deputy could not find any proof that a theft had occurred. (*Id.* at 16.)

When Rankin was finally able to reach Henderson, she commented to him that she felt the Jefferson County Sheriff's Department failed to properly investigate her theft reports due to previous charges against her. (Tr. at 10.) On May 4, 2007, Rankin met Henderson's sister at the Clancy dwelling to inspect the property. Rankin observed that it looked as if someone had been living in the home. There were eggshells on the counter, sunflower seeds all over, and empty beer cans. Henderson claimed that no one had authorization to live in the home. (*Id.*) Rankin was told that Henderson was in California, although he later learned that she was either in Louisiana or Florida. (*Id.* at 11.)

During Rankin's initial interview with Henderson, she claimed that a top-of-the-line Neptune washer had been stolen. When Rankin inspected the home, however, there was a less expensive washing machine hooked up to the only washer hookup in the basement. Rankin found it odd that the Neptune washer was

missing from the premises, but another washing machine of lesser value was hooked up. (Tr. at 11.) Some of Henderson's other loss claims also perplexed Rankin. For example, Rankin claimed to be missing things like a hot tub, wood stoves and four-wheelers, which she claimed were stored in the basement. (Tr. at 13-14.)

Upon physically inspecting the home, Rankin found it very unlikely that four-wheelers could have ever been stored in the basement since the only access to the basement was a 6-foot wide sliding patio door, that, when opened, provided less than 3 feet of clearance. (Tr. at 14.) Moreover, there was so much stuff stored in the basement, there was virtually nowhere for a four-wheeler to be stored. (*Id.* at 15.)

Rankin was also concerned about Henderson's lack of timely cooperation with his requests for information. For example, Rankin made numerous requests for the names and addresses of the relatives who supposedly discovered the thefts and potential suspects. Henderson never supplied this information. (Tr. at 11.) By August 7, 2007, three months after Henderson made her claim, she still had not provided Rankin with a proof of loss form or law enforcement reports concerning the alleged thefts. (*Id.* at 12.) On August 17, 2007, Henderson promised Rankin she would promptly get him the law enforcement investigative reports. By September 27, 2007, she still had failed to do so. (*Id.*)

During a telephone conversation on September 27, 2007, Rankin asked Henderson to get back into the Clancy dwelling to inspect it again. For the first time, Henderson told him that she had lost the home in a foreclosure. (Tr. at 12-13.) At this point, Rankin had enough concerns about Henderson's claim that he turned the matter over to the SIU. (Tr. at 13.) The SIU found four liens and four judgments against Henderson, as well as some bankruptcy filings. (Tr. at 16.)

On October 21, 2007, Rankin advised Henderson that he needed to examine her under oath, a process utilized when the insurance company has no confirmation that a claimant actually sustained a loss. (Tr. at 16.) Rankin tried to arrange this questioning for several months. Henderson missed her appointment set for December 7, 2007. She told the attorney in Louisiana, who FIE hired to examine Henderson under oath, that she had been hospitalized after a snake had bitten her. (Tr. at 16.) On December 11, 2007, she changed her story, saying that a spider had bitten her. (Tr. at 17.)

Regarding Henderson's claim of a second theft, she maintained that she had called Sheriff Doolittle's office 15 times asking to file a theft report. Sheriff Doolittle reported there were no records of such calls. Sheriff Doolittle had records of Henderson calling in 1996, 2002, and 2003 on other issues. (Tr. at 17.) Henderson claimed that her attorney, Greg Duncan, would file a police report on

her behalf. When Rankin contacted Greg Duncan, he stated that he did not represent Henderson and could not represent Henderson because he represented Jefferson County. (Tr. at 17.)

Nonetheless, after a representative from FIE examined Henderson under oath, FIE paid the ACV on Henderson's claim of loss, although it did so with a reservation of rights letter. (Tr. at 17, 22.) FIE paid the claim partly because an individual was arrested in Lewis and Clark County while in possession of some of the property Henderson claimed had been stolen. (Tr. at 26.) Rankin did not know the identity of the person arrested or whether that person was actually prosecuted. (Tr. at 31-32.) Moreover, Cheryl Meier (Meier), an investigator for CSI, instructed FIE that to avoid an allegation of bad faith, it should pay the claim since it could not conclusively prove that a theft did not occur. (Tr. at 37-38.)

Henderson's policy had a "Concealment of Fraud" provision which provided:

This entire policy is void if any insured has knowingly or willingly concealed or misrepresented any material fact or circumstance related to this insurance before or after the loss.

(Tr. at 22.) Almost a year after Henderson received payment for the ACV of the property that she claimed had been stolen, she contacted Rankin about being compensated for the actual replacement cost of the alleged stolen property.

Henderson subsequently submitted fraudulent receipts to support her claim for the replacement value. (Tr. at 19.)

At the conclusion of the testimony, and after considering both parties' arguments regarding restitution, the district court ordered Henderson to pay restitution to FIE in the amount of \$22,602.24. (Tr. at 56.) In so doing, the district court explained:

I realize that what Ms. Henderson is claiming is that she submitted false claims to the insurance company to document the replacement value of the goods, but from the evidence in the case that Mr. Rankin set forth today, it looked as if there was a pattern of fraud that began from the very moment she reported this claim to the insurance company, I believe more than six months or so after the occurrence.

(Tr. at 55.) The district court entered a written judgment on September 27, 2013, and Henderson filed a timely appeal. (D.C. Docs. 32, 40.)

### **SUMMARY OF THE ARGUMENT**

Since there is substantial evidence in the record to support the district court's finding that Henderson's insurance fraud actually began at the time she made her first report of loss due to an alleged theft, the district court properly refused to allow Henderson to be unjustly enriched by her fraudulent conduct and properly ordered Henderson to repay the insurance company for the amount it had disbursed to her pursuant to a reservation of rights. Moreover, since the "Fraud and

Concealment” policy provision clearly set forth that any fraudulent conduct on the part of the policy holder, either before or after a claim has been submitted, voids the policy, Henderson’s guilty plea to insurance fraud for conduct subsequent to her claim voided her policy. The insurance company was the victim of criminal conduct and suffered a pecuniary loss, and was entitled to restitution through a civil suit. As such, the district court properly awarded the insurance company restitution as part of Henderson’s criminal sentence.

## ARGUMENT

### I. THE STANDARD OF REVIEW

This Court reviews a district court’s order imposing restitution for correctness. *City of Billings v. Edward*, 2012 MT 186, ¶ 18, 366 Mont. 107, 285 P.3d 523. The Court reviews a district court’s findings of fact regarding the amount of restitution to determine whether the findings are clearly erroneous. *Id.* A finding is “clearly erroneous if [it is] not supported by substantial evidence.” *Id.*, quoting *State v. Breeding*, 2008 MT 162, ¶ 11, 343 Mont. 323, 184 P.3d 313. “Substantial evidence is ‘evidence that a reasonable mind might accept as adequate to support a conclusion.’” *Id.*, quoting *Johnston v. Palmer*, 2007 MT 99, ¶ 26, 337 Mont. 101, 158 P.3d 998.

## II. THE DISTRICT COURT PROPERLY ORDERED HENDERSON TO PAY RESTITUTION TO FIE.

### A. Introduction

Montana Code Annotated § 46-18-201(5) provides that if a sentencing judge finds that a victim, as defined by Mont. Code Ann. § 46-18-243, has sustained a pecuniary loss the judge *shall* require payment of full restitution to the victim. Montana Code Annotated § 46-18-243(2)(a)(i)(A) defines a victim as a person who suffers a pecuniary loss of property as a result of the commission of an offense. Pecuniary loss means: “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts of events constituting the offender’s criminal activities. . . .” Mont. Code Ann. § 46-18-243(1)(a). An insurer is a person. Mont. Code Ann. § 33-1-202(3).

### B. FIE is a Victim and Suffered a Pecuniary Loss as a Result of Henderson’s Fraudulent Conduct.

Henderson admits that she defrauded FIE by submitting to it false receipts in an effort to be paid for “replacement costs” of replacing the property she alleged was stolen. Since FIE never reimbursed Henderson for the replacement cost of the alleged stolen property, Henderson argues that she owes no restitution. Henderson maintains that FIE was legally obligated to pay Henderson her ACV claim for theft of her property from a residence she had not occupied since 2005 because she

never admitted that her claim regarding the theft was fraudulent. The evidence presented at the sentencing hearing clearly established that FIE always had serious doubts about the legitimacy of Henderson's initial theft claim, but in order to avoid any potential allegation that FIE was acting in bad faith, it paid Henderson \$22,602.24 under a reservation of rights.

FIE was concerned about the legitimacy of Henderson's insurance claim based upon the totality of the circumstances. Henderson never informed FIE that she was no longer residing at her dwelling in Clancy, or even in Montana for that matter. Moreover, she did not report the theft of property to FIE until seven months after the theft allegedly occurred. After she did make the claim with FIE, she was extremely evasive about providing information. She repeatedly promised to provide copies of law enforcement reports documenting the alleged theft but never did so. She repeatedly promised to provide the names and contact information for her relatives who allegedly discovered the theft but never did so. She claimed that certain property was stolen, such as a spa, a wood staff, four-wheelers, and a Neptune washing machine that simply did not ring true. Thus, even though FIE paid her claim under a reservation of rights to avoid any allegation that it was acting in bad faith, and to further investigate the legitimacy of the claim, FIE never believed that Henderson had actually suffered any loss.

Henderson argues, though, that since the State did not charge her with insurance fraud based upon her initial claim of loss, she is entitled to keep the \$22,602.24 FIE disbursed to her. Henderson asserts that since she never admitted to criminal conduct in relation to the reported theft, she was entitled to the money in the first instance, and despite her fraudulent conduct in seeking further reimbursement for the property, and the suspicious circumstances surrounding her ACV claim, she is entitled to keep the money.

This Court has previously held that insurance payments made under fraudulent claims entitle the insurance company to restitution in the amount of the insurance payments. *See Tyler v. Fireman's Fund Ins. Co.*, 255 Mont. 174, 178, 841 P.2d 538, 541 (1992). In *State v. Borsberry*, 2006 MT 126, 332 Mont. 271, 136 P.3d 993, this Court addressed an issue similar to the one presented in the instant case. Borsberry rolled his car in an accident on the interstate. He then called his insurance company and filed a claim over the phone. A claims adjuster interviewed Borsberry about the accident, and Borsberry gave a version of events that another vehicle forced him to slam on his breaks, causing Borsberry to slide into the borrow pit to avoid hitting the other car. *Id.*, ¶ 5. The insurance company paid Borsberry's claim for medical expenses and property damage in the amount of \$22,997.51 under a reservation of rights. *Id.*, ¶ 6.

A highway patrol trooper investigated Borsberry's accident and concluded that Borsberry and the driver of the other vehicle were involved in a speed contest when Borsberry rolled his vehicle. *Id.*, ¶ 7. The State charged Borsberry with felony criminal endangerment, insurance fraud or, alternatively, attempted insurance fraud, and providing false reports to law enforcement authorities. *Id.*, ¶ 8. The jury acquitted Borsberry of providing false reports to law enforcement and criminal endangerment, but found him guilty of insurance fraud. The district court deferred Borsberry's sentence for six years and ordered him to pay \$22,997.52 in restitution to the insurance company. *Id.*, ¶ 10.

On appeal, Borsberry argued that the district court erred in ordering him to pay restitution to the insurance company because the insurance company did not suffer a pecuniary loss since it was legally obligated to pay Borsberry's claim. *Id.*, ¶ 23. This Court observed that Borsberry's insurance policy contained a provision that allowed the insurance company to void the policy if Borsberry filed a fraudulent claim, and the jury convicted Borsberry of insurance fraud. Further, the insurance company paid Borsberry's claim under a reservation of rights. Thus, the insurance company suffered a pecuniary loss based on Borsberry's criminal conduct, and the district court properly ordered Borsberry to pay restitution. *Id.*, ¶ 25.

Henderson will likely argue that since the jury convicted Borsberry of insurance fraud on the claim he submitted from his wreck, the restitution the court ordered him to pay was directly related to the conviction. Thus, *Borsberry* is distinguishable, since here, Henderson did not financially benefit from the offense to which she pled guilty. Nonetheless, the order of restitution in the instant case is in keeping with this Court's restitution jurisprudence.

This Court has recognized that the criminal code's provision of restitution, "engraft[s] a civil remedy onto a criminal statute," creating a procedural shortcut for crime victims who would be entitled to a civil recovery against the offender." *State v. Brownback*, 2010 MT 96, ¶ 19, 356 Mont. 190, 232 P.3d 385, quoting *United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999). Moreover, restitution is not limited by the definition of the offense or to only those injuries arising as a "direct" result of the offense. *State v. Jent*, 2013 MT 93, ¶ 12, 369 Mont. 468, 299 P.3d 332, citing *State v. LaTray*, 2000 MT 262, ¶¶ 12-14, 302 Mont. 11, 11 P.3d 116. Further, pecuniary loss includes special damages that a person could recover against the offender in a civil action arising out of the offender's criminal activities. Mont. Code Ann. § 46-18-243(1)(a).

Henderson's insurance policy included a "Fraud or Concealment" clause that provided that any fraudulent statement, either before or after the claim, voided the policy. (*See* Tr. at 22.) Henderson was fully aware of this policy provision and

assumed the risk of forfeiting her coverage when she admittedly submitted fraudulent receipts to obtain even more money out of her insurance company. In the instant case, FIE clearly could have recovered the \$22,602.24 from Henderson through a civil action since Henderson's fraudulent conduct voided the policy.

Although, as Henderson observes in her brief, there must be a causal relation between the offender's criminal conduct and the pecuniary loss, *see State v. Breeding*, 2008 MT 162, ¶ 13, 343 Mont. 323, 184 P.3d 313, under any interpretation Henderson's fraudulent criminal conduct, to which she pled guilty, is the causal connection mandating restitution. But for Henderson's suspicious report of theft of property in the first instance, FIE would have never paid Henderson the ACV of the alleged stolen property under a reservation of rights, and but for Henderson initially reporting the property as stolen, she never could have submitted the fraudulent receipts in an effort to receive even more money from the insurance company. Once Henderson pled guilty to that act of insurance fraud, FIE was entitled to recoup its prior disbursement to Henderson.

There are similarities between the circumstances in this case and those before the Court in *State v. Ness*, 2009 MT 300, 352 Mont. 317, 216 P.3d 773. In *Ness*, a woman, Jami Sherman (Sherman), was involved in a single-car accident while driving under the influence of alcohol. Sherman was thrown from her vehicle and was lying in a prone position on the roadway when Ness's vehicle

struck and killed her. Ness fled the scene, knowing that he had hit something with his car. *Id.*, ¶ 3. After hearing the news of Sherman's death the following morning, Ness changed the vehicle's turn signal lenses, which had been broken, disposed of the pieces of the broken lenses, and washed the vehicle. *Id.*, ¶ 4.

The State ultimately charged Ness with tampering with physical evidence. Ness entered an *Alford*<sup>3</sup> plea, pursuant to a plea agreement. As part of Ness's sentence, the district court ordered him to pay \$3,500 for Sherman's funeral expenses. *Id.*, ¶¶ 5-6. On appeal, Ness argued the district court erred because there was no nexus or correlation between the crime for which he was convicted, and the restitution imposed. *Id.*, ¶ 9. This Court disagreed, explaining that Sherman's funeral expenses were not "wholly unrelated" to Ness's crime because "Ness's actions 'created a situation in which [funeral expenses] were reasonably necessary.'" *Id.*, ¶ 17, quoting *State v. LaTray*, 2000 MT 262, ¶¶ 21-22, 302 Mont. 11, 11 P.3d 116. The same is true in the instant case.

It is also clear from the district court's remarks at sentencing, that the court believed Henderson's fraudulent conduct began at the time she reported the theft of property from the Clancy dwelling in which she no longer resided. Even though Henderson did not admit that conduct was fraudulent, the State presented substantial evidence at sentencing to cast doubt on the legitimacy of Henderson's

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<sup>3</sup> See *North Carolina v. Alford*, 400 U.S. 254 (1970).

ACV claim. Under the circumstances of this case, allowing Henderson to keep the \$22,602.24 would have been a bitter pill to swallow. As this Court has also recognized, district courts have broad powers to impose reasonable requirements upon an offender, and that Mont. Code Ann. § 46-18-202(1)(f),<sup>4</sup> which allows a district court to include “any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society,” also provides a basis for restitution. *State v. Perkins*, 2009 MT 150, ¶ 12, 350 Mont. 387, 208 P.3d 386. Thus, having concluded that Henderson’s fraudulent conduct began when she made her initial claim of theft of property to FIE, under Mont. Code Ann. § 46-18-202(1)(g), it was appropriate for the district court to also impose this condition for purposes of rehabilitation and protection of the victim or society from expense of insurance fraud. *See, e.g., State v. McIntire*, 2004 MT 238, ¶ 17, 322 Mont. 496, 97 P.3d 576.

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<sup>4</sup> This provision is now set forth in Mont. Code Ann. § 46-18-202(1)(g).

**CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm the district court's judgment, including the restitution award to FIE.

Respectfully submitted this 4th day of September, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,895 words, excluding certificate of service and certificate of compliance.

  
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