

ORIGINAL

NO. 36739-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

COLIN EISENHUT,

Respondent.

RECEIVED  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
PORT ORCHARD  
DEC 20 2007

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 06-8-00802-6

BRIEF OF APPELLANT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED December 20, 2007, Port Orchard, WA *Servio L. Myette*  
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to each counsel listed at left.**

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## **I. ASSIGNMENT OF ERROR**

The trial court's ruling that expenses for medical treatment are not actual expenses incurred under RCW 13.40.020 unless the treatment is performed.

## **II. ISSUE**

**ARE ACTUAL EXPENSES FOR MEDICAL TREATMENT INCURRED, EVEN IF THE TREATMENT HAS NOT YET BEEN PERFORMED, WHERE THERE IS SUFFICIENT EVIDENCE TO DEMONSTRATE THE EXPENSES WILL BE NECESSARY?**

## **III. STATEMENT OF THE CASE**

On October 6, 2006, Respondent, Colin Eisenhut, assaulted victim Ian Fleming. CP 4-9; RP 8. As a result of the assault, Ian had to undergo several medical exams and procedures, resulting in an undisputed out of pocket expense of \$9,560.00. CP 27, 30-31; RP 5, 8, 9, 15.

In addition to the \$9,560.00 actually paid for medical treatment, Ian's injuries require additional medical procedures that have not yet been performed. CP 31; RP 9-12.

First, Ian is missing a tooth from the assault. CP 31; RP 10. That missing tooth will have to be replaced, either by a bridge, or by placing an implant in the gap. Id. Ian's primary dental physician, Dr. Houpt DMD, has

estimated the cost of the bridge to be \$3,276.00, and, in the alternative, the cost of the implant to be \$3,843.00. RP 9. According to Ian's father, Jeff Fleming, no one knows which procedure will be necessary to repair Ian's teeth, but one or the other will eventually be required. RP 11.

Second, according to Jeff Fleming, Ian's remaining teeth will require crowns when complete. The estimate given for the crowns by Dr. Houpt is 3,936.00. RP 10.

The court held a restitution hearing on August 16, 2007. RP 1- 19. During the hearing, Respondent's counsel stipulated to the \$9,560.00 out of pocket expenses incurred by the victim. CP 30; RP 4, 6, 15. Respondent's counsel argued that the remaining amounts were not recoverable because future medical costs are not allowed by statute. RP 14-15.

The court, reading the definition of restitution found in RCW 13.40.020(22)<sup>1</sup> questioned whether the words "actual expenses incurred for medical treatment for physical injury to persons" meant the expenses had to be performed and paid for before they were "incurred". RP 16-17. Without

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<sup>1</sup> "Restitution' means financial reimbursement by the offender to the victim, and shall be limited to easily ascertainable damages for injury to or loss of property, *actual expenses incurred for medical treatment for physical injury to persons*, lost wages resulting from physical injury, and costs of the victim's counseling reasonably related to the offense. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses. Nothing in this chapter shall limit or replace civil remedies or defenses available to the victim or offender." RCW 13.40.020(22) (emphasis added).

rendering a decision on the issue, the court took the matter under advisement and asked the parties to submit any cases pertinent to the issue. RP 18. The court advised it would render a final decision within 7 days. Id.

On August 23, 2007, the court entered its decision and order on restitution. CP 27. The court found the definition of “Restitution” in RCW 13.40.020(22), specifically the word “incurred”, requires there be a present obligation to pay for medical treatment. CP 27. The court concluded a present obligation to pay requires the medical treatment actually be performed and billed. Id. Medical expenses not performed and not billed are not “incurred”, and, therefore, not proper “restitution” for which Respondent is obligated. Id.

On September 5, 2007, the State filed this appeal.

#### **IV. ARGUMENT**

##### **ACTUAL EXPENSES FOR MEDICAL TREATMENT ARE INCURRED, EVEN IF THE TREATMENT HAS NOT YET BEEN PERFORMED, WHERE THERE IS SUFFICIENT EVIDENCE TO DEMONSTRATE THE EXPENSES WILL BE NECESSARY.**

Appellant contends the trial court erred when it found that medical treatment had to be performed and billed in order for the expenses to be “incurred” as provided in RCW 13.40.020(22). In this case there was undisputed evidence that victim Ian Fleming would need to pay for medical procedures in order to restore his teeth. Those procedures had a known dollar

amount. The fact that the procedures had not been performed, did not render the obligation questionable or speculative. Thus, the court's ruling was a misinterpretation of the definition of "restitution" in RCW 13.40.020(22).

### **Standard of Review**

When considering a juvenile court's finding of restitution, the standard of review is whether the court's finding was an abuse of discretion. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999), citing, *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991), and, *State v. Fleming*, 75 Wn. App. 270, 274, 877 P.2d 243 (1994), *petition dismissed*, 129 Wn.2d 529, 919 P.2d 66 (1996).

The trial court abuses its discretion whenever its order is manifestly unreasonable or is exercised on untenable grounds, or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981), citing, *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). To the extent a ruling is based on an incorrect interpretation of the law, it is for untenable reasons and thus is a presumptive abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

### **The Trial Court Misinterpreted the Law**

Restitution is a creature of statute and the Legislature has granted

broad power to the trial court to order restitution. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999); *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Because the power to order restitution comes from Legislative mandate however, failure to follow the statutory requirements renders any action of the court void. *State v. Mark*, 36 Wn. App. 428, 436, 675 P.2d 1250 (1984).

Juvenile restitution provisions are construed liberally to achieve their purpose, which is to compensate the victims and hold juveniles accountable for their actions. *State v. Donahoe*, 105 Wn. App. 97, 100, 18 P.3d 618 (2001). Providing for the payment of restitution in juvenile cases, therefore, promotes fundamental goals in the Juvenile Justice Act. *State v. Landrum*, 66 Wn. App. 791, 797, 832 P.2d 1359 (1992), *citing*, RCW 13.40.010(2)(c), and (h); *State v. Bennett*, 63 Wn. App. 530, 533, 821 P.2d 499 (1991); *State v. Bush*, 34 Wn. App. 121, 124, 659 P.2d 1127, *review denied*, 99 Wn.2d 1017 (1983).

In furtherance of those goals, restitutions statutes should be interpreted in such a way as to avoid unlikely, strained or absurd results. *Landrum* at 797, *citing*, *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990), and, *State v. Curwood*, 50 Wn. App. 228, 231, 748 P.2d 237 (1987).

Pursuant to RCW 13.40.190(1), the Court, in its dispositional order,

shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the respondent's offense. RCW 13.40.190. "Restitution" is defined in RCW 13.40.020(22):

"Restitution" means financial reimbursement by the offender to the victim, and shall be limited to easily ascertainable damages for injury to or loss of property, *actual expenses incurred for medical treatment for physical injury to persons*, lost wages resulting from physical injury, and costs of the victim's counseling reasonably related to the offense. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses. Nothing in this chapter shall limit or replace civil remedies or defenses available to the victim or offender. RCW 13.40.020(22) (emphasis added).

In the present case, there is no question or dispute that Ian Fleming had severe oral damage and tooth loss as a result of being punched by the Respondent Colin Eisenhut. CP 31-32; RP 7-11. In addition to the undisputed medical expenses already paid, Ian's father testified his son would need to have a missing tooth fixed, either by bridge or implant. RP 9. The undisputed testimony was that Ian was "definitely going to do one or the other". Id. The only difference being \$3,843 for the implant or \$3,276 for the bridge. Id. These were known and undisputed amounts to fix the missing tooth.

In addition, Ian's father testified to the necessity of crowns for the damaged teeth. RP 10. According to Mr. Fleming's testimony, his son Ian is "going to need crowns because of the condition of his teeth." Id. There is a

known cost to complete the crowns, which is \$3,936. *Id.*

Thus the issue here is not whether the procedures will need to be performed in the future, instead the issue is whether Ian is entitled to an award of restitution for the cost of necessary procedures though not yet performed and billed.

The trial court ruled medical expenses are not “incurred” until the procedures and expenses are performed and billed to the victim, thus obligating the victim to pay them. CP 27. In support of its order, the court cited *State v. Goodrich*, 47 Wn. App. 114, 117, 733 P.2d 1000 (1987) for its finding that there be a present obligation to pay for the treatment necessitated by the injury. CP 27.

Indeed, *Goodrich* requires the victim be obligated to pay for the treatment. *Id.* at 117. However, the trial court’s strained interpretation of “obligation” means treatment must be performed and billed first, thus legally obligating the victim to pay the expense, versus needing the treatment but not having it done or paid for yet. This is an incorrect interpretation of *Goodrich*, which actually clarifies RCW 13.40.020(22) and the words “actual expenses incurred”.

The term “incurred” is not limited to expenses actually performed or paid for, but instead includes all expenses that are verified and necessary to

the treatment of the victim, regardless of whether they are yet to be performed or paid for. *Goodrich*, 47 Wn. App. at 117.

In *Goodrich*, Division I of the Court of Appeals was presented with interpretation of the language “actual expenses incurred” as it related to restitution.<sup>2</sup> Martin Goodrich pled guilty to second-degree assault and was ordered to pay \$1,963.00 in restitution for “future medical treatment”. *Goodrich* at 115. Goodrich appealed, arguing that the future costs were not yet “incurred” by the victim. *Id.* The court held that the word “incurred” should be given its common meaning under statutory restitution provisions. *Id.* at 116. The court went on to state:

“Incurred” means to become liable or subject to. ***Proof of payment is unnecessary*** before restitution is ordered, but the victim must have an obligation to pay for the medical treatment necessitated by her injury. If there is sufficient evidence to demonstrate that the victim is obligated to pay for the medical services ***which will be performed***, and there is adequate proof of the amount of the obligation, an award of restitution for the medical services is proper. *Id.* at 117, quoting, Webster's International Dictionary 1145 (3d ed. 1971) (emphasis added).

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<sup>2</sup> The Court in *Goodrich* examined language in RCW 9.94A.140(1) [recodified as 9.94A.750 in 2001], which provided restitution in cases “based on easily ascertainable damages for injury to or loss of property, ***actual expenses incurred for treatment for injury to persons***, and lost wages resulting from injury.” *Goodrich*, at 116. While that statute deals with restitution under former provisions of the SRA, there is no substantive difference between the language cited and the current definition of restitution under RCW 13.40.020(22).

The Court in Goodrich then remanded the matter back to the trial court to determine whether the victim “incurred” the future costs awarded. Id.

Thus, nothing in Goodrich requires Ian Fleming to have the dental treatment prior to an award of restitution, so long as there is adequate proof of treatment that will be performed. This decision is not inconsistent with other cases that have awarded anticipated damages not yet performed or paid. See, State v. Shannahan, 69 Wn. App. 512, 849 P.2d 1239 (1993) [Unpaid medical cost to victim driver awarded based on articulable basis]; and, State v. Morse, 45 Wn. App. 197, 723 P.2d 1209 (1986) [Unpaid medical expenses sufficient to afford a reasonable basis].

Cases such as Landrum, supra, illustrate the importance of imposing restitution such that the victim is compensated and the interpretation of the restitution laws is consistent with that result.<sup>3</sup> The trial court’s interpretation would lead to absurd results. What if the victim can’t pay for the work prior to it being done? What if the dentist or physician requires pre-payment or a deposit and the victim can’t afford it? To find Respondent not responsible

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<sup>3</sup> “Because the psychological damage to the child sexual abuse victim may last a lifetime, counseling for these victims is now commonly recognized as an essential part of the recovery process. Landrum’s suggested construction would frustrate the overall purposes of the JJA by allowing the defendants to escape responsibility for the results of their actions and leaving the victims without compensation for their injuries. This construction would also render the counseling provision practically meaningless by restricting it to a narrow and unusual class of cases. Landrum, 66 Wn. App. 791, 797, citing, Governor’s Task Force on Community Protection, Final Report, November 28, 1989, at I-2.

for expenses necessary and reasonable to repair Ian Fleming's teeth simply because the work isn't done yet would be contrary to the clear intent of the Legislature and restitution laws. *Id.*

There is no dispute that Ian Fleming will require substantial dental work for replacement of his missing tooth and crowns. Both Ian's Father and the attending dental physician document those expenses. RP 9-11. The expenses are verified by the estimates done by Dr. Houpt DMD. *Id.* These are not speculative damages. They are known and determinate amounts necessary to repair the damage Respondent caused.

Whether the treatment to replace the missing tooth will involve a bridge or an implant is irrelevant. We know at minimum a bridge will be necessary. The bridge results in a cost of at least \$3,276.00, along with \$3,936.00 necessary for crowns. That amount totals \$7,212.00 in actual medical expenses the trial court refused to order as restitution because the procedures were not done yet.

## V. CONCLUSION

The State contends sufficient evidence exists to demonstrate expenses Ian Fleming will be obligated to pay in order to fix his teeth. These expenses will be necessary, and there is proof of the amount of the obligation.

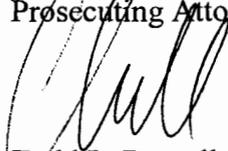
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Goodrich, at 117. Therefore, the State respectfully requests this Court remand the matter back to the trial court with instructions the trial court award additional restitution upon a proper determination of future medical/dental costs. Id.

DATED December 20, 2007.

Respectfully submitted,

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