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STATE OF WASHINGTON  
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NO. 67804-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

NOE FUENTES,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF APPELLANT**

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A. ASSIGNMENT OF ERROR

The dispositional court erred by entering a restitution order that failed to include restitution for losses incurred by the victim insurance company without making a finding that the juvenile was unable to pay at present or in the future.

B. ISSUES

1. Can a dispositional court refuse to order restitution to a victim insurance company simply because the victim is an insurer?
2. Did the trial court err in finding that the juvenile could not pay now or in the next ten years where the juvenile simply asserted that he did not presently have money or a job?

C. FACTS

On March 17, 2011, 15 year-old Noe Fuentes was charged with malicious mischief in the third degree for throwing a large rock through a woman's car window. CP 1. Fuentes pleaded guilty as charged on July 13, 2011, stating that he "knowingly and maliciously caused physical damage to a car . . . by breaking the window," CP 7, and in his written plea agreement he promised to pay restitution "in full to all victims on charged counts, including

dismissed counts and cause #s." CP 9 (emphasis in original).<sup>1</sup> At the disposition hearing held on August 10, 2011, the court ordered restitution, to be determined on a future date. CP 21.

A restitution hearing was held on September 16, 2011.

RP 1. Defense counsel handed forth an affidavit indicating that his client had no assets and was unemployed, and counsel argued that Fuentes should not be required to pay full restitution. RP 3; CP 24-27. The court indicated that he intended to order restitution in full. RP 3 ("I'm going to order the restitution in the amount that's been requested of \$2,139.22"). When defense counsel reminded the court, however, that the bulk of restitution was owed to American Family Insurance, the court changed its mind.

I am reminded by counsel that *it is my practice* and I will in this case order the \$500 as being the amount of restitution, and I'll leave it to the insurance carrier, as capable as they are, if they wish to seek restitution, it wouldn't be very difficult for them to get an order in that amount. So the amount of restitution ordered in this matter by the court will be \$500, though the court does recognize there's additional insurance loss.

RP 4 (italics added). The prosecutor asked whether the court was finding that the company was not a victim but the court refused to

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<sup>1</sup> The agreement also contained the sentence, "The respondent agrees to pay restitution in the specific amount of \$2,139.22", but a box preceding that sentence was not checked. CP 9. Apparently, the precise amount of restitution was not agreed upon before the plea.

answer. RP 4. The prosecutor then asked whether the court was finding the juvenile unable to pay and the following exchange occurred:

COURT: I think he's going to have a hard time paying \$500. I mean, I'm not sure what you're asking me. If you want me to comment on what the likelihood is that this is going to be paid off at any time in the near future, I guess I could give you my opinion. It's probably not real likely.

MR. HERZER: And I just wanted to have some clarification on that issue since the RCW for restitution specifically requires a finding of the respondent's inability to financially, or to be financially able to pay back--

COURT: I appreciate that and I think I would make that finding.

RP 4-5. Defense counsel noted that the Respondent was not in school and was unable to work. RP 5. The State reminded the court that the defendant would simply have to pay \$1,600.00 over a ten-year period, that it was best to obtain an order in case the defendant became able to pay, and that he could always be relieved of his obligation to pay if his circumstances worsened in the future. RP 6. Defense counsel argued that it was logical to

conclude that Respondent would likely be unable to pay. RP 6.

The court responded as follows:

COURT: Well, again, on the balance of things, again, my general feeling is that I'm primarily concerned with the, if there's going to be any emphasis that this court is going to place on where money goes and where it's paid, it's to the person who's had the out-of-pocket loss. I believe insurance carriers are more than capable, and it would be of no effort whatsoever if they decided to do it, to get a judgment against Mr. Fuentes for whatever amount is owed for that. So I'll, having worked for insurance companies in the past, I will trust their ability to be made whole if they decide that it's worth doing that. So I think the record's been made, my decision's been made and we'll go on.

I've signed the order setting restitution. We'll file the financial declaration with the clerk.

RP 6-7. The written order provides restitution to the car owner but not to the insurance company. CP 28.

D. ARGUMENT

THE DISPOSITIONAL COURT ERRED BY CATEGORICALLY DENYING RESTITUTION WITHOUT MAKING ANY MEANINGFUL INQUIRY INTO THE JUVENILE'S ABILITY TO PAY WITHIN TEN YEARS.

Pursuant to statute, a juvenile found guilty of an offense must pay restitution to any injured person.

(3) Before entering a dispositional order as to a respondent found to have committed an offense, the court shall hold a disposition hearing, at which the court shall:

\* \* \*

(f) Determine the amount of restitution owing to the victim, if any, or set a hearing for a later date not to exceed one hundred eighty days from the date of the disposition hearing to determine the amount, except that the court may continue the hearing beyond the one hundred eighty days for good cause . . .

RCW 13.40.150.

In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent.

RCW 13.40.190(1)(a). 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.

RCW 13.40.020(25). A juvenile has up to ten years to pay restitution. RCW 13.40.190(1)(d). Insurers are victims under the statute and are entitled to restitution. State v. A.M.R., 147 Wn.2d 91, 97, 1 P.3d 790 (2002); State v. Sanchez, 73 Wn. App. 486, 488-90, 869 P.2d 1133 (1994).

Originally, a dispositional court had discretion to not order restitution for losses suffered by insurance companies, but amendments to the Juvenile Justice Act in 1997 took away that authority. See A.M.R., 147 Wn. 2d at 96 (citing Laws of 1997, ch. 338, § 29(1)). In 2004, the legislature reinstated part of the authority to deny restitution to insurers but the denial turns on the juvenile's inability to pay.

At any time, the court may determine that the respondent is not required to pay, or may relieve the respondent of the requirement to pay, full or partial restitution to any insurance provider authorized under Title 48 RCW if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider and could not reasonably acquire the means to pay the insurance provider the restitution over a ten-year period.

RCW 13.40.190(g).

Here, the court first categorically ruled, consistent with its general practice, that restitution should not be ordered to an

insurance carrier. RP 5. Such a "practice" plainly violates the statute and the decision in A.M.R. Restitution must be paid to an insurance carriers unless the court makes specific findings. Thus, the dispositional court's order is flawed to the extent that court excluded the insurance carrier as a matter of practice.

When reminded that it was required to find that the juvenile was unable to pay the outstanding amount over a ten-year period, the court simply said it was unlikely the Respondent would be able to pay. RP 6. But Fuentes had only asserted that he was *presently* unemployed and unable to pay. He made no effort to prove, nor did the court find, a reasonable likelihood that he was not employable in the foreseeable future, or at least for the next ten years. Nor did the court find that Fuentes was unable to pay "full or *partial* restitution to any insurance provider." RCW 13.40.190(g) (italics added).

This was error. The \$1,600.00 restitution obligation could be satisfied over a ten-year period with equal monthly payments of \$13.33 per month. Even if Fuentes did not pay for five full years – until he was 20 years old and would have greater earning power – his obligation over the remaining five-year payment period would be

less than \$25.00 per month, a modest monthly obligation even for someone earning only minimum wage.

If the legislative requirement to prove an inability to pay is to have any meaning, the juvenile must provide some proof that he has no present or future earning power before a court cancels a restitution obligation. In this case, Fuentes did not establish that he would be unable to make full *or partial* restitution to the insurance carrier over the course of ten years. It appears the trial court was simply following his "practice," RP 4, of refusing restitution as to insurance carriers, rather than performing an individualized consideration of this juvenile's true ability to pay in full or in part over a ten-year period.

The trial court seemed to believe that restitution need not be ordered for insurers because "insurance carriers are more than capable" of obtaining a civil judgment on their own. RP 6. This reasoning violates the statute and is poor public policy.

Two purposes of the Juvenile Justice Act are to "make the juvenile offender accountable for his or her criminal behavior" and to "[p]rovide for restitution to victims of crime." RCW 13.40.010(c) and (h). The plain language of the restitution statutes furthers these goals. Although the legislature has decided to treat

insurance companies differently, insofar as a court may reduce a juvenile's obligation to a carrier if a juvenile cannot pay, RCW 13.40.190(g) is a measured step in that direction, rather than a wholesale abandonment of restitution to insurance carriers. The statutory scheme allows a dispositional court to balance an insured's interest in collecting restitution against a juvenile's interest in avoiding a crushing financial burden. The focus must be on striking the appropriate balance. The trial court's reasoning, however, ignores this balance by adopting a practice that either by design or *de facto* forces the courts and insurance carriers to bear additional costs of processing a civil lawsuit where there is no real dispute that money is owed.

Moreover, it is simply inaccurate to say that filing a civil lawsuit takes "no effort whatsoever." RP 6. Lawyer and staff time must be expended to initiate the suit, filing fees must be paid, and time and effort must be expended to finalize the suit, even if liability is clear. The courts become burdened with adjudicating a duplicative claim. And, a lawsuit may also force additional costs on a juvenile if he is required to obtain legal counsel to defend against a separate civil suit. This trial court's approach – which essentially requires an insurer to routinely file lawsuits to be compensated for

relatively small amounts that are clearly owing – distorts the legislatively creating balancing process and effectively immunizes juveniles from restitution obligations to insurance companies regardless of ability to pay.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse and remand for imposition of full restitution, unless Fuentes can establish that he will not be able to pay *any* amount to the insurance carrier over the next ten years.

DATED this 20<sup>th</sup> day of January, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Daniel Pelka, the attorney for the respondent, at Society of Counsel Representing Accused, 1401 E. Jefferson Street, Suite 2000, Seattle, WA 98122-5576, containing a copy of the Brief of Appellant, in STATE V. NOE FUENTES, Cause No. 67804-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

1/26/12  
Date 1/26/12