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68020-0

NO. 68020-0-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EMERIC MOCKOVAK,

Appellant.

APPELLANT'S CONSOLIDATED REPLY BRIEF AND BRIEF OF
CROSS-RESPONDENT

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A. INTRODUCTION TO REPLY BRIEF

The State urges upon this Court an untenably expansive view of “but for” causation that flies in the face of the express statutory limitation that losses must be “a direct result of the crime charged,” RCW 9.94A.030(53). Thus, the State contends that there is no legal error in ordering restitution for the cost of two stress-related medical visits where those visits took place more than 10 months after the last act constituting any part of the charged criminal conduct and where all of the evidence presented at the restitution hearing confirmed that the stress was caused by Defendant’s upcoming criminal trial, not by any of the charged criminal conduct. The prosecutor asserted that King’s cardiology appointment occurred during “the exact same time frame during which the defense was interviewing Dr. King’s employees.” RP 9/22/11, at 10-11. She asserted, “I know from my own observations that that caused a great deal of stress throughout the company.” *Id.* at 11. She contended that the cost of treatment for stress caused by the trial preparation process – “stress from the defense interviews” – was something the court could order restitution for. *Id.* at 11. Similarly, the cardiologist opined that King’s symptoms were the result of “stress suffered from criminal proceedings associated with his practice,” and noted that “most of the professional work at [King’s] clinic has now been dumped on him” CP 253, 243. That

evidence affirmatively establishes that Defendant's criminal conduct did not cause the stress that prompted the medical visits, but instead the stress was caused by the upcoming criminal trial. The State's response is to contend that there would not have been a criminal trial "but for" the charged criminal conduct, so the stress is sufficiently connected to permit restitution. That is not the law. See Parts B(1)(a) and (b) below. Nor can the State muster any plausible justification for awarding to the insured a loss that was suffered, if at all, by the insurance company that paid part of the medical bill. *See* Part B(1)(c) below.

Even more shocking is the State's argument that restitution can be ordered here for losses resulting from Defendant's decision to exercise his constitutional right to trial by jury. Under the State's theory, if a defendant does not simply plead guilty, the defendant becomes legally responsible for the stress his trial may cause to others. That is an untenable proposition for the obvious reason that it would penalize a defendant for exercising his constitutional right to trial by jury. Here, it is all the more remarkable because Mockovak was acquitted at trial of the State's charge that he solicited the murder of Brad Klock – the very event that the State contended started the entire criminal investigation. It is important for this Court to state firmly and clearly that the State is wrong when it says that a defendant commits compensable injury, cognizable under principles of

restitution, when he does not simply plead guilty to whatever the State charges. *See* Part B(2) below.

The State also urges that doubling an award of restitution without any explanation is entirely permissible and is simply part and parcel of judicial discretion. The obvious flaw in the State's argument is that it is an improper invitation to use the cloak of unexplained judicial discretion to allow restitution for losses that the law expressly forbids. It is, at core, a cynical appeal to disregard the law. Judicial discretion, properly conceived, exercised, and explained, must be in aid of legally permissible results, not an end run around what the law forbids. It is entirely the State's conjecture to infer that is what the Superior Court did, and it is legally untenable to assert that such a thing would be permissible if it were to occur. *See* Part B(3) below.

B. ARGUMENT IN REPLY

- 1. BECAUSE THERE IS NO DIRECT CAUSAL CONNECTION BETWEEN MOCKOVAK'S INCHOATE CRIMES AND KING'S STRESS OVER THE DISRUPTION OF HIS BUSINESS CAUSED BY THE CRIMINAL TRIAL, IT WAS ERROR TO ORDER ANY RESTITUTION.**
- a. The Time Period Between Commission Of The Crimes And Provision Of The Medical Services Was More Than Ten Months.**

In *State v. Hahn*, 100 Wn. App. 391, 400, 996 P.2d 1125 (2000), this court held that a record "which merely identifies medical services

rendered either on the date of the crime or shortly thereafter” is “insufficient” to establish the requisite causal connection between the crime and the medical services. In *Hahn*, even though some of the medical expenses were incurred “within five days of the crime,” this court found insufficient proof that they were the direct result of the crime.

In the present case, King saw the cardiologist on September 28 and October 19, 2010. CP 243, 254. The criminal acts for which Mockovak was convicted ended on November 7, 2009. Thus, King’s medical expenses were incurred more than 10-3/4 and 11-1/3 months after commission of the criminal acts for which Mockovak was found guilty. The gap in time is so substantial that, as a matter of law, it cannot support an award of restitution. Moreover, as shown above, all of the evidence presented at the restitution hearing – including the prosecutor’s own unsworn testimony about what she observed – showed that the stress was related to defense counsel’s interviews of company employees in preparation for the upcoming trial.

b. There Is No Need To Discern The “Relative Effects Of Multiple Stressors.” There Was Only One Stressor And That Was The Stress Of Disruption Of The Work Of The Clinic Which Was Caused By The Upcoming Trial.

In an attempt to deflect attention from the huge gap in time between the last act of the criminal conduct charged and King’s first visit to the cardiologist, and to disregard the constitutional infirmity in penalizing a

defendant who exercises his right to a jury trial, the State urges that a causal analysis, as required by the restitution statute itself, would create unmanageable challenges. The State mischaracterizes Mockovak's argument as one which, if accepted, would have the appellate courts "distinguishing [the] relative effects of multiple stressors on a particular victim." *Brief of Respondent*, at 20.¹ But Mockovak makes no such argument. There was evidence of *only one* stressor – the stress of business disruption caused by the trial – which legally is not sufficient to justify a restitution order.

At the first restitution hearing Judge Hayden said that the cardiologist "might say" that King's stress symptoms "had absolutely nothing to do with his fear of having almost been killed." RP 9/22/11, at 32. On the other hand, the doctor might say that King's stress was related to such fears. "I am assuming that that is what he would say." *Id.* at 33.

¹ The State attempts to analogize this case to one where "a sexual abuse victim" sought counseling for the after effects of such abuse and during such counseling sessions also discussed the stress of the criminal trial. *Brief of Respondent*, at 20. But in the State's hypothetical, the victim *was* sexually abused and thus had need for counseling because she was in fact assaulted and injured. But in the present case, King was *never* assaulted. King never even knew that an assault against him was being contemplated by Mockovak until after Mockovak had been arrested. Moreover, when the police informed King of Mockovak's plot, King did *not* then go and seek counseling. Indeed, King *never* sought any kind of counseling. And he did not begin to experience chest pain until the defense attorneys started interviewing his clinic employees to prepare for the criminal trial. There is no suggestion whatsoever that there was anything improper or overreaching about the manner in which defense counsel conducted those interviews.

But the cardiologist never said that. King never said that either. The fact that King *never* said anything like that can only be viewed as a concession that he *was not* having any such thoughts. Instead, the record evidence is simply that King was stressed about the fact that the trial was coming up – it was scheduled to begin in January 2011 – and clinic employees were being taken away from their work by the need to submit to interviews conducted by defense counsel.

c. **Although A Court May Order Restitution Paid To An Insurance Company For A Loss Suffered By That Company, A Court Cannot Order Restitution Paid To The Insured For The Insurance Company's Loss.**

State v. Ewing, 102 Wn. App. 349, 352, & P.3d 835 (2000) holds that “[a]n insurance company that pays benefits to a crime victim suffers a direct loss as a result of the crime, and a sentencing court may order the offender to pay restitution to the insurance company” The State claims that *Ewing* supports the restitution order entered in this case. But the order in this case does not provide for the payment of any restitution to an insurance company, and thus the *Ewing* principle is simply irrelevant.

Assuming, *arguendo*, that the requisite causal connection between the cardiologist’s services and Mockovak’s offenses was proved, the Superior Court could have ordered \$695.70 paid to Premera Blue Cross to compensate it for the \$695.70 which Premera paid to the cardiologist. But the Court made no such order. Instead, all of the restitution which the

Court ordered is to be paid to King. But the restitution statutes do not authorize the Superior Courts to order restitution to be paid to one person where the financial injury was suffered by a different person. Accordingly, even assuming the requisite proof of causation was made, it was error for the Superior Court to order restitution in excess of \$837.64, the amount that King paid for the medical visits.

d. No Matter Which Appellate Review Standard This Court Employs When Reviewing the Sufficiency Of The Causal Connection, The Superior Court Erred In Ordering Restitution For The Cost Of The Cardiologist's Services.

In his opening brief Mockovak noted that Division One of this Court has held that it is an abuse of discretion for a Superior Court to order restitution where the loss suffered is not causally related to the offense. *State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). Similarly, the Supreme Court has held that when deciding whether to order restitution, if the trial court “applied an incorrect legal analysis, it abused its discretion.” *State v. Kinneman*, 155 Wn.2d 272, ¶ 35, 119 P.3d 350 (2005). Appellant Mockovak respectfully submits that the trial court did abuse its discretion, because the loss was not proved to be the direct result of the crimes for which he was convicted.

Mockovak notes that Division III has taken a different approach, but one which leads to the same conclusion. In *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2011), Division Three applied a *de novo*

standard of review to the trial court's determination of causation in an order of restitution:

The question is whether the loss here is causally connected to the crime for which Mr. Acevedo was convicted. ***It is a question of law that we will review de novo.***

Acevedo, 158 Wn. App. at 229-30 (emphasis added) (citation omitted). Employing that standard, the *Acevedo* Court set aside the Superior Court's restitution order because the State "failed to show a causal connection between Mr. Acevedo's crime and the damage to [the crime victim's] Acura [automobile]." *Id.* at 231.

Mockovak submits that Division III's analysis is correct because whether an injury is the direct result of a crime is a question of law, and questions of law are reviewed de novo. But under either the *Vinyard/Kinneman* or the *Acevedo* standard, this Court should vacate the restitution order because the legal conclusion that the requisite causal connection exists rests upon untenable reasons, is not supported by facts in the record, and was reached by applying the wrong legal standard.

2. A DEFENDANT WHO EXERCISES HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY CANNOT BE ORDERED TO PAY RESTITUTION FOR LOSSES OTHERS SUFFER BECAUSE OF THEIR STRESS OVER THE DISRUPTION OF BUSINESS CAUSED BY THE CRIMINAL TRIAL.

"The imposition of a penalty for the exercise of a defendant's legal rights violates due process." *State v. Sandefer*, 79 Wn. App. 178, 181, 900

P.2d 1132 (1995). “[P]enalizing those who chose to exercise” their constitutional rights “would be patently unconstitutional.” *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968).

The Superior Court was well aware of this constitutional principle. Judge Hayden specifically rejected the contention that restitution could be ordered for costs incurred as a result of the defendant’s decision to exercise his right to trial. RP 9/22/11, at 12. As Judge Hayden explained:

[I]f there is, for instance, a case of the victim takes the stand and being cross-examined by the defense is very stressful – which it frequently is – as a consequence of being cross-examined they end up in therapy. Is that compensable? . . . I don’t think so.

The State simply does not address this point. But the State does urge that there is no legal error in awarding damages for stress-related losses that plainly are caused by the upcoming criminal trial. Indeed, the prosecutor herself went out of her way to provide her own observation about how the interviews by defense counsel created enormous stress. RP 9/22/11, at 11. And the cardiologist’s own recorded statements report that King’s symptoms were the result of “stress suffered from criminal proceedings associated with his practice” CP 254.

The State claims that the Superior Court had authority to order restitution for the cost of the cardiologist’s services because King’s stress

was caused by Mockovak's upcoming trial and the trial would not have occurred "but for" the charged criminal conduct. Certainly a criminal trial is related to the fact that commission of a crime has been alleged. But "[r]estitution cannot be imposed based on the defendant's 'general scheme' or acts 'connected with' the crime charged, when those acts are not part of the charge." *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993).²

The required causal connection is one "between *the crime* and the victim's claimed damages." *State v. Dedonado*, 99 Wn. App. 251, 252, 991 P.2d 1216 (2000). A causal connection between *the trial* and the medical injury is not sufficient. The defendant's act of electing to go to trial is "not part of the charge." *Miszak*, 69 Wn. App. at 428. Restitution may be ordered for costs which are "consequential in the sense that but for the [crime] the victim would not have incurred them." *State v. Kinneman*, 155 Wn.2d 272, 286, 119 P.3d 350 (2005). Restitution may *not* be ordered for costs which are "consequential" only in the sense that they would not have been incurred but for the fact that the defendant elected to

² Several Washington cases hold that restitution cannot be ordered for the cost of repairing damage to property which was caused during flight from a crime scene, even though the crime was a but-for cause of the flight and the ensuing car collision with another vehicle. *See, e.g., State v. Dauenhauer*, 103 Wn. App. 373, 12 P.3d 661 (2000); *State v. Oakley*, 158 Wn. App. 544, 242 P.3d 886 (2010).

have a trial.³

This Court should state plainly that it is not permissible for a restitution order to include any component for losses that result not from the acts of criminal conduct charged, but from the stress related to a defendant's decision to exercise his constitutional rights, such as his rights to seek bail and trial by jury. Any other rule would amount to an impermissible burden upon the exercise of constitutional rights.

3. A COURT MAY NOT USE THE STATUTORY POWER TO ORDER UP TO DOUBLE THE AMOUNT OF THE VICTIM'S LOSS AS A MEANS OF CIRCUMVENTING THE STATUTORY REQUIREMENT THAT RESTITUTION CAN BE ORDERED ONLY FOR LOSSES THAT ARE THE "DIRECT RESULT" OF THE DEFENDANT'S CRIMINAL OFFENSE.

The State seeks to save the restitution order by making the assumption that the Superior Court intended to exercise the statutorily conferred

³ The State's citation to *Hartley v. State*, 103 Wn.2d 768, 777-78, 698 P.2d 77 (1985) is puzzling. In that case, the Court analyzed the civil concept of "legal cause" in the context of a negligence action against the State. The plaintiff argued that the State negligently failed to revoke a motorist's driver's license, and had it done so the driver would not have been driving while intoxicated and thus would not have collided with and killed the occupants of another car. Despite the fact that the failure to revoke the driver's license was a "but-for" cause of the victims' deaths, the Supreme Court held that the State's negligence was *not* a proximate cause of their deaths because it was "too remote and insubstantial" a cause. Therefore, the *Hartley* Court held that the State could *not* be held liable. The opinion in *Hartley* has very little relevance to the statutory requirement in a *criminal* case that restitution be ordered only when there is proof that the loss suffered was "the direct result" of the defendant's crime. But even assuming that *Hartley* has some minimal relevance, it strongly suggests that restitution may *not* be ordered for expenses incurred as the result of a defendant's decision to go to trial.

power to order restitution in an amount up to “double the amount” of the victim’s actual loss. RCW 9.94A.753(3). *Brief of Respondent*, at 23. The State contends that the Superior Court “apparently chose to simply award King restitution in the amount of the total bill for the medical expenses” (which was \$1,543.34), even though King himself paid only slightly more than half that amount (\$837.64 plus \$10). *Id.* But there is nothing in the record to support the assumption that the Superior Court was, in effect, ordering a doubling. The order makes no mention of RCW 9.94A.753(3).

Even more troubling is the State’s assertion that “[t]he court’s decision to award a higher amount than the actual cost to King was a considered response to the disproportion of the restitution that could be ordered and the losses King suffered.” *Id.* What does the State mean by the phrase “the disproportion of the restitution that could be ordered and the losses King suffered”? By referring specifically to restitution “that could be ordered,” the State concedes that there were other losses for which restitution *could not be ordered*. But the State never identifies these losses. Presumably the State means to refer to King’s request that he be granted restitution for the costs of public relations services, legal services rendered in connection with civil litigation, and legal services related to child-visitation disputes between Mockovak and his ex-wife.

The State argues that the trial judge was entitled to exercise his

statutory doubling power in order to make up for the fact that he had no legal authority to order restitution for those losses. Thus the State argues that the trial judge was entitled to use the statutory doubling power to *circumvent* the statutory restriction that restitution can be ordered only for losses that are sustained “as a direct result of the crime charged.” And yet it is well settled that “The law should not be construed to do indirectly what it cannot do directly.” *Pierce County v. State*, 159 Wn.2d 16, 48, 148 P.3d 1002 (2006). *Accord State v. McNeil*, 20 Wn. App. 527, 534, 582 P.2d 524 (1978) (“[W]e cannot allow the prosecutor to do indirectly what the lack of speedy trial prevented him from doing directly.”); *State v. Holmes*, 68 Wash. 7, 13, 122 P. 345 (1912) (since trial court in criminal case cannot instruct jury as to what verdict to return, it also cannot set aside a jury verdict of acquittal since that would improperly permit a trial court to do indirectly what it cannot do directly). Consequently, if the Superior Court judge did do what the prosecution claims he did, and used one statute to circumvent the restriction of the other, he clearly exceeded his legal authority and entered an unlawful order.

Finally, even if the Superior Court had some other legitimate basis for exercising its discretionary power to order up to “double the amount” of the victim’s actual loss, it would still be incumbent on the Superior Court to identify that reason. The State asserts that “[n]o findings are required

by the court.” *Brief of Respondent*, at 23. But this confuses the need for some kind of statement of reasons with a requirement that formal “findings” be entered. The former is required even though the latter is not. As this Court said when reviewing the appellant’s sentence in *State v. Bevins*, 85 Wn. App. 281, 283, 932 P.2d 190 (1997), “the applicable statute did not require separate, written findings in support of a manifest injustice standard[,] [h]owever, . . . the disposition court must set forth its reasons. . . . That is sufficient for meaningful appellate review.” *Cf. State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) (“a judge errs when she does not enunciate the reasons for her decision” to exercise her discretion to admit evidence of uncharged criminal acts because the absence of such a statement “precludes effective appellate review”). Without some kind of statement of “objectively assessable reasons” there is no way for an appellate court to determine whether discretion has been abused, and thus no way to obtain meaningful appellate review. *See State v. Williams*, 96 Wn.2d 215, 228, 634 P.2d 868 (1981). Here the Superior Court offered no reasons and the only hypothetical reason which the State offers up as a justification for the order requiring payment of more than the victim’s actual losses is invalid as a matter of law. The unexplained exercise of judicial discretion “to double the amount” cannot be justified as a means to order restitution for losses that the law expressly prohibits.

C. INTRODUCTION TO BRIEF OF CROSS-RESPONDENT

Joseph King and Michael Mockovak were co-owners of the shares of two closely held corporations, the King and Mockovak Eye Center, Inc. (“KMEC”) and Clearly Lasik, Inc. CP 30. Together they operated several eye surgery clinics using the corporate form to conduct this business. CP 30. On August 30, 2011, Joseph King, submitted a restitution request asking the Superior Court to order Mockovak to pay King a total of \$220,439.95. CP 275. That request included, *inter alia*, requests to be awarded the following sums:

- \$147,307.82 paid to the Corr Cronin law firm (CP 274-75) for attorney services in the prosecution of two different law suits: the first suit, on behalf of the two corporations, was brought against Mockovak to recover damages for alleged business losses said to be attributable to the negative publicity which surrounded Mockovak’s arrest and prosecution; the second suit against Mockovak was brought by King and King’s family members to recover damages for emotional distress suffered when law enforcement informed them of Mockovak’s solicitation of murder.
- \$19,193.12 paid by Clearly Lasik, Inc., to the Lee & Lee law firm (CP 275) to provide “witness consulting” to corporate employees Daniel Kultin, Christian Monea, and King during the criminal trial.
- \$10,444.18 paid by Clearly Lasik, Inc. to the Stafford Frey Cooper law firm (CP 275) to “advise” King during Mockovak’s criminal trial of Mockovak held long after Mockovak’s arrest.
- \$26,615.00 paid by Clearly Lasik, Inc. to hire a PR firm, Sound Counsel Crisis Communications (CP 275, 341), to preserve and protect the corporate image of Clearly Lasik during Mockovak’s criminal trial.

- \$5,000 paid by King to the Scott Horenstein Law Firm (CP 275) to help King's sister-in-law (who was also Mockovak's ex-wife) pay her legal fees incurred in child custody and visitation proceedings all of which occurred after Mockovak's arrest.
- \$8,460.49 paid by the King Lasik corporation to a contract eye surgeon to perform surgeries (CP 275) while King attended, or was preoccupied with, Mockovak's criminal trial, so that the business could continue to profit during the trial.
- And a \$1,876 expense (CP 277) associated with cancelling a camper rental after Mockovak's arrest.

King sought restitution to recoup his litigation expenses in connection with the two civil suits against Mockovak. In the first suit (*see* CP 29-37), King sought restitution for litigation expenses incurred by the two corporations, KMEC and Clearly Lasik. That suit is still pending in King County Superior Court. In the second civil suit (*see* CP 70-77), King sought emotional distress damages for himself and for members of his family. That suit was dismissed with prejudice by the Honorable Richard Eadie (CP 78) and an appeal from that dismissal is pending in this Court.⁴

The chief problem with King's restitution request is simply that Washington's criminal restitution statutes do not authorize the Superior Court to award them because they were not incurred as "a direct result of the crime charged." RCW 9.94A.030(40). Mockovak's criminal conduct did not take or injure any of King's "property," or any property owned by

⁴ That appeal is currently pending under COA No. 67479-0-I.

either of the two corporations. Nor did Mockovak's criminal conduct injure King. In fact, King did not even know about Mockovak's criminal conduct when it occurred. Every one of the expenses for which King sought "restitution" was incurred *after* Mockovak's arrest and is alleged to have been caused by Mockovak's arrest and his ensuing trial, *not* by the criminal conduct itself.

Restitution may be ordered to recover litigation expenses such as attorneys' fees, if the expenses are incurred in an effort to discover, or to undo, the crime committed by the defendant. *See, e.g., State v. Tobin*, 161 Wn.2d 517, 530, 166 P.3d 1167 (2007) (restitution properly ordered for cost of resurveying geoduck beds: "As a direct result of Tobin's illegal conduct, the State must resurvey in order to determine the status of the geoduck tracts from which he illegally harvested. Otherwise, the impact of Tobin's illegal harvest cannot be accurately known Thus, the need to resurvey is a direct, and even foreseeable, cost of Tobin's crimes."); *State v. Vinyard*, 50 Wn. App. 888, 751 P.2d 339 (1988) (Superior Court directed to determine on remand whether any of the attorneys' fees incurred were incurred in "locating or returning the child" and thus properly causally related to the defendant's crime of custodial interference). But *none* of King's litigation expenses fall under that category.

Mockovak was arrested, tried, and convicted of the crimes of solicitation of murder and attempted murder. King alleged that Mockovak's arrest and trial generated extensive publicity which had a negative effect on the corporations' business. King claimed he was entitled to restitution for the litigation expenses incurred by the two corporations in the course of prosecuting this business loss lawsuit. King also alleged that he was entitled to restitution to recover attorneys' fees that he paid to an attorney who was representing Mockovak's ex-wife in a family law case involving contested issues of child custody and visitation. None of these litigation expenses were the direct result of the criminal act of soliciting an informant to arrange for the hiring of hit men. Indeed, no real hit men were ever hired, no real attempt on King's life was ever made, so Mockovak's crimes did not directly result in harm or loss to anyone. Mockovak was never charged or convicted of any crime that involved taking money from the corporations, and obviously the corporations were not the victims of any attempted or solicited murder.

Since the litigation expenses incurred by King and the two corporations were *not* the direct result of the solicitation of murder or attempted murder, the Superior Court ruled correctly when it refused to order any restitution for these costs.

D. STATEMENT OF THE CASE FOR THE STATE'S CROSS-APPEAL

1. KING AND MOCKOVAK EYE CENTER, INC., P.S. v. MOCKOVAK, CAUSE NO. 09-2-42328-8

On November 23, 2009, King and Mockovak Eye Center, Inc. (“KMEC”) and Clearly Lasik, Inc., two corporations, commenced a lawsuit against Mockovak. CP 29-37. The complaint in that lawsuit described the eye surgery business conducted by the corporations, their joint ownership by King and Mockovak, the FBI sting operation, Mockovak’s arrest, and the purported business losses *suffered by the corporations* allegedly resulting from publicity from Mockovak’s arrest. CP 30-34, ¶¶6-25. The corporations sought recovery of the “fees and costs and disbursements” which they incurred in the course of that litigation, and for the lost value of the shares of the two corporations. CP 36-37, ¶ 44. The Corr Cronin law firm acted as counsel for the two corporations. CP 37. The Profit and Loss Statements for KMEC and Clearly Lasik, which Judge Yu required those businesses to produce to Mockovak, showed that in connection with this lawsuit Clearly Lasik paid legal fees of approximately \$121,000. CP 27, 60. These legal fees were the expenses of Clearly Lasik, Inc.; they were not King’s personal expenditures.

On July 29, 2011, Mockovak answered the complaint and brought his

own third-party claims against King and against King's new corporation, King Lasik, Inc., asserting that King has used the opportunity presented by Mockovak's arrest to steal the assets of the two jointly owned Lasik eye surgery businesses and to leave Mockovak with nothing. CP 129-130, ¶¶ 7-8.

**2. JOSEPH KING, ET AL. v. MOCKOVAK,
CAUSE NO. 09-2-47040-5.**

On December 31, 2009, King and his family filed their own lawsuit against Mockovak. *See Joseph King, et al. v. Mockovak*, (the "King litigation"). The complaint in this case also described the businesses, their ownership, the FBI sting operation, Mockovak's arrest, and the emotional distress suffered by the King family as a result of Mockovak's release on bail pending his criminal trial. CP 71-76, ¶¶3.1-3.26. In this lawsuit King specifically sought recovery of cancelled pre-paid travel plans (CP 73, ¶3.13), other out-of-pocket expenses (CP 74, ¶¶3.15-3.19), the costs of the family's emotional distress (CP 74, ¶3.21), and their costs and fees in bringing the King litigation. (CP 77. "Prayer for Relief"). Initially the Stafford Frey Cooper law firm and then later the Corr Cronin law firm represented the Kings.

On June 8, 2011, Superior Court Judge Richard Eadie dismissed pursuant to CR 12(b)(6) the King litigation. CP 78-79. On July 29, 2011, King filed a notice of appeal in the King litigation. CP 114-15. That

appeal has been argued but no decision has yet been rendered.

E. ARGUMENT IN OPPOSITION TO THE STATE'S CROSS-APPEAL

1. ATTORNEYS' FEES INCURRED IN CIVIL LITIGATION ARE COMPENSABLE ONLY IF THEY WERE INCURRED IN AN EFFORT TO DISCOVER, OR TO UNDO, THE CRIME FOR WHICH THE CRIMINAL DEFENDANT WAS CONVICTED. NONE OF THE ATTORNEYS' FEES REQUESTED HERE MEET THESE CRITERIA.

The majority of the expenses comprising King's restitution request were attorneys' fees. King hired lots of lawyers. He hired lawyers (1) to represent two corporations, Clearly Lasik and KMEC, in a suit to recover for alleged business injuries supposedly caused by the media that surrounded Mockovak's arrest and his trial; (2) to coach corporate employees who were going to testify as witnesses at Mockovak's criminal trial; (3) to advise King during Mockovak's criminal trial; and (4) to represent Mockovak's ex-wife in custody and visitation proceedings occasioned by Mockovak's arrest. None of these litigation expenses were the direct result of the crimes for which Mockovak was convicted and thus Judge Hayden ruled correctly when he denied King's request for restitution.

In *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005), the Supreme Court considered the question of when attorneys' fees incurred in civil litigation are compensable as restitution to a crime victim. The Court focused on whether the fees "directly resulted" from the crime and approved

the award of such fees *only* where the fees were incurred in discovering the crime or attempting to recover what was taken in a crime.

In reaching this conclusion, the *Kinneman* Court examined three Court of Appeals' decisions, *Christiansen*,⁵ *Martinez*,⁶ and *Vinyard*.⁷ The Court held that the crucial factor in each of those three cases was whether the attorneys' fees were incurred in the course of a civil suit which had been brought to discover, or to recover, what had been stolen or taken by the defendant in the course of committing the crime for which the defendant had been convicted. For example, if the defendant stole money from someone and that person brought a civil suit to get that money back, then there was a direct causal connection between the criminal conduct and the civil suit. Under these circumstances the sentencing court could order restitution for attorneys' fees incurred in the process of recovering the stolen property through the civil litigation. But if the attorneys' fees were incurred in pursuit of some other goal which was not a "direct result" of the crime committed, such as obtaining a modification of a child custody decree, where the modification was necessitated by the arrest and incarceration of the defendant, then restitution was not authorized.

Christensen involved a lawyer who stole \$143,282.81 from his client,

⁵ 100 Wn. App. 534, 997 P.2d 1010 (2000).

⁶ 78 Wn. App. 870, 881, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996).

⁷ 50 Wn. App. 888, 751 P.2d 339 (1988).

Sorenson. Sorenson hired a lawyer to sue Christensen to recover the stolen funds and the case was eventually settled with Christensen's malpractice insurance carrier. But because Sorenson had to pay her attorney \$42,381.38 in attorney fees and costs, she was not made whole. The sentencing court ordered Christensen to pay Sorenson restitution and to make her whole by paying the difference between what he had stolen and what Sorenson had recovered after her attorneys' fees had been deducted.

On appeal Christiansen attempted to rely on *Martinez*. In that case the defendant was convicted of arson for burning down his own house. But before he had been identified as the arsonist, the defendant had brought suit to collect on his homeowner's insurance, causing his insurer to incur attorney fees. At his arson sentencing, as part of the restitution he was ordered to pay, Martinez was ordered to pay his insurance company's attorney fees that it had incurred in the civil suit. The *Christensen* Court disagreed with broad dicta in *Martinez* suggesting that attorneys' fees in civil cases were never compensable as restitution (*dicta* also disapproved by the *Kinneman* Court), but agreed with the *Martinez* Court's conclusion that the insurer's civil attorneys' fees did *not* directly result from the defendant's crime of arson. The Court noted that the absence of a directly resulting loss in *Martinez* distinguished that case from Christiansen's situation:

Because [Sorenson] had to pay attorney fees to get any recovery at all in the civil suit, she remained considerably

out of pocket *with respect to the funds Christiansen stole from her*. The trial court, rightly concerned with making Sorenson whole, ordered Christensen to make up the shortfall. This was not an abuse of discretion under the restitution statute. *Sorenson incurred the fees as a direct result of Christensen's offense*.

Christiansen, 100 Wn. App. at 538 (emphasis added).

In *Vinyard*, the defendant was convicted of second degree custodial interference. She stole her youngest child from the father and hid the child for fifteen months. Eventually the child was found in Texas and returned to the father in Washington State. At sentencing, the court ordered Vinyard to pay restitution to the father. The restitution award included attorneys' fees incurred for two different purposes, one that was compensable as restitution, and one that was not.

The father sought restitution of fees incurred in the course of locating and returning the child to Washington State from Texas. He also sought restitution for other legal fees incurred in connection with hearings pertaining to modification of the mother's right of child visitation after the child was recovered and after Vinyard was arrested. The Court of Appeals held that the portion incurred in the litigation involving child visitation rights was *not* properly included in the restitution order:

The restitution award also included \$4,540 for past attorney fees incurred . . . Testimony indicated that some of the fees were incurred incidental to various hearings after the child's return, unrelated to this action, regarding Vinyard's visitation rights. Although Mrs. Vinyard's rights of

visitation would naturally be affected by her actions, ***attorney fees and costs incurred in conjunction with these hearings are not expenses incurred in locating or returning the child, or causally related to the actual crime of custodial interference. Thus, the fees connected with Mr. Vinyard's representation in the separate domestic action were improperly granted under the restitution statutes.***

Vinyard, 50 Wn. App. at 894 (emphasis added).

As for the remainder of the legal fees sought, the *Vinyard* Court held that the record did not contain sufficient evidence for it to be able to discern whether they were incurred in connection with the task of locating and returning the child to Washington State. Thus, the appellate court ordered a remand and held that “the trial court shall determine whether and to what extent . . . the past attorney fees were incurred in locating or returning the child or causally related to the actual crime of custodial interference” *Id.* at 894-95. The Washington Supreme Court later specifically approved of the *Vinyard* decision. *See State v. Tobin*, 161 Wn.2d 517, 525, 166 P.3d 1167 (2007); *Kinneman*, 155 Wn.2d at 288-89.

Finally, in *Kinneman* itself, the defendant was an attorney who had made over 70 withdrawals of his client's money from his trust account and had diverted over \$200,000 of their money to his own personal use. *Kinneman*, 155 Wn.2d at 276. *Kinneman* had been hired to act as an escrow agent in five real estate transactions where the client was refinancing the mortgage on each property. *Kinneman* failed to pay off liens on the properties, and stole

the money that was supposed to be used to pay off those lien holders. The title insurance company and the lender incurred attorney fees in the course of having to go around and pay off those unpaid lien holders. Kinneman eventually pled guilty to 67 counts of felony theft for stealing his client's money – money that should have been paid to those lien holders.

On appeal the Supreme Court held that the key factor was whether the attorneys' fees were incurred as a direct result of the crime for which the defendant had been convicted. Following the same approach taken by the Court of Appeals in *Vinyard*, the *Kinneman* Court remanded with directions that the sentencing court should decide whether there was a direct causal connection between Kinneman's theft crimes and the attorney fees incurred by the title insurance company and the mortgage lender:

Finally, the Court of Appeals properly remanded this case for an evidentiary hearing on Rodney Brown's losses and to determine ***whether restitution should be imposed for attorney fees and costs incurred*** by Brown, Option One [the lender] and Old Republic [the title insurance company] ***allegedly as a direct result of Kinneman's thefts.***

Kinneman, 155 Wn.2d at 290 (emphasis added).

Applying these principles to the present case leads inexorably to the conclusion that *none* of the attorneys' fees sought by King can be the subject of a lawful order of restitution. The lost business lawsuit brought by the two corporations does not seek to discover or undo the crimes for which Mockovak was convicted. Nor can the expense of hiring lawyers for witness

coaching and personal counsel during the criminal trial be viewed as “losses” or “injuries” which “directly resulted” from Mockovak’s criminal acts of soliciting and attempting the commission of a murder.

These costs are no more than secondary or tertiary consequences resulting from purely voluntary or discretionary acts by the businesses and King. For example, most victims of criminal offenses do not choose to hire personal lawyers to advise them in connection with their role as a witness in a criminal trial. Those that do make that choice, such as King, cannot seek restitution for such an expense. Similarly, litigation costs incurred in connection with child custody and visitation disputes between Mockovak and his ex-wife are *not* the direct result of Mockovak’s criminal offenses.

In sum, none of the attorneys’ fees incurred by either King or by the corporations, met the Supreme Court’s criteria for restitution, because none of them were incurred in an effort to discover the magnitude of the defendant’s offense, or to find stolen property, or to undo the effects of the commission of the crimes of solicitation of murder or attempted murder.

2. NONE OF THE LITIGATION OR PUBLICITY EXPENSES WERE THE “DIRECT RESULT” OF THE INCHOATE CRIMINAL OFFENSES FOR WHICH MOCKOVAK WAS CONVICTED. SINCE NO CRIME WAS EVER COMPLETED, THERE WAS NOTHING TO “UNDO”.

In the present case, Mockovak’s convictions are all for inchoate crimes. As the Court recognized in *State v. Jensen*, 164 Wn.2d 943, 951, 195 P.3d

512 (2008), “[s]olicitation is properly analyzed as an attempt to conspire.” Consequently, solicitation offenses are a subset of the category of “attempts to conspire” and thus they are properly characterized as “double inchoate” crimes. *Id.* “The crime of solicitation is the most inchoate of the three anticipatory offenses.” *Id.* at 952.

In the crime of solicitation, criminal liability may attach to words alone. Solicitation involves no more than asking someone to commit a crime in exchange for something of value. Unlike conspiracy and attempt, it requires no overt act other than the offer itself.

Jensen, 164 Wn.2d at 952.

To obtain a conviction for attempt, an overt act is required. But while there “must be more than mere preparation to commit a crime,” it is not necessary for any actual harm to result from the attempt. *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006) (“[A]n attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed.”).

Consistent with these rules applicable to inchoate crimes, Mockovak was convicted of offenses which did not involve any completed criminal offense. No one was killed, and since the killers were entirely fictional people who did not even exist, no one was ever in any danger of being killed. This is of critical significance when assessing the permissible scope of an order of restitution in this case because the loss must be a

“direct result” of the crime for which the defendant was convicted. The crime of solicitation of murder was proved on the basis of Daniel Kultin’s testimony that Mockovak asked him to find some hit men to kill King. The attempted murder conviction was premised upon Mockovak’s giving \$10,000 cash to Daniel Kultin.

A solicitation offense is complete the moment those words promising payment for murder were spoken. Mockovak’s solicitation offense was charged as having been committed between October 14, 2009 and November 6, 2009. No injury to King, and no injury to either of the two closely held corporations (which King and Mockovak co-owned), “directly resulted” from Mockovak’s solicitation of murder. The attempted murder offense was charged as having been committed between November 7 and November 12, 2009. No injury to King, or to either corporation, directly resulted from that act either. Thus, by November 13, both criminal offenses had been committed. The alleged business losses supposedly occurred thereafter, not as a direct result of Mockovak’s crimes, but as a consequence of newspaper and TV coverage of his arrest and prosecution. As a matter of law, none of the attorney fees at issue – for the unresolved business losses lawsuit, for witness consulting and personal counsel during the criminal trial, and for handling the child custody/visitation matter pertaining to Mockovak’s daughter – are the direct result of Mockovak’s crime.

In an analogous context, in *Vinyard* the Court of Appeals held that restitution could *not* be ordered for travel expenses incurred *after* the stolen child had been returned to Washington State.⁸ Similarly, attorneys' fees incurred in child custody litigation were not properly included in a restitution award to the child's father. Due to her arrest and incarceration, it was no longer possible for the mother to have custody of the child, and that necessitated a court proceeding to modify the child custody decree. Even though the child custody modification would not have occurred "but for" the mother's crime, nevertheless the litigation cost of conducting that judicial proceeding was *not* the direct result of her crime, and therefore that cost could *not* be included in an award of restitution. By the time fees were incurred in connection with the child custody proceeding, the defendant's crime – custodial interference – was long over. *State v. Vinyard*, 50 Wn. App. 888, 893, 751 P.2d 339 (1988).

3. WHILE NEGATIVE MEDIA PUBLICITY MAY BE VIEWED AS "CONNECTED WITH" MOCKOVAK'S INCHOATE CRIMES, THAT IS NOT SUFFICIENT TO AUTHORIZE AN AWARD OF RESTITUTION FOR LOST BUSINESS THAT ALLEGEDLY WAS CAUSED BY SUCH PUBLICITY.

As noted above, "[r]estitution cannot be imposed based on the defendant's 'general scheme' or acts 'connected with' the crime charged,

⁸ "[W]hile travel expenses incurred *before* Stephen was returned are connected to Mr. Vinyard's search for the child, those *after* his return do not appear to be." (Italics added).

when those acts are not part of the charge.” *State v. Woods*, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998); *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). “The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged.” *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993). In this case, there is no direct causal connection between the crimes charged and the cost of paying for the corporations’ civil suit that King chose to initiate. In the suit for alleged business losses, the plaintiffs are two corporations jointly owned by King and Mockovak. King’s decision to initiate this lawsuit was a strategic choice that he made after the media devoted much attention to Mockovak’s arrest. No proof has ever been offered (1) to establish that the corporations did actually suffer business losses, or (2) to establish that such losses were caused by media publicity surrounding Mockovak’s arrest and prosecution. But even assuming, *arguendo*, that such proof could be offered, as a matter of law this still would not be sufficient to establish the requisite direct causal connection between the attorneys’ fees incurred in connection with the corporations’ lawsuit (which is yet to be tried and is still pending in the trial court) and Mockovak’s criminal offenses.

4. TRIAL OF THE BUSINESS LOSSES CASE MAY RESULT IN A DECISION THAT KING HAS ATTEMPTED TO PLUNDER THE ASSETS OF THE CORPORATIONS AND THAT KING ACTUALLY OWES MOCKOVAK MONEY.

The largest component of the total amount of restitution which King

sought consists of attorneys' fees paid to the Corr Cronin law firm. Because the Corr Cronin law firm invoices submitted to the Superior Court were redacted, it is not possible to tell exactly how much Corr Cronin billed for representation of the corporations in the business losses case, and how much Corr Cronin billed for representation of the King family in the emotional distress case. However, because the profit and loss statements for Clearly Lasik, Inc. show expenditures of \$121,000 for attorneys' fees (CP 60), it is clear that at least that much of the total amount of attorneys' fees (\$147,307.82) is attributable to the business losses case.

While the corporations claim that Mockovak owes them money, Mockovak filed third party claims against King alleging that King owes him money because King has plundered the assets of the corporations. CP 129-146. In these claims Mockovak asserts that King used the opportunity presented by Mockovak's arrest to steal the jointly owned corporate assets and to set up his own corporation (King Lasik) under the "Clearly Lasik" banner, in an attempt to leave Mockovak penniless. CP 129-130, ¶¶ 7-8. At the September 22, 2011 restitution hearing, the State offered no evidence whatsoever to support the contention that the businesses suffered any loss at all from publicity surrounding Mockovak's arrest and prosecution. Indeed, the notion is far-fetched, given that King incorporated a new Lasik eye surgery business within less than two weeks of Mockovak's arrest, operated

his new corporation out of the offices of KMEC and Clearly Lasik, and busily began appropriating equipment, customers, and other assets of those two corporations while using the “Clearly Lasik” trade name as if it were owned by King Lasik. CP 129, ¶ 4; 136-37, ¶¶ 41-48.

The business losses case is currently pending in the King County Superior Court before the Honorable May Yu. If and when it is tried, it may result in a determination that it was *King* who has harmed the jointly owned corporations by seizing the opportunity created by Mockovak’s arrest to steal the corporations’ assets for his own personal gain. Thus, the trial may result in a determination that any business losses suffered by the corporations are the result of either King’s own malfeasance with corporate assets, or the result of criminal conduct by King. Alternatively, the trial of the business loss case may result in a determination that the corporations have not suffered any loss at all.

Finally, it is worth noting that the complaint filed by the corporate plaintiffs in the business losses case specifically prays for an award of attorney fees as part of the relief requested. CP 37. Thus, if the corporate plaintiffs obtain the relief they have requested they will recover their attorneys’ fees in that forum. In sum, Judge Hayden committed no error in declining to award any restitution for attorneys’ fees incurred by the corporate plaintiffs in a case that is yet to be tried, where no business losses

have ever been proven, much less a direct connection between such alleged losses and Mockovak's crimes.

5. THE LEGAL EXPENSES OF THE CORPORATIONS ARE NOT KING'S PERSONAL EXPENSES.

In support of his restitution request that the Court order Mockovak to reimburse him for attorneys' fees paid to the Corr Cronin law firm, King furnished documentation that showed that the fees were billed to the corporation, Clearly Lasik, Inc., and that they were expensed to the corporation. CP 288-329; 62. Despite the fact that the corporation claimed to have paid these fees, by seeking restitution for such fees King implied that he had paid these fees himself.

If it were true that King personally paid them, then to the extent that those attorney fees were expensed to the corporation and served to reduce Clearly Lasik's taxable income, the IRS was defrauded. No Court should ever reward King for having so deceived the IRS, but allowing King to claim that he paid what he earlier represented the corporation had paid.

If it is not true that King personally paid these fees, and if the corporation (which is half owned by Mockovak) really did pay them, then King could never be entitled to any restitution for these litigation expenses because he never incurred these expenses.

6. THE CORPORATE EXPENSE OF HIRING A PUBLIC RELATIONS FIRM TO PROTECT THE BRAND NAME OF THE COMPANY DURING A CRIMINAL TRIAL IS NOT SOMETHING FOR WHICH RESTITUTION CAN BE ORDERED IN A CRIMINAL CASE.

The documents furnished to the Superior Court showed that Clearly Lasik, Inc. made a business decision to hire a PR firm during Mockovak's criminal trial, to protect its corporate brand and image. CP 341. This expense also does not qualify as a loss for which restitution can be awarded to King. First, King did not pay this expense; the corporation did. It was billed to Clearly Lasik, not to King, and Clearly Lasik was not the victim of the attempted and solicited murder. Second, the expense was not the "direct result" of Mockovak's crimes. It was the result of a corporate choice to protect its image over a year after Mockovak's arrest.

7. THE RESTITUTION STATUTE SPECIFICALLY EXCLUDES ANY AWARD FOR "MENTAL ANGUISH, PAIN AND SUFFERING AND INTANGIBLE LOSSES." A FORTIORI RESTITUTION MAY NOT BE AWARDED FOR LITIGATION COSTS INCURRED IN A SUIT SEEKING TO RECOVER DAMAGES FOR PRECISELY SUCH INJURIES.

The restitution statute specifically *excludes* emotional distress from the category of injuries for which restitution can be awarded:

Restitution shall not include reimbursement for damages for mental anguish pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense.

RCW 9.94A.753(3). Since the Legislature prohibited any restitution

award for emotional distress damages, *a fortiori* restitution cannot be ordered for the litigation costs incurred when prosecuting a lawsuit for the recovery of emotional distress damages. Moreover, Judge Eadie ruled that no emotional distress damages could ever be recovered and dismissed that lawsuit. Clearly, Judge Hayden did not err in denying any restitution to cover the litigation expenses of the emotional distress damages lawsuit.

8. RESTITUTION FOR THE COST OF RENTING A CAMPER VAN WAS PROPERLY DENIED. EVEN ASSUMING, THAT KING CAME BACK FROM VACATION EARLIER THAN ANTICIPATED BECAUSE HE WANTED TO “PROTECT” HIS EYE SURGERY BUSINESS, THERE IS NO DIRECT CONNECTION BETWEEN MOCKOVAK’S CRIMES AND THE COST OF RENTING A CAMPER VAN.

The King family was on vacation in Australia when Mockovak was arrested on November 12, 2009. CP 73; RP 1/19/11, at 120. A Seattle detective reached King by telephone, told him of Mockovak’s foiled plot, and told him that Mockovak had been arrested. CP 73. Upon learning these things, King decided to come back from vacation early. King provided the Superior Court with “receipts related to that expense,” and that receipt showed that King paid \$1,876 to “Aussie Campervans” for a seven day rental of a camper van. CP 277. King claimed that he came back to the United States “immediately” after being notified, but he did not specify what day he left Australia. King sought reimbursement for the entire rental fee even though he had the rental car starting on November

9th and thus had it for at least three days. CP 277.

King did not present any evidence as to *why* he decided to cut short his vacation and travel home early. In his letter to the Superior Court, King's lawyer simply said, "Mockovak's threats forced Dr. King and his family to return early from a prescheduled vacation from Australia." CP 273. But at the restitution hearing King's attorney suggested that King incurred those additional travel expenses and came home early because he was "making sure that [his] own family and employees are protected during the period immediately after [Mockovak's arrest]." RP 9/22/11, at 28. No explanation was ever provided as to how coming home early from Australia helped to "protect" King and his family from Mockovak, who was in jail even before the time the Kings left Australia to return to Washington State.

There are factual circumstances where it is proper to order the payment of restitution for the out-of-pocket cost of providing security. For example, "costs incurred by a bank to unload surveillance film, to purchase new film, and to reload bank surveillance cameras were properly included in restitution." *Tobin*, 161 Wn.2d at 525, citing *State v. Smith*, 119 Wn.2d 385, 388, 831 P.2d 1082 (1992). But no such circumstances exist in the present case. Mockovak's crimes did not cause King to travel to Australia, or to rent a camper van while there, and did not cause King to

cut short the duration of the period of time for which he rented the camper van. Whatever cost is associated with the unused portion of the camper van rental fee, that cost was not the direct result of Mockovak's crimes.

9. THE SUPERIOR COURT DID NOT RULE THAT RESTITUTION COULD NEVER BE ORDERED FOR LITIGATION COSTS. INSTEAD, IT EXPLICITLY RECOGNIZED THAT UNDER SOME CIRCUMSTANCES SUCH RESTITUTION COULD BE AWARDED.

The State mischaracterizes Judge Hayden's ruling in an attempt to set up a straw man argument that it can then knock down. The State claims that Judge Hayden ruled that certain types of expenses "could never" be the subject of a restitution award. For example, the State claims that its appeal presents the following issue:

Attorney fees in this case were incurred: to protect the victim's family, his business, and his employees after the murder plot by the victim's business partner was revealed; to recover the value of the damage to the firm as a result of the crimes; and in preparation for the criminal trial. ***Did the trial court err in concluding that these legal expenses, which were causally related to the defendant's crimes, could never be awarded as restitution because they were not related to the discovery of stolen property?***

Brief of Respondent, at 2 (emphasis added).

In fact, Judge Hayden never made such a categorical ruling. He did not rule that legal expenses "could never" be recovered as restitution, and the State fails to cite to anything in the record to support this characterization of his ruling. On the contrary, Judge Hayden gave a

specific example of factual circumstances where legal expenses *could* be the subject of a restitution award. He did say, "If this had been a theft case, if you were out directly trying to recover the fruits of the theft, it is recoverable." RP 9/22/11, at 28. He did *not* say that a theft case was the *only* type of case where restitution could be ordered to reimburse the victim for legal expenses. The example Judge Hayden gave was fully consistent with the decisions rendered in *Kinneman*, *Vinyard*, *Christiansen*, and *Martinez*.

F. CONCLUSION

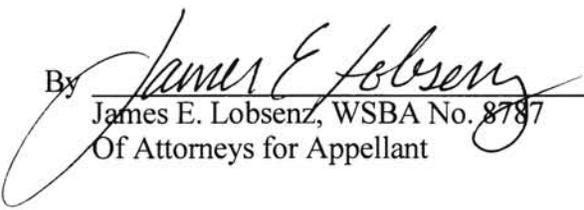
For the reasons stated above in Sections A and B, Appellant Mockovak asks this Court to vacate the Superior Court's restitution order of November 7, 2011, which directed Mockovak to pay \$1,543.34 to King.

For the reasons stated above in Sections C, D and E, Cross-Respondent Mockovak asks this Court to affirm the Superior Court's order of September 22, 2011, denying the remainder of the State's request for restitution.

DATED this 10th day of January, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By


James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

NO. 68020-0-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EMERIC
MOCKOVAK,
Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On January 10, 2013, I caused to be served VIA E-MAIL and US MAIL one copy of the following document on:

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**APPELLANT'S CONSOLIDATED REPLY BRIEF AND BRIEF OF
CROSS-RESPONDENT**



LILY T. LAEMMLE
Legal Assistant to James E. Lobsenz