

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0406

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SAMI JO LODAHL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John Brown, Presiding

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STATEMENT OF ISSUES

1. Did the district court correctly impose restitution for the Montana State Fund, as an insurer of the victim of the offense, that paid for the offense victim's covered medical expenses and lost income?
2. Did the district court correctly impose restitution for the assault victim who the Appellant claims for the first time on appeal was comparatively negligent?
3. Did the district court correctly follow its statutory mandate to impose restitution regardless of the Appellant's argument that she was unable to pay?

STATEMENT OF THE CASE

On March 3, 2017, the State charged the Appellant, Sami Lodahl (Lodahl), with felony assault on a peace officer, in violation of Mont. Code Ann. § 45-5-210. (D.C. Docs. (Docs.) 1-3.) Pursuant to a plea agreement, the State amended the information. (Docs. 41-43.) On February 26, 2018, Lodahl pleaded guilty to misdemeanor assault in violation of Mont. Code Ann. § 45-5-201(d). (*Id.*) In the plea agreement, Lodahl agreed to a jointly recommended sentence, including payment of \$3,030.82 in restitution to the Montana State Fund (MSF), which paid for the assault victim's covered medical expenses and a portion of her lost income pursuant to a workers' compensation insurance policy. (Doc. 41 at Ex. A.)

However, during the change of plea hearing, Lodahl reserved the right to challenge the restitution. (2/26/18 Hr'g Tr. at 8-9.)

The district court held a restitution hearing on August 30, 2018. (Doc. 65.) Based on testimony and affidavits of loss from the assault victim and a representative from MSF, the district court concluded restitution was required in the amount of \$1,261.20 to the assault victim and \$4,891.29 to MSF. (Doc. 71.) On May 22, 2019, the district court sentenced Lodahl to 6 months in the Gallatin County Detention Center with all the time suspended but for 20 days of credit for time served. (Doc. 75.) The district court imposed restitution as outlined in its findings of fact and conclusions of law from the restitution hearing for a total amount of \$6,152.49. (Docs. 71, 75.) The district court did not impose a fine and waived all fees and costs except a \$100 flat administration fee for the restitution. (*Id.*; 5/22/19 Hr'g Tr. at 10-12, 15.) The district court granted Lodahl's unopposed motion to stay execution of the judgment pending appeal of the restitution order. (Docs. 76-77; 5/22/19 Hr'g Tr. at 17-18.)

STATEMENT OF FACTS

On March 3, 2017, the State charged Lodahl with felony assault on a peace officer, in violation of Mont. Code Ann. § 45-5-210. (Docs. 1-3.) The facts supporting the charge were detailed in the State's affidavit of probable cause and

motion for leave to file information, which was based in part on a review of video evidence of the assault. (Doc. 1.) On January 30, 2017, Lodahl made an initial appearance on a different charge. (*Id.* at 1-2.) Sergeant Dawn Miller (Sergeant Miller) was working the justice court initial appearances at the Gallatin County Detention Center. (*Id.* at 2-4.) During Lodahl's initial appearance, Lodahl refused to sit down and spit on the floor. (*Id.*) Sergeant Miller called another officer for assistance. (*Id.*)

When the other officer arrived, Lodahl was seated and Sergeant Miller ordered Lodahl to return to the booking area. (*Id.*) Lodahl stood up, screamed something about a garbage can, then turned around and started punching Sergeant Miller. (*Id.*) Lodahl punched Sergeant Miller three or four times in the face and chest. (*Id.*) The other officer tried to restrain Lodahl but Lodahl continued to kick Sergeant Miller two or three times from the floor until the other officer was able to move Lodahl away from Sergeant Miller. (*Id.*) The assault caused Sergeant Miller abrasions on her chin and cheek, pain in her ribs, a sprained finger, and her glasses were bent in half. (*Id.*)

Lodahl entered into an agreement with the State to plead guilty to misdemeanor assault in violation of Mont. Code Ann. § 45-5-201(d). (Docs. 41-43.) Lodahl pleaded guilty to the charge on February 26, 2018. (*Id.*) In the plea agreement, Lodahl agreed to a jointly recommended sentence, including payment of

\$3,030.82 in restitution to MSF. (Doc. 41 at Ex. A.) However, during the change of plea hearing, Lodahl reserved the right to challenge the restitution. (2/26/18 Hr'g Tr. at 8-9.)

The district court held a restitution hearing on August 30, 2018. (Doc. 65.) Sergeant Miller testified MSF paid all her medical bills directly to the provider because she ran everything through her workers' compensation insurance. (8/30/18 Hr'g Tr. at 9.) MSF also paid Sergeant Miller directly for a portion of her lost income. (*Id.* at 10.) Sergeant Miller verified the affidavit of loss she submitted was for income loss she incurred that was not covered by her policy with MSF. (*Id.* at 11, 14-16.) The total amount of lost income she claimed was \$1,261.20. (*Id.* at 11 (State's Ex. 1).) Sergeant Miller testified she had not previously received any compensation for this amount and the restitution claimed would make her whole. (8/30/18 Hr'g Tr. at 11-12.)

On cross-examination, Sergeant Miller testified the lost income she incurred was a direct result of Lodahl's assault. (*Id.* at 12.) She also had the following exchange with Lodahl's counsel:

[Lodahl's counsel]. Would you agree that Ms. Lodahl was not in handcuffs at the time?

[Sergeant Miller]. Yes.

Q. Would you agree that Ms. Lodahl was seated in such a way that she could have access to you?

A. Yes.

Q. Would you agree that the procedures since then have changed in the jail?

A. Yes.

Q. Would you agree that you could have taken other steps to avoid this assault?

A. I guess there's always different steps you can, yeah.

Q. Okay. Would you agree that your behavior since this assault has occurred and similar events has changed because of it?

A. I'm in a different position now.

Q. If you were in the same setting would you approach a similar presentation of facts in the same way?

A. They've changed procedures so I would have to, I guess.

Q. Okay. They changed procedures because you put yourself at risk handling that situation the way you handled it, correct?

A. Yes.

(*Id.* at 13-14.) Notwithstanding this testimony, Lodahl did not argue below that Sergeant Miller was negligent or that Sergeant Miller's negligence contributed to the cause of her injuries. (*Id.* at 1-50; 5/22/19 Hr'g Tr. at 3-19; Doc. 69.)

The State called Janis McArthur (McArthur), who is a claim examiner for MSF who worked on Sergeant Miller's claims. (8/30/18 Hr'g Tr. at 17-18.) McArthur verified the affidavit of loss she submitted on behalf of MSF included paid losses of \$3,495.87 for Sergeant Miller's medical expenses and \$1,395.41 for

her lost income. (*Id.* at 18-19 (State’s Ex. 2).) McArthur testified insured medical expenses are covered based on a fee schedule set by the Montana Department of Labor. (8/30/18 Hr’g at 20.) Medical providers submit bills directly to MSF, and MSF pays the fees incurred directly to the provider. (*Id.* at 20-21.) The claim process cuts out the insured from the billing process. (*Id.*) McArthur explained MSF’s workers’ compensation insurance covers only 66 and 2/3 percent of an insured employee’s lost income until they can go back to work. (*Id.* at 19-20, 23-24.) MSF paid Sergeant Miller directly for the portion of her lost income that was insured and claimed that amount in its affidavit of loss. (*Id.* at 19-20.)

Lodahl testified during the restitution hearing regarding her monthly income, which included both earned income and social security disability income (SSDI). (*Id.* at 31-45.) She also testified about her monthly expenses and mental health issues. (*Id.*) Lodahl said she agreed she should be held responsible for Sergeant Miller’s lost wages, but she did not agree with MSF’s claims “because that’s a risk of her job and State Fund would not have paid those bills if it was not a risk of her job.” (*Id.* at 42-43.)

At the conclusion of the restitution hearing, the district court reserved any analysis or decision until after the parties submitted proposed findings of fact and conclusions of law. (*Id.* at 45-48.) Lodahl had previously informed the district court she did not contest the restitution calculations but wanted to raise legal

arguments regarding the statutory authority to impose restitution to MSF and her ability to pay. (*Id.* at 3-5; 2/26/18 Hr’g Tr. at 8, 20-21.) To accommodate this request, the district court ordered the parties to make a staggered filing of proposed findings of fact and conclusions of law. (8/30/18 Hr’g Tr. at 45-48.) The district court allowed Lodahl to include legal analysis in either the proposed filing or a separate supplemental brief. (*Id.* at 45-47.)

Lodahl included her legal analysis in its proposed findings of fact and conclusions of law filed on October 10, 2018. (Doc. 69.) Lodahl acknowledged she caused Sergeant Miller’s injuries. (*Id.* at 3.) In closing, Lodahl said she “agrees that she owes Sgt. Miller restitution for Sgt. Miller’s remaining special damages, specifically 33% of Sgt. Miller’s lost wages.” (*Id.* at 8.) Lodahl acknowledged MSF was a victim by statute, but she proposed the district court find MSF was not entitled to restitution because the claimed losses were general damages, not special damages as the restitution statutes require. (*Id.* at 3, 6.) Lodahl also argued the restitution requested would cause an undue burden on her because she did not have an ability to pay. (*Id.* at 5, 7.)

The State filed its proposed findings of fact and conclusions of law on October 16, 2018. (Doc. 70.) The State proposed restitution be imposed as requested for both Sergeant Miller and MSF, and Lodahl did have the ability to

pay. (*Id.*) The district court set a date for Lodahl to file a reply brief, but she did not file a reply. (*Id.* at 47; Docs. 69, 71.)

On February 5, 2019, the district court issued its findings of fact and conclusions of law on restitution. (Doc. 71.) The district court concluded both Sergeant Miller and MSF were victims entitled to restitution by statute and was not persuaded by Lodahl's argument that she was unable to pay. (*Id.*)

On May 22, 2019, the district court sentenced Lodahl to a 6-month sentence with all of it suspended but for 20 days of time served. (Doc. 75.) The district court imposed restitution in the amount of \$1,261.20 to Sergeant Miller and \$4,891.29 to MSF. (Docs. 71, 75.) During the sentencing hearing, Lodahl asked the district court to waive all fines and fees and cap the restitution administration fee based on her ability to pay. (5/22/19 Hr'g Tr. at 10-12.) The State did not object. (*Id.*) The district court did not impose a fine and waived all fees and costs except a \$100 flat administration fee for the restitution. (Doc. 75; 5/22/19 Hr'g Tr. at 10-12, 15.)

The district court granted Lodahl's unopposed motion to stay execution of the judgment pending appeal of the restitution order. (Docs. 76-77; 5/22/19 Hr'g Tr. at 17-18.)

SUMMARY OF ARGUMENT

The district court correctly imposed restitution to MSF because the restitution statutes require it. Lodahl does not dispute that she caused bodily injury to Sergeant Miller or that MSF, as her insurer, paid for Sergeant Miller's covered medical expenses and paid her directly for the covered portion of her lost income. Lodahl's only argument is a request of this Court to interpret the plain language of Mont. Code Ann. § 46-18-243(2)(a)(iv) in a way that would allow her to avoid paying full restitution. MSF reimbursed Sergeant Miller by paying her insured losses, and they are entitled to subrogation by statute. This Court should reject Lodahl's attempt to manipulate the plain language of the restitution statutes to the detriment of the victims. The district court correctly relied on the applicable restitution statutes to conclude MSF is entitled to restitution as an insurer victim that incurred a pecuniary loss.

Lodahl's attempt to pursue a comparative negligence defense for the first time on appeal should be rejected. Lodahl did not request below that the district court reduce or eliminate the restitution requested by Sergeant Miller based on her comparative negligence or otherwise reference any negligence defense. Rather, Lodahl agreed in her proposed findings and conclusions of law that she owed Sergeant Miller restitution for her uninsured lost income. The district court should not be held in error for an issue that it did not have the opportunity to consider.

The district court correctly imposed restitution regardless of Lodahl’s ability to pay because it was statutorily mandated to do so. Lodahl asks this Court to ignore this mandate because she raised an ability to pay argument. This does not invalidate the statutory mandate or provide grounds to reverse the district court’s restitution order.

The district court’s imposition of restitution should be affirmed.

ARGUMENT

I. Standard of review

“A criminal sentence is reviewed for legality.” *State v. Patterson*, 2016 MT 289, ¶ 9, 385 Mont. 334, 384 P.3d 92 (citing *State v. Simpson*, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 1144). This Court reviews “the imposition of criminal sentences to determine if they are statutorily authorized.” *Patterson*, ¶ 9 (citing *State v. Henderson*, 2015 MT 56, ¶ 13, 378 Mont. 301, 343 P.3d 566). Restitution cases create mixed questions of fact and law, which this Court reviews de novo. *Patterson*, ¶ 9 (citing *State v. Cerasani*, 2014 MT 2, ¶ 11, 373 Mont. 192, 316 P.3d 819).¹

¹Lodahl includes standards of review for unpreserved errors, specifically plain error and the exception for illegal sentences that originated in *State v. Lenihan*, 184 Mont. 338, 342-43, 602 P.2d 997, 999-1000 (1979). However, she does not include any reference to these bases for review in the substance of her argument. (Appellant’s Brief (Br.) at 5-6.)

II. The district court correctly imposed restitution for MSF because they are an insurer victim that incurred a pecuniary loss due to Lodahl’s assault of Sergeant Miller.

“Montana law requires a sentencing court to order restitution when a defendant’s crime results in pecuniary loss to a victim.” *State v. Hill*, 2016 MT 219, ¶ 10, 348 Mont. 486, 380 P.3d 768 (citing Mont. Code Ann. § 46-18-201(5); *State v. Aragon*, 2014 MT 89, ¶ 12, 374 Mont. 391, 321 P.3d 841). The statutory definition of a victim includes “a person who suffers loss of property, bodily injury, or death as a result of . . . the commission of an offense,” Mont. Code Ann. § 46-18-243(2)(a)(i)(A), and “an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss.” Mont. Code Ann. § 46-18-243(2)(a)(iv). Pecuniary loss includes “without limitation out-of-pocket losses, such as medical expenses [and] loss of income.” Mont. Code Ann. § 46-18-243(1)(a).

MSF is a nonprofit and independent workers’ compensation insurance provider that “is required to insure any employer in this state who requests coverage.” Mont. Code Ann. § 39-71-2313(1), -2313(2). MSF is “established for the purpose of allowing an option for employers to insure their liability for workers’ compensation and occupational disease coverage.” Mont. Code Ann. § 39-71-2313(1). By statute, MSF is entitled to the right of subrogation. Mont. Code Ann. § 39-71-414(1). The relationship between an insurer and an

insured is contractual. Pursuant to the contract terms, MSF made payments for the benefit of Sergeant Miller, as an employee of Gallatin County, toward medical expenses and loss of income. The plain language of Mont. Code Ann. § 46-18-243(2)(a)(iv) defines MSF as a restitution victim because Lodahl caused MSF, Sergeant Miller's insurer, to incur a pecuniary loss.

Lodahl does not dispute that she caused bodily injury to Sergeant Miller or that MSF paid for Sergeant Miller's medical expenses and lost income in the amount of restitution imposed. Instead, Lodahl asks this Court to interpret Mont. Code Ann. § 46-18-243(2)(a)(iv) to exclude MSF as a victim because they never "reimbursed" Sergeant Miller. To support her argument, Lodahl cites various definitions, including *Black's Law Dictionary* 886, 1476 (10th ed. 2014) as "defining 'reimbursement' to mean '[r]epayment' or 'indemnification,' and defining 'indemnification' to mean 'the action of compensating for loss or damage sustained.'" (Br. at 12.) This definition does not support her argument. MSF reimbursed Sergeant Miller, because they compensated her for loss or damage sustained by paying her medical bills and paying a portion of her lost income. *See Black's Law Dictionary* 886, 1476 (10th ed. 2014).

Lodahl asks this Court to interpret "reimbursed" in a way that would only allow an insurer to be a restitution victim if they made payments directly to an insured victim rather than paying a medical provider. This undermines the plain

language of Mont. Code Ann. § 46-18-243(2)(a)(iv), which includes insurers in the definition of victim, and turns the purpose of insurance on its head. An insurer pays a provider directly, so the insured does not have to come up with money out-of-pocket to pay for insured losses. The restitution statutes should not be interpreted to impose procedural obstacles that allow a criminal defendant to avoid paying full restitution to the detriment of the victims.

This Court’s reasoning in *State v. Fenner*, 2014 MT 131, ¶¶ 10-12, 375 Mont. 131, 325 P.3d 691, is instructive. In *Fenner*, ¶ 6, the defendant was convicted of assault with a weapon and ordered to pay restitution directly to the victim for all the medical and dental costs incurred. The defendant “argued that, since the insurer had paid for some of the damage and had not included any affidavit on its right to recover, [the victim] was only entitled to a lesser sum of the pecuniary loss.” *Id.* This Court rejected that noting, “the party causing damages could not benefit from an offset based on the insurance of the injured party.” *Id.* ¶ 12.

This Court explained, “our restitution statutes reflect an intent to ‘require an offender to make *full restitution* to any victim who has sustained pecuniary loss.’” *Id.* (quoting Mont. Code Ann. § 46-18-241(1)) (emphasis in original). “[W]e will not presume that the Legislature intended our restitution statutes to create an offset that benefits the wrongdoer first and leaves the victims to await full compensation.” *Fenner*, ¶ 12 (relying on *Vortex Fishing Sys. v. Foss*, 2001 MT

312, ¶ 28, 308 Mont. 8, 38 P.3d 836, and *People v. Hove*, 76 Cal. App. 4th 1266, 1272-73 (Cal. App. 4th Dist. 1999)). Lodahl argues *Fenner*, ¶ 12, is distinguishable because the “compensability of ‘offsets’ was at issue.” (Br. at 14.) But Lodahl’s desired result would leave MSF in the wind for pecuniary losses incurred for the benefit of Sergeant Miller. This is at odds with this Court’s application of Mont. Code Ann. § 46-18-241(1) in *Fenner*, ¶ 12.

The fact distinguishing this case from *Fenner*, ¶ 6, is that MSF submitted an undisputed affidavit of loss. While this Court in *Fenner*, ¶ 12, held a criminal defendant cannot avoid paying restitution to the crime victim when an insurer does not submit an affidavit of loss, it must likewise be true that a criminal defendant cannot avoid paying full restitution when an insurer victim does submit an affidavit of loss. As this Court explained:

The fact that [the victim] had insured himself for medical expenses was due to good fortune and foresight; it should not benefit his attacker rather than himself *or his insurance company*.

Fenner, ¶ 12 (emphasis added). Lodahl’s manipulation of the meaning of reimbursed in Mont. Code Ann. § 46-18-243(2)(a)(iv) is an attempt to avoid making full restitution, which would benefit her at the expense of MSF, the victim insurer. *See Fenner*, ¶ 12.

Further, Lodahl cannot support her argument that “MSF cannot ‘reimburse’ for a nonexistent loss.” (Br. at 15.) Regardless of the manner of payment,

Sergeant Miller's injuries do exist, both physical and pecuniary, and MSF incurred pecuniary loss because of the injuries caused by Lodahl. This includes both medical expenses and lost income. Lodahl focuses most of her argument on medical expenses, but MSF's coverage of Sergeant Miller's loss of income illustrates the problems with Lodahl's statutory interpretation of reimbursed. Lodahl's assault caused Sergeant Miller to miss work and lose income. MSF reimbursed Sergeant Miller with direct payments for a portion of the wages she would have earned but for the injuries caused by Lodahl's assault. This fits any definition for reimbursed that Lodahl has forwarded.

To counter this, Lodahl argues MSF's payment to Sergeant Miller for lost income does not qualify MSF as a victim because the payment was a direct benefit of her employment. It was a direct benefit of her employment because MSF, as Sergeant Miller's insurer, was contractually obligated to pay for the losses caused by Lodahl's assault. The plain language of the statute allows MSF to recover for these losses as an insurer. *See* Mont. Code Ann. §§ 46-18-201(5), -243(1)(a), -243(2)(a)(iv). Lodahl's direct benefit argument has no bearing on whether MSF was a victim and shows Lodahl's sole intention is to avoid paying full restitution to the victims of her assault. *See Fenner*, ¶ 12.

To support her statutory interpretation argument, Lodahl makes two assertions that are contradicted by statute. Lodahl baldly asserts MSF's payments

to Sergeant Miller for lost income are general damages. (Br. at 13.) This ignores the inclusion of both medical expenses and loss of income as special damages in Mont. Code Ann. § 46-18-243(1)(a). It also ignores that MSF, as Sergeant Miller’s insurer, was contractually obligated to pay for the losses caused by Lodahl’s assault. The plain language of the statute allows MSF to recover for these losses as an insurer. *See* Mont. Code Ann. §§ 46-18-201(5), -243(1)(a), -243(2)(a)(iv).

Lodahl also incorrectly asserts MSF is not a victim because they have no “cognizable right” of subrogation. (Br. at 15-16.) MSF has a cognizable right to subrogation because they are entitled to it by statute. *See* Mont. Code Ann. § 39-71-414(1). Lodahl confuses a “cognizable right” with a cognizable claim. This Court explained in *Fenner*, ¶ 12, that any subrogation issues between a victim insurer and the crime victim are not a mechanism for the criminal defendant to avoid paying restitution in full.

[T]he issue of subrogation under § 27-1-308, MCA, is between [the victim] and his insurer, and has no bearing on the amount of restitution that [the defendant] must pay. While the restitution statutes include an insurer as a victim to the extent that it has paid reimbursement for the loss, § 46-18-243(2)(a)(iv), MCA, there is no provision requiring deduction of any such reimbursement from the amount the offender must be ordered to pay. [The victim] and his insurer are entitled to any damages *that could be pursued* against [the defendant] in a civil action, regardless of any subrogation issues between them.

Id. (emphasis added). Here, MSF has a cognizable right to subrogation regardless of the status of any subrogation claim “that could be pursued” by MSF in the future. *See Fenner*, ¶ 12.

This is consistent with this Court’s opinion in *State v. Sharp*, 2006 MT 301, 334 Mont. 470, 148 P.3d 625. In *Sharp*, ¶¶ 3-4, the defendant challenged the restitution imposed to pay an insurance company for payments made to repair the victim’s vehicle. On appeal, the defendant argued the insurance company was not entitled to restitution because they had no right of subrogation until the victim had been made whole. *Id.* ¶ 4. The defendant relied on the lack of a restitution claim from the victim for the insurance deductible, out-of-pocket expenses, insurance premiums, diminished vehicle value, or interest. *Id.* ¶ 7. This Court affirmed the district court’s conclusion that the insurance company was entitled to subrogation for purposes of Mont. Code Ann. § 46-18-243. *Sharp*, ¶¶ 8-10.

In its decision, this Court considered and rejected the same argument Lodahl makes here based on the made whole doctrine. *Id.* ¶¶ 7-8. The made whole doctrine did not apply in *Sharp*, ¶¶ 7-8, because the victim had not claimed any of the losses alleged by the defendant. This Court’s reasoning in *Sharp*, ¶¶ 7-10, is even more compelling here, because Sergeant Miller testified that the restitution award would make her whole. Moreover, if Lodahl pays restitution, Sergeant Miller will be made whole before MSF is paid anything. *See* Mont. Code Ann. § 46-18-251(3)

(payment of restitution is applied first to a victim until their “unreimbursed pecuniary loss is satisfied,” then later to “any insurance company that has compensated the victim”).

Lodahl’s argument undermines the basic rationale of the made whole doctrine as stated by this Court:

When the sum recovered by the Insured from the Tortfeasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.

Skauge v. Mountain States Tel. & Tel. Co., 172 Mont. 521, 528, 565 P.2d 628, 632 (1977) (quoting *St. Paul Fire & Marine Ins. Co. v. W. P. Rose Supply Co.*, 19 N.C. App. 302, 305, 198 S.E.2d 482, 484 (1973).) Here, the restitution award to MSF shifts the risk of nonpayment from Sergeant Miller to MSF. *See id.* The made whole doctrine is designed to protect the insured from an insurer’s subrogation action before they have fully recovered their loss. *See Swanson v. Hartford Ins. Co.*, 2002 MT 81, ¶ 20, 309 Mont. 269, 46 P.3d 584. Here, a direct award to MSF protects Sergeant Miller by eliminating the need for a future subrogation action.

This Court construes a “statute as a whole to avoid an absurd result and to give effect to a statute’s purpose.” *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. It would be absurd to rely on the made whole doctrine to interpret the restitution statutes in a way that would unnecessarily burden an insured

victim. *See id.* Lodahl’s attempt to manipulate the plain language of the restitution statutes to avoid paying full restitution should be rejected. *See Fenner*, ¶ 12.

The restitution award should be affirmed, because the district court correctly relied on the applicable restitution statutes to require Lodahl to pay MSF restitution. *See Sharp*, ¶ 8. MSF is entitled to restitution as an insurer victim that incurred a pecuniary loss.

III. The district court correctly imposed restitution to Sergeant Miller for uninsured lost income and it should not be faulted based on Lodahl’s comparative negligence theory forwarded for the first time on appeal.

“It is well settled that a party may not change its theory on appeal from that advanced in the trial court; nor may a party raise an argument for the first time on appeal.” *State v. Lewis*, 2012 MT 157, ¶ 22, 365 Mont. 431, 282 P.3d 679 (quoting *State v. Shepard*, 2010 MT 20, ¶ 12, 355 Mont. 114, 225 P.3d 1217) (internal quotations omitted).

Lodahl relies on *City of Whitefish v. Jentile*, 2012 MT 185, 366 Mont. 94, 285 P.3d 515, to argue “[t]he district court failed to conduct a comparative negligence analysis before ordering restitution despite [sic] presented with evidence of the same.” (Br. at 18.) The mere presence of evidence in the record that may support a defense is not sufficient to preserve an issue for appeal without first presenting a supporting argument to the district court. Lodahl did not argue

below that Sergeant Miller was comparatively negligent or otherwise raise any negligence argument. In stark contrast to the facts here, the defendant in *Jentile*, ¶¶ 14, 28, argued multiple theories of negligence to dispute the restitution imposed.

This Court in *Jentile*, ¶ 30, held the defendant's negligence arguments sufficiently raised a comparative negligence defense that the district court should have considered before imposing restitution. This holding does not require a trial court to consider comparative negligence in every restitution case without a request from a defendant. *See Jentile*, ¶ 30. It does not require a trial court to unilaterally identify witness testimony that may or may not support a comparative negligence defense. *Id.* It does not support Lodahl's argument that the district court should be held in error for the presence of facts in the record that may or may not support an argument she did not make. *Id.*

Lodahl had an opportunity to raise a comparative negligence defense during the restitution hearing and in its proposed findings of fact and conclusions of law, as specifically provided by the district court. But to the contrary, she noted in her proposed findings and conclusions of law that she "agrees that she owes Sgt. Miller restitution for Sgt. Miller's remaining special damages, specifically 33% of Sgt. Miller's lost wages." (Doc. 69 at 8.) The district court should not be held in error for Lodahl's decision not to raise a negligence defense or otherwise reference testimony that may support comparative negligence in a form that the

district court could consider. *See State v. Dewitz*, 2009 MT 202, ¶ 30, 351 Mont. 182, 212 P.3d 1040 (“it is unfair to fault the trial court on an issue it never had the opportunity to consider”).

Alternatively, Lodahl attempts to use ineffective assistance of counsel (IAC) as a vehicle to pursue an unpreserved error. (Br. at 17-18.) Lodahl correctly cites the IAC standard, but provides no analysis to meet her burden to prove either of the mandatory elements. *See State v. Ugalde*, 2013 MT 308, ¶ 66, 372 Mont. 234, 311 P.3d 772 (a defendant bears the burden to prove both IAC elements). This Court is not obligated “to conduct legal research on behalf of a party, to guess at his or her precise position, or to develop legal analysis that may lend support to that position.” *Johnston v. Palmer*, 2007 MT 99, ¶ 30, 337 Mont. 101, 158 P.3d 988. Lodahl has failed to show her counsel was ineffective or sufficiently present this issue for this Court’s review. *See id*; Mont. R. App. P. 12(1)(g).

This Court should reject Lodahl’s new theory that Sergeant Miller was comparatively negligent.

IV. The district court was statutorily mandated to impose restitution and its consideration of Lodahl’s ability to pay argument does not invalidate this mandate.

Lodahl acknowledges a district court is statutorily mandated to impose restitution regardless of an offender’s ability to pay. (Br. at 19-20.) In *State v.*

Brownback, 2010 MT 96, ¶ 28, 356 Mont. 190, 232 P.3d 385, this Court interpreted the restitution statutes to hold the mandate for district courts to order full restitution in Mont. Code Ann. §§ 46-18-201(5), -241(1), is paramount to the general policy statement relied on by Lodahl in Mont. Code Ann. § 46-18-101(3)(h). The district court's rejection of Lodahl's argument that she did not have the ability to pay prior to imposing restitution does not invalidate the mandatory restitution imposed.

Lodahl's reliance on *State v. Eaton*, 2004 MT 283, 323 Mont. 287, 99 P.3d 661, does not nullify the statutory mandate and is inconsistent with this Court's recent application of that case in *State v. Ingram*, 2020 MT 327, ¶¶ 11-12, 402 Mont. 374, ___ P.3d ___. In *Ingram*, ¶ 11, this Court explained the mere receipt of social security disability income does not immunize a defendant from a mandatory fine. "Rather, it merely prohibits the capture of those benefits to satisfy the fine." *Id.* The same is true for the mandatory restitution imposed here. *See id.* Lodahl had earned income aside from her SSDI, and the district court did not specifically or illegally burden Lodahl's SSDI by imposing mandatory restitution. *Id.*

At the very least, any error of the district court's ability to pay analysis is harmless because it does not affect Lodahl's substantial rights. *See State v. Ilk*, 2018 MT 186, ¶ 21, 392 Mont. 201, 422 P.3d 1219 (reversal of a judgment "requires the substantial rights of the defendant be affected"). The district court is statutorily mandated to impose restitution regardless of Lodahl's ability to pay.

See Brownback, ¶ 28. The district court’s consideration of Lodahl’s ability to pay argument prior to imposing mandatory restitution does not affect her substantial rights. *See id.*; *Ilk*, ¶ 21.

The district court correctly followed its statutory mandate of imposing restitution regardless of Lodahl’s ability to pay and the imposed restitution should be affirmed.

CONCLUSION

The State respectfully requests this Court affirm Lodahl’s sentence.

Respectfully submitted this 19th day of January, 2021.

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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 5,386 words, excluding certificate of service and certificate of compliance.

/s/ Brad Fjeldheim

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-19-2021:

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