

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0574

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLOTTE ANN WOLFCHILD,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Ashley Harada, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BJORN BOYER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
bjorn.boyer@mt.gov

PETE WOOD
Attorney at Law
1604 N. 30th Street
Boise, ID 83703

ATTORNEY FOR DEFENDANT
AND APPELLANT

SCOTT TWITO
Yellowstone County Attorney
JOHN RYAN
Deputy County Attorney
P.O. Box 35025
Billings MT 59107

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 9

I. Standard of review 10

II. The district court’s restitution order was correct 11

 A. The district court did not err by making the restitution payable
 to “Scott Lantz or the Estate of Faith Justice Lantz” 12

 B. The district court did not err by ordering Wolfchild to pay
 \$2,096.10 for the period between July 2, 2021, and July 29,
 2021 13

 C. The district court correctly awarded Scott \$35,000 in restitution..... 15

CONCLUSION 21

CERTIFICATE OF COMPLIANCE..... 22

TABLE OF AUTHORITIES

Cases

<i>State v. Aragon</i> , 2014 MT 89, 379 Mont. 391, 321 P.3d 841	15
<i>State v. Benoit</i> , 2002 MT 166, 310 Mont. 449, 51 P.3d 495	16, 17, 19
<i>State v. Brave</i> , 2016 MT 178, 384 Mont. 169, 376 P.3d 139	10-11, 11
<i>State v. Coluccio</i> , 2009 MT 273, 352 Mont. 122, 214 P.3d 1282	15
<i>State v. Dodson</i> , 2011 MT 302, 363 Mont. 63, 265 P.3d 1254	15
<i>State v. Fenner</i> , 2014 MT 131, 375 Mont. 131, 325 P.3d 691	13
<i>State v. Kirn</i> , 2012 MT 69, 364 Mont. 356, 274 P.3d 746	15
<i>State v. LaTray</i> , 2000 MT 262, 302 Mont. 11, 11 P.3d 116	12
<i>State v. Lodahl</i> , 2021 MT 156, 404 Mont. 362, 491 P.3d 661	10
<i>State v. McIntire</i> , 2004 MT 238, 322 Mont. 496, 97 P.3d 576	12
<i>State v. O’Connell</i> , 2011 MT 242, 362 Mont. 171, 261 P.3d 1042	16
<i>State v. O’Connor</i> , 2009 MT 222, 351 Mont. 329, 212 P.3d 276	15
<i>State v. Passwater</i> , 2015 MT 159, 379 Mont. 372, 350 P.3d 382	15

Other Authorities

Montana Code Annotated

§ 46-18-201(5)	12
§ 46-18-241	15
§ 46-18-243(2)(a)(iv)	13-14, 14, 15

STATEMENT OF THE ISSUES

Whether the district court erred when it awarded restitution to the estate of the victim, Faith Lantz, and her husband, Scott Lanz.

STATEMENT OF THE CASE

The State charged Appellant Charlotte Wolfchild (Wolfchild) with one count of assault with a weapon for attacking Faith Lantz (Faith) and repeatedly hitting her in the head with a bar glass. (Doc. 1.) As a result of the attack, Faith was diagnosed with a traumatic brain injury, which required her husband, Scott Lantz (Scott), to care for her full-time for several months. (6/22/22 Hr'g Tr. (6/22 Tr.) at 10-13.) In November 2021, Faith was admitted to the hospital for COVID-19 complications, ultimately passing away in January 2021, while the case was still pending. (*Id.* at 12.)

Wolfchild and the State entered a plea agreement, wherein Wolfchild agreed to plead guilty to the assault with a weapon charge. (Doc. 40.) In return, the State agreed to dismiss an escape charge, which stemmed from Wolfchild going on the lam after the district court furloughed her from jail to attend her child's funeral. (Docs. 26, 40.) The plea agreement contemplated the State arguing for a ten-year sentence to the Montana State Prison with five years suspended and a request for

Wolfchild to pay “any legally claimed restitution.” (Doc. 40 at 3.) Wolfchild was free to recommend a different sentence. (*Id.*)

In June 2021, approximately six months prior to her death, Faith filled out a “Victim’s Affidavit in Support of Financial Loss” with the help of an attorney who was representing her to obtain worker’s compensation benefits. (Doc. 41 at 15-16; 6/22 Tr. at 25.) The affidavit detailed approximately \$44,450.50¹ in losses, including medical expenses, her lost wages, and income Scott lost when he was required to care for Faith. (Doc. 41 at 16-20.)

As Faith had died prior to the restitution hearing, the State called Scott to testify about Faith’s and his financial losses due to the assault. (6/22 Tr. at 19.) Wolfchild objected to the district court ordering any restitution at all because Scott had not been formally appointed as the executor of Faith’s estate. (*Id.* at 24.) The court ultimately halted the restitution hearing and requested that the parties brief the issue. (*Id.* at 31-32.)

In her restitution brief, Wolfchild claimed she should not have to pay restitution because Scott was not properly qualified to represent Faith’s estate, Scott was not a “victim” as contemplated in the restitution statute, and his damages

¹ The documented expenditures in Faith’s affidavit totaled \$45,723.50. However, it appears that Faith or her attorney miscalculated and only requested \$44,450.50. (Doc. 41 at 16-20.) At the restitution hearing, the State agreed to honor the lower amount because it was the amount requested in Faith’s affidavit. (8/12/22 Hr’g Tr. at 40-42.)

were speculative. (Doc. 51.) At the second restitution hearing, the district court rejected Wolfchild's arguments and found that a preponderance of the evidence supported awarding restitution to "the estate of Faith Lantz or her husband, whatever the case may be." (8/12/22 Hr'g Tr. (8/12 Tr.) at 44.) The court concluded that it was "beside the point right now" whether the restitution was properly owed to Faith's estate or to Scott, finding that Wolfchild should not "receive a benefit" simply because Faith had passed, and noting that "these expenses still exist." (*Id.* at 44-45.)

In the written judgment, the district court ordered Wolfchild to pay restitution in the amount of \$44,450.50 to "Scott Lantz or the Estate of Faith Justice Lantz." (Doc. 57.) Additionally, the court sentenced Wolfchild to 15 years at the Montana State Prison, with 5 years suspended. (*Id.*) In crafting its sentence, the court relied on the severity of Wolfchild's offense and injuries to Faith, her extensive criminal history, and her previous failures at rehabilitation. (*Id.*) Wolfchild now appeals the restitution order.

STATEMENT OF THE FACTS

On December 30, 2020, Faith was working as the apartment manager at Sage Towers in Billings. (Doc. 1 at 1-2.) A tenant in the building told Faith that she was afraid to leave her apartment because Wolfchild had assaulted her two

days prior. (*Id.*) Wolfchild was not a tenant but was visiting her cousin, Sandra Norquay (Norquay), who lived there. (8/12 Tr. at 49.) Since Wolfchild was not a resident, but was causing problems, Faith went to Norquay's apartment to tell Wolfchild to leave. (Doc. 1 at 2.)

When Faith arrived at Norquay's apartment, Norquay answered the door, but Faith could see Wolfchild inside. (Doc. 1 at 2.) Faith told Wolfchild she had to leave the building. (*Id.*) Wolfchild, who was drunk at the time, began to yell and swear. (*Id.*; 8/12 Tr. at 55-56.) Faith responded by telling Wolfchild that she would call the police if Wolfchild did not leave. (Doc. 1 at 2.) Wolfchild challenged Faith to call, and Faith obliged. (*Id.*)

Wolfchild left Norquay's apartment and began walking toward the elevator while Faith was still on the phone with dispatch. (Doc. 1 at 2.) Wolfchild became impatient while waiting for the elevator and went to the stairway, shoving Faith as she passed. (*Id.*) Faith advised dispatch that Wolfchild had just assaulted her. (*Id.*) Wolfchild then turned around and walked back to the elevator. (*Id.*) When Wolfchild got on the elevator, Faith joined her per management's policy on escorting people from the complex. (*Id.*) Wolfchild told Faith, "I'll show you what an assault is," and began hitting Faith in the face with a bar glass. (*Id.*)

Norquay came out of her apartment when she heard the commotion. (Doc. 1 at 1-2.) Norquay told Wolfchild to stop her assault because she was "going to kill"

Faith. (*Id.* at 2.) Wolfchild responded that Faith “deserve[d] it,” but then stopped and fled the scene. (*Id.*) The district court issued a warrant for Wolfchild’s arrest. (Doc. 5.) Wolfchild was apprehended six months later in Great Falls. (Doc. 5.)

Faith suffered a traumatic brain injury and post-concussive syndrome, and she developed post-traumatic stress disorder from the assault. (Doc. 41 at 59.) Her treating psychiatric physician, Dr. Reza Ghomi, observed that Faith had a “very protracted recovery from her brain injury due to the severity of the injury and the complications with post-concussive syndrome following.” (*Id.*) Faith’s brain injury caused her almost constant migraines and she went partially blind in her right eye from “early cataracts due to the assault.” (*Id.* at 57.)

Prior to the assault, Scott had also experienced a run of bad luck. (*See* 8/12 Tr. at 23-24.) In May 2019, he injured his shoulder while working as a deliveryman for the American Linen Supply Company (Alsco). (*Id.*) Scott attempted to rehabilitate through physical therapy, but ultimately required surgery in December 2019. (*Id.* at 24.) The doctors told Scott he would be unable to work for four to six months after the surgery. (*Id.*) In early 2020, Scott felt like he was getting close to being able to go back to work at Alsco. (*Id.* at 25.) However, Alsco laid Scott off as part of COVID-19-related cutbacks before he could go back to work. (*Id.*)

Scott did not immediately get another job. (*See* 8/12 Tr. at 25-26.) Prior to AlSCO, Scott had had a wide range of employment experience, including operating heavy machinery, working in water rescue, working as an animal control officer, as an animal euthanasia technician and crematorium operator, and as a manager of an air cargo operation at the airport. (*Id.* at 26-27.)

At the time of the assault, Scott was not employed. (8/12 Tr. at 26-27.) However, he had spoken to the manager at a company where he could be a heavy machinery operator. (*Id.*) The manager told Scott that they would hire him and that whenever he “was ready to come on board,” to let them know. (*Id.* at 26.) Scott did not accept the position because Faith needed a full-time caretaker. (*Id.*)

As a result of the attack, Faith was required to get treatment from a host of professionals, including a psychologist, a neurologist, and an ophthalmologist. (6/22 Tr. at 10.) She experienced frequent migraines, shaking episodes, sweating, panic attacks, and had extreme sensitivity to light, noise, and touch. (*Id.* at 10-11.) Faith also suffered from memory loss, had difficulty concentrating, and had difficulty with her eye-hand coordination. (*Id.* at 11.) And Faith’s personality changed, resulting in her having frequent bursts of anger and severe mood swings. (*Id.*)

After the attack, Faith attempted to go back to work on a limited basis, but she was unable to fulfill her work responsibilities. (8/12 Tr. at 32.) Faith’s doctor,

Dr. Trenay Hart, did not clear her for further work due to her traumatic brain injury and she remained unemployed. (*Id.* at 34.) Dr. Hart estimated that it would take 12 to 18 months before Faith would be able to go back to work. (Doc. 41 at 49.)

Faith began receiving worker's compensation on January 15, 2021. (Doc. 41 at 49.) Worker's compensation paid her \$465.78 per week, which was two-thirds of her former salary of \$698.67 per week. (*Id.*) Worker's compensation paid that amount through July 2, 2021. (*Id.*) However, leading up to July 2, 2021, Faith had missed several therapy appointments because she had an elevated temperature, and the hospital would not allow her to attend her therapy due to COVID-19 protocols. (8/12 Tr. at 19-20.) Worker's compensation terminated Faith due to the missed therapy sessions.² (*Id.*) Scott and Faith fought the worker's compensation decision, and ultimately got the payments reinstated, but then Faith passed away. (*Id.* at 32.)

Faith signed her restitution affidavit on July 29, 2021, and the expenses only covered what she had incurred to that date. (Doc. 41 at 16.) Faith did not update the request prior to her death and Scott did not request any post-July 29, 2021 restitution, despite Faith continuing to be unable to work because of the assault. (*See id.*) Faith submitted evidence of medical bills totaling \$13,436.04, which included expenses from her emergency room visit, prescriptions, and follow up

² At the restitution hearing, Wolfchild contended that Faith had been terminated from therapy for refusing to wear a COVID-19 mask, but Scott maintained that was not the reason for her termination. (8/22 Tr. at 19-20.)

doctor visits. (*Id.* at 17.) Faith's insurance reimbursed her \$10,398.00, leaving \$3,038.04 in out-of-pocket expenses that Faith paid for. (*Id.* at 18.) Neither the State nor Faith's insurance company sought restitution for the \$10,398.00. (*See id.*)

Faith calculated her lost wages for the period between January 15, 2021, and July 2, 2021, to be \$16,768.08. Worker's compensation paid \$11,178.72 of those lost wages, leaving Faith with \$5,589.36 in uncompensated lost wages. (Doc. 41 at 49.) Faith also requested that Wolfchild compensate her for all of her lost wages for the period after worker's compensation terminated her, between July 2, 2021, and July 29, 2021, a total amount of \$2,096.10. (*Id.*) Neither the State nor the worker's compensation program requested that Wolfchild pay restitution to worker's compensation.

Finally, Faith and Scott requested that Wolfchild pay restitution of \$35,000 for Scott's lost wages for the seven months from January 2021 through July 2021 because Scott had foregone employment during that period to care for Faith. (Doc. 41 at 49; 6/22 Tr. at 21-22.) Scott had made \$60,000 per year when he worked for Alsco, which equals \$5,000 per month. (6/22 Tr. at 22.) Scott arrived at the \$35,000 amount by multiplying \$5,000 by the number of months he had cared for Faith prior to her submitting her restitution affidavit. Scott would later be hired by Consumer Healthcare to provide in-home health care to Faith at a rate of \$13

per hour. (8/12 Tr. at 28.) Neither the State nor Consumer Healthcare sought restitution for those expenses. (*See id.*)

Faith's traumatic brain injury complicated her treatment at the hospital for COVID-19, making her combative and sensitive to the hospital lights. (6/22 Tr. at 12, 14-16.) Scott could not be at the hospital with her the entire time due to COVID-19 protocols. (*Id.* at 14.) Faith died on January 12, 2022, at 42 years old. (*Id.* at 12, 14.)

SUMMARY OF THE ARGUMENT

The district court did not err by ordering Wolfchild to pay restitution to "Scott Lantz or the Estate of Faith Justice Lantz." Both Faith's estate and Scott were victims entitled to restitution. Any dispute that might arise between Scott and Faith's estate on the distribution of the restitution is between those parties. The issue does not affect the total amount of restitution that Wolfchild owes, and she cannot assert the rights of Faith's estate.

The district court did not err in awarding restitution for the entire amount of Faith's lost wages for the month of July 2021. Wolfchild does not contest that the lost wages were recoverable, she only argues that she should not have to pay the amount worker's compensation had previously been reimbursing Faith for.

Wolfchild's argument lacks merit because she is not entitled to any offset from worker's compensation's reimbursements to Faith.

Finally, the district court did not err by awarding Scott \$35,000 in lost wages. The district court heard sufficient evidence that Scott had to forego employment to care for Faith due to the assault. Scott had previously worked as a heavy equipment operator and had a standing offer of employment to go to work in that field. However, Scott could not accept the employment because he needed to care for Faith. Scott conservatively estimated his lost wages by using what he had made at AlSCO, even though he knew he could make more as an equipment operator. Scott's wages were not speculative, and the district court properly ordered Wolfchild to pay them.

ARGUMENT

I. Standard of review

This Court "review[s] criminal sentences for legality to determine if they are statutorily authorized." *State v. Lodahl*, 2021 MT 156, ¶ 11, 404 Mont. 362, 491 P.3d 661. Restitution awards are mixed questions of law and fact that this Court reviews de novo. *Id.* This Court reviews the legality of a restitution obligation for correctness. *Id.* However, this Court only reviews the amount of restitution a district court imposes for clear error. *State v. Brave*, 2016 MT 178,

¶ 6, 384 Mont. 169, 376 P.3d 139. “A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if [this Court’s] review of the record convinces [the Court] that the [district] court made a mistake.” *Id.*

II. The district court’s restitution order was correct.

On appeal, Wolfchild concedes that the district court correctly ordered her to pay the \$3,038.04 in out-of-pocket medical expenses. (Appellant’s Br. (Br.) at 16.) Wolfchild further concedes that the district court correctly ordered her to pay Faith’s lost wages for the period between January 15, 2021, and July 2, 2021, which totaled \$5,589.36. (Br. at 16.) Finally, Wolfchild concedes that she owes \$931.56 for the time between July 2, 2021, and July 29, 2021, which she calculates to be \$232.89 per week, equal to the one-third of Faith’s salary that would not have been covered by worker’s compensation had worker’s compensation continued to reimburse Faith. (Br. at 18.)

Wolfchild narrows her appeal to three issues. First, she argues that the district court erred by making the restitution order payable to Faith’s estate or to Scott, without distinguishing the specific amount payable to each. (Br. at 14.) Wolfchild next argues that the district court erred by awarding restitution for the entire amount of Faith’s lost wages for the period between July 2, 2021, and

July 29, 2021, after her worker’s compensation benefits were terminated. (Br. at 17-18.) Finally, Wolfchild argues that Scott’s \$35,000 in lost wages was too speculative to be awarded. (Br. at 18-23.) The State will respond to each argument in turn below.

A. The district court did not err by making the restitution payable to “Scott Lantz or the Estate of Faith Justice Lantz.”

A district court is required to order “‘payment of full restitution’ as part of a criminal sentence if it finds that a victim has sustained a pecuniary loss.” *Lodahl*, ¶ 13 (quoting Mont. Code Ann. § 46-18-201(5)). A “victim” is defined as “‘a person who suffers loss of property, bodily injury, or death as a result of the commission of an offense’ and includes ‘the estate of a deceased or incapacitated victim.’” *State v. McIntire*, 2004 MT 238, ¶ 14, 322 Mont. 496, 97 P.3d 576.

The “classification of an individual as a victim—for the purpose of ordering restitution – does not depend on the individual’s relationship to the elements of the crime for which the defendant is being sentenced.” *State v. LaTray*, 2000 MT 262, ¶ 16, 302 Mont. 11, 11 P.3d 116. Instead, the restitution statute “empowers courts to impose restitution for economic loss[es]” suffered because of criminal conduct. *LaTray*, ¶ 21.

Here, Faith was a “victim” within the meaning of the restitution statute because she suffered bodily injury from Wolfchild’s criminal offense, which

resulted in a pecuniary loss. When Faith died, her estate succeeded her status as the victim. Furthermore, Scott was also a “victim” of the offense because he suffered a loss of property due to Wolfchild’s criminal conduct when he was required to care for Faith. In her opening brief, Wolfchild concedes that both Faith’s estate and Scott met the statutory definition of a “victim.” She only argues that the district court should have distinguished between the damages awarded to each.

Although the district court could have specifically assigned damages between Faith’s estate and Scott, its failure to do so does not constitute reversible error. Scott certainly has a claim to the restitution as an heir to Faith’s estate. If Faith’s daughters, or any other party, also has a claim to the restitution, that is an issue between Scott and the other interested party. Wolfchild is “not in a position to assert [the] rights” of the heirs to Faith’s estate. *See Lodahl*, ¶ 19. The court’s failure to distinguish between Faith’s estate and Scott did not affect the total amount of restitution Wolfchild owes. The court’s order did not prejudice her. Accordingly, this Court should not disturb the order.

B. The district court did not err by ordering Wolfchild to pay \$2,096.10 for the period between July 2, 2021, and July 29, 2021.

A “victim” of a criminal offense includes an “insurer, to the extent that the insurer has reimbursed the victim for [a] pecuniary loss.” *State v. Fenner*, 2014 MT 131, ¶ 8, 375 Mont. 131, 325 P.3d 691 (citing Mont. Code Ann. § 46-18-

243(2)(a)(iv)). A defendant is not entitled to any offset in restitution to a victim, even if the victim's insurer has compensated the victim for the same loss. *Fenner*, ¶ 10. The issue of whether the victim must repay the insurance company any restitution received is between the victim and the insurance company and does not concern the criminal defendant. *Fenner*, ¶ 12. Simply put, "[t]here is no provision requiring deduction [from restitution] of any such reimbursement from the amount the offender must be ordered to pay." *Id.* The defendant causing damages cannot benefit from an offset based on the injured party receiving insurance money. *Id.*

Here, even though neither the State nor worker's compensation sought restitution for the sums paid to Faith, the district court would have been well within its authority to require Wolfchild to pay all of Faith's lost wages between January and July 2021. Wolfchild received a benefit when worker's compensation did not request restitution. However, worker's compensation's decision to terminate Faith from receiving benefits had no bearing on whether Wolfchild was required to pay Faith's lost wages. Wolfchild has conceded that payment for lost wages was appropriate. Pursuant to *Fenner*, there is no merit to Wolfchild's argument that Faith's only recourse to full compensation for July 2021 was through fighting for worker's compensation. Wolfchild has unjustly benefited from Faith's worker's compensation. She should not be allowed to further benefit at the expense of Faith's estate.

C. The district court correctly awarded Scott \$35,000 in restitution.

A district court must order offenders to pay victims restitution for pecuniary losses suffered because of a crime. *State v. Coluccio*, 2009 MT 273, ¶ 36, 352 Mont. 122, 214 P.3d 1282 (*overruled on other grounds by State v. Kirn*, 2012 MT 69, ¶ 8 n.1, 364 Mont. 356, 274 P.3d 746) (citing Mont. Code Ann. § 46-18-241). “Loss of income constitutes an appropriate element of a pecuniary loss.” *State v. Dodson*, 2011 MT 302, ¶ 11, 363 Mont. 63, 265 P.3d 1254 (citing Mont. Code Ann. § 46-18-243(1)(a)).

This Court grants deference to the amount of restitution a district court orders and will only overturn it if it is clearly erroneous. *State v. Passwater*, 2015 MT 159, ¶ 21, 379 Mont. 372, 350 P.3d 382. The award will be upheld if it is supported by “substantial evidence,” which “is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance.” *Id.* (quoting *State v. Aragon*, 2014 MT 89, ¶ 9, 379 Mont. 391, 321 P.3d 841).

The district court may award restitution “even though the actual losses may be uncertain, if the losses were calculated by use of reasonable methods based on the best evidence available under the circumstances.” *Passwater*, ¶ 20 (quoting *State v. O’Connor*, 2009 MT 222, ¶ 14, 351 Mont. 329, 212 P.3d 276). The district court need only use “reasonable methods based on the best evidence available

under the circumstances’ to calculate uncertain losses.’” *Dodson*, ¶ 12 (quoting *State v. O’Connell*, 2011 MT 242, ¶ 14, 362 Mont. 171, 261 P.3d 1042).

Reasonable methods may include a “reasonably close estimate of the loss.” *Id.* (quoting *State v. Benoit*, 2002 MT 166, ¶ 29, 310 Mont. 449, 51 P.3d 495).

On the other hand, “‘speculative calculations’ will not suffice to draw findings of facts to support an order of restitution.” *Dodson*, ¶ 13 (quoting *Coluccio*, ¶ 45). In *Coluccio*, the wife of a negligent vehicular homicide victim requested nearly \$3 million as restitution to compensate for her husband’s lost wages. *Coluccio*, ¶ 43. However, the wife could not explain how she calculated the lost wages, or adequately account for why she was requesting compensation for \$92,422 per year of lost wages when the pay stubs she provided only indicated he had been making approximately \$55,216. *Id.* The wife also presented a document prepared by an attorney friend, estimating total lost wages to be \$1,338,504, but she could not explain how that figure had been calculated. *Coluccio*, ¶ 44. This Court held the district court erred by adopting the \$1,338,504 amount because it was based on “[a]ssumptions, ballpark figures from friends, and purely speculative calculations” *Coluccio*, ¶ 45.

In contrast, this Court upheld a restitution request for lost wages in *Dodson*, even though the victim did not have a job at the time of the accident. *Dodson*, ¶ 14. The victim in *Dodson* was 17 years old when *Dodson*, while intoxicated, crashed

his vehicle into the victim's vehicle, shattering her ankle. *Dodson*, ¶ 5. The victim could not work during the summer following the incident, so she requested lost wages, which her father calculated to be \$2,500. *Dodson*, ¶ 6. The victim's father calculated the lost wages by multiplying the minimum wage by 40 hours per week for the 10-week summer vacation. *Dodson*, ¶ 40.

Dodson did not challenge the wage assumption but, instead, challenged the amount because the victim did not have an offer of employment. *Dodson*, ¶ 14. Dodson claimed that it would be mere speculation to assume the victim could have found a minimum wage job for the summer. *Id.* However, Dodson failed to present any contrary evidence regarding the victim's ability to find a job. *Id.* Instead, Dodson limited his cross-examination of the victim to questions about whether she had previous employment that she would be returning to. *Id.* This Court rejected Dodson's argument and upheld the restitution order, stating there was sufficient evidence that the victim had lost potential summer earnings. *Id.*

This case is more like *Dodson* than *Coluccio*. First, Wolfchild concedes on appeal that Scott was an appropriate victim. Furthermore, she does not contest that he could be compensated for lost wages. Instead, she argues that Scott's lost wages were too speculative because he was not employed at the time of the assault. Pursuant to *Dodson*, Wolfchild's argument lacks merit.

Scott had been unemployed at the time of the assault due to his own injury, though he had sufficiently recovered to start looking for work. Prior to the assault, Faith had been financially supporting the family, which she could no longer do when she was unable to work. Therefore, it became more important for Scott to work, but he was then unable to do so because Faith could not take care of herself.

Scott testified that he had offers for employment to operate heavy machinery, which would have paid him more than what he previously made at AlSCO. The district court accepted his testimony as credible and ordered the restitution. The offers were not speculative. Scott testified that the manager of a construction company had told him he could start whenever he was ready to work.

On appeal, Wolfchild challenges Scott's testimony because he did not say exactly when he received the offer nor provide the name of the person or company who made him the offer. (Br. at 20-23.) Those are questions that Wolfchild's counsel could have asked Scott at the restitution hearing. The lack of that evidence does not change Scott's testimony that he received an offer of employment, that he had to forego employment to care for Faith, or that he could have made at least \$35,000 over the seven months from January through July 2021. The district court's determination that Scott was owed that amount of restitution was not clearly erroneous.

Wolfchild also argues on appeal that Scott's offer for work operating heavy machinery was speculative because he had not previously worked in that field. In making the argument, Wolfchild misconstrues Scott's testimony. During his testimony, Scott specifically testified that he had been a heavy equipment operator "in the past" and that he had spoken to the manager of a company who said he could "come on board with them" whenever he was ready. (8/12 Tr. at 26-27.) The prosecutor then asked Scott "what other kind of jobs" he had done "throughout the course of [his] adult life." (*Id.* at 27.) In answering the prosecutor's question, Scott listed various jobs he had previously worked.

Since the prosecutor's question asked Scott to list jobs he had held "other" than being a heavy equipment operator, Scott did not list being a heavy equipment operator as one of those jobs. On appeal, Wolfchild argues that Scott "never testified to having worked even a single day operating heavy machinery" because he did not list being a heavy equipment operator as one of his "other" jobs. (Br. at 22.) That is not true. Scott specifically testified that he had been a heavy equipment operator in the past. However, he did not list being a heavy equipment operator in response to the prosecutor's question because the question asked Scott what other jobs he had performed. Contrary to Wolfchild's argument, Scott's testimony that he had worked with heavy equipment in the past supported his contention that he could again obtain that kind of work.

Scott's calculation for his restitution was derived from his past wages at AlSCO. The amount was a conservative estimate of the restitution owed because he knew he could make more money as a heavy equipment operator. Like in *Dodson*, the fact that Scott did not have a written offer of employment in hand was not fatal to his restitution request. He produced sufficient evidence that he had to forego employment to care for Faith and that his calculated wages were reasonable. Therefore, the district court's findings related to Scott's restitution were not clearly erroneous.

If this Court finds the restitution award was speculative, the proper remedy would be to remand to the district court for additional proceedings so Scott can give additional evidence of his pecuniary loss. *Coluccio*, ¶ 46. In this case, the amount of restitution the district court ordered Wolfchild to pay is likely well below the amount the district court could have ordered. For example, the district court could have ordered Wolfchild to pay all of Faith's medical expenses and lost wages. Faith did not fill out a subsequent affidavit to cover restitution expenses between July 29, 2021, and her death. Nor did Scott request any lost wages after July 29, 2021, or ask for Consumer Healthcare to be reimbursed for the \$13 per hour he was paid to care for Faith. Upon remand, the district court would be able to reconsider all the evidence, which could result in a much higher order for

restitution. However, remand here is not necessary because there was sufficient evidence to support the district court's order.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order for restitution.

Respectfully submitted this 20th day of May, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Bjorn Boyer
BJORN BOYER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,872 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Bjorn Boyer
BJORN BOYER

CERTIFICATE OF SERVICE

I, Bjorn E. Boyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-20-2024:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Charlotte Ann Wolfchild
Service Method: eService

Peter Allan Wood (Attorney)
1604 N 30th St
Boise ID 83703
Representing: Charlotte Ann Wolfchild
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Bjorn E. Boyer
Dated: 05-20-2024