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IN THE SUPERIOR COURT FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE) TRAFFIC CASE NO. 18-03006
NORTHERN MARIANA ISLANDS,)
) ORDER FINDING THAT (1) ENTITIES,
Plaintiff,) SUCH AS DFEMS AND CHCC, ARE
) NOT ELIGIBLE TO RECEIVE
v.) RESTITUTION WHEN THEY ARE
) ONLY "INDIRECT THIRD-PARTY
ESEKIEL "Easy" SMITH,) VICTIMS" OF A CRIME; (2) THE
) TORT DEFENSE OF COMPARATIVE
Defendant.) NEGLIGENCE IS NOT APPLICABLE
) HERE BECAUSE THE VICTIM'S
l,) FAMILY MEMBERS DID NOT
) NEGLIGENTLY CONTRIBUTE TO
) THEIR DAMAGES; AND (3)
) VOLUNTARY OFFERTORY GIFTS TO
) PRIESTS FOR PERFORMING THE
) FUNERAL MASS ARE NOT
) ECONOMIC LOSSES FOR PURPOSES
) OF RESTITUTION UNDER 6 CMC §
) 4109
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I. INTRODUCTION

THIS MATTER came before the Court on a Restitution Hearing on October 2, 2019. Assistant Attorney General J. Robert Glass, Jr. appeared on behalf of the Commonwealth Government, and Assistant Public Defender Jean Pierre Nogues appeared on behalf of Defendant Esekiel "Easy" Smith ("Defendant" or "Smith"), who appeared in custody. The October 2, 2019 Restitution Hearing was a continuation of a hearing held on June 5, 2019,

¹ Esekiel Smith is also known by his nickname "Easy."

during which the Court ordered the parties to submit briefs. The issues briefed and argued by the parties were:

- 1) Whether Defendant Smith owes restitution for the costs of emergency services provided by the Department of Fire and Emergency Medical Services ("DFEMS") and the hospital, the Commonwealth Health Care Corporation ("CHCC").
- 2) Does the civil tort defense of comparative negligence, which limits the amount of damages owed by a defendant by the amount of fault attributed to the victim, apply in the criminal restitution context, and, if so, by what percentage does it reduce the restitution to be paid by Defendant Smith?
- 3) Has the Commonwealth Government proven by a preponderance of the evidence that the victim's family in this case is owed restitution for burial and funeral expenses as a result of the death of the victim Melton Agulto?

II. BACKGROUND

In the evening of August 18, 2019, Melton Agulto ("Victim or Agulto") was intoxicated and got into two physical altercations—first at the San Vicente basketball court and then later at his home. These altercations caused Agulto to sustain injuries, which resulted in DFEMS being called to transport Agulto from his home to CHCC. Agulto was still intoxicated at the time he was admitted to CHCC. In his intoxicated state, Agulto acted belligerently to CHCC personnel and other patients. Subsequently, CHCC personnel called for police assistance. Agulto fled from CHCC before the police arrived. CHCC personnel informed the police that Agulto headed north on foot on middle road. The police searched for Agulto but could not locate him. After evading the police search, Agulto continued north in Puerto Rico walking in the middle of the street.

Sometime after midnight on August 19, 2019, Esekiel Smith, while driving north in Puerto Rico, struck Agulto as Agulto walked in the middle of the street. Smith fled the scene

after the accident. Sometime later, the accident was reported to the police. Agulto was transported to CHCC in an ambulance operated by DFEMS. Unfortunately, Agulto died as a result of his injuries.

In the early morning hours of August 19, 2019, the same morning of the accident, Smith appeared at the police station and voluntarily surrendered himself to the police.

On January 30, 2019, Defendant accepted responsibility and pled guilty to violating 9 CMC § 6101(a) (leaving an accident scene) and 9 CMC § 7104(a) (reckless driving).

Also on January 30, 2019, Smith waived his right to a Pre-Sentence Investigation Report and was sentenced to five (5) years and six (6) months imprisonment, with the last six (6) months suspended.² As part of Smith's sentence, he was ordered to pay restitution to Agulto's family and made eligible for work release while serving his sentence to pay this restitution.³ The parties agreed that, at a minimum, Smith owed \$1,000 in restitution, which was immediately paid from the bail money posted by Smith. However, the parties disagreed as to how much more Smith owed in restitution and to whom.

On February 1, 2019, the Commonwealth Government filed its Notice of Next of Kin and Motion for Restitution Hearing to determine the full amount of restitution to be paid by Smith.

On June 5, 2019, the Court held a Restitution Hearing. The Commonwealth was represented by Assistant Attorney General J. Robert Glass, Jr., and Defendant Smith, who appeared in custody, was represented by Assistant Public Defender Jean Pierre Nogues.

At the June 5, 2019 Restitution Hearing, the Court received the following admitted exhibits: (1) CHCC's morgue facility bill; (2) Cabrera's Funeral Home bill; (3) a statement

² Defendant is eligible to apply for parole subject to approval by the Board of Parole.

³ The Commonwealth of the Northern Mariana Islands Department of Corrections has rules and regulations for work release eligibility.

by Gloria Cabrera; (4) the receipt for Victim's death certificate; (5) the invoice from Island Touch; (6) the invoice from DFEMS; (7) the Department of Public Safety's Brief Report concerning the accident; (8) an Affidavit of Records Custodian / Business Records Certificate of Authenticity; and (9) a letter from Carlo Andre Canepa, MD. Also, the Court heard the sworn testimonies of: (1) Department of Public Safety Officer James A. Omar; (2) Department of Public Safety Officer Norris Kwon; (3) CHCC employee Roselyn Gibbons; and (4) Victim's mother, Gloria Cabrera.

At the end of the June 5, 2019 Restitution Hearing, the Court ordered the parties to submit briefs on the following issues: (1) the circumstances in which Commonwealth Government agencies are entitled to restitution; and (2) whether the tort defense of comparative negligence could apply in the criminal restitution context. On July 19, 2019, the Commonwealth Government submitted the Commonwealth's Brief. The Commonwealth's Brief argued that Victim's family, CHCC, and DFEMS are entitled to a total of \$8,613.76 in restitution and that Defendant Smith cannot use the tort defense of comparative negligence to reduce the amount.

On August 28, 2019, Defendant filed his Response to Commonwealth's Brief ("Defendant's Brief"). In Defendant's Brief, Defendant Smith conceded that he owed \$4,972 in restitution. However, Defendant argued that: (1) DFEMS and CHCC were not victims in this case and are not entitled to restitution; (2) the tort defense of comparative negligence should apply in this matter; and (3) Victim's family have not proven by a preponderance of the evidence that they are entitled to \$1,775 of the requested restitution.

On September 20, 2019, the Commonwealth Government filed its Reply Brief to Defendant's Brief.

III. DISCUSSION

A. The Department of Fire and Emergency Medical Services and The Commonwealth Health Care Corporation, as "Indirect Third-Party Victims," Are Not Entitled to Restitution

In the Commonwealth of the Northern Mariana Islands, a person convicted of a criminal offense is statutorily obligated to pay appropriate restitution to the victim or victims as a condition of probation, 6 CMC § 4109. For the purposes of 6 CMC § 4109, the term "victim" includes "any corporation, business, estate, trust, partnership, association, joint venture, government, governmental department, agency or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime." 6 CMC § 9101(a)(4) (emphasis added). The phrase "direct victim" excludes third parties whose only injury as a result of a crime is the payment of the actual victim's medical expenses. See Commonwealth of the N. Mar. I. v. Saburo, 2002 MP 3 ¶ 22 (concluding that the defendant was not liable to pay restitution to the actual victim's employer for medical expenses paid by the employer because the employer was an indirect third-party victim of the crime).⁴ For entities to be a "direct victim" of a crime, they must be the entity "against which the probationer's crimes had been committed—that is, entities that are the immediate objects of the probationer's offenses." People v. Martinez, 36 Cal. 4th 384, 393 (2005) (finding defendant was not liable to pay restitution to the California Department of Toxic Substances Control for the costs the department incurred in removing hazardous waste from defendant's illegal drug laboratory because the "defendant's attempt to manufacture methamphetamine was not an offense

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⁴ Although the ultimate holding of *Commonwealth of the N. Mar. I. v. Saburo*, 2002 MP 3, that indirect third-party victims are not entitled to restitution in Title 9 (Traffic Code) cases, was statutorily overturned when the Commonwealth Legislature amended 6 CMC § 4109 (Criminal Code) to allow victims in Title 9 cases to receive restitution under 6 CMC § 4109, *Saburo's* finding that the phrase "direct victim" excludes indirect third-party victims whose only harm as a result of a crime is unpaid medical expenses was unaffected by the statutory change and remains good law.

committed against the [California Department of Toxic Substances Control], nor was the [California Department of Toxic Substances Control] the immediate object of his crime").⁵

Here, Defendant Smith's reckless driving and act of leaving the scene of the accident were committed against Agulto, not DFEMS and CHCC.⁶ Neither were DFEMS and CHCC the immediate objects of Defendant Smith's crimes. The only harm that DFEMS and CHCC can claim to have suffered is the economic damage caused by the uncompensated medical care that DFEMS and CHCC provided to Agulto. The harm claimed by DFEMS and CHCC is essentially the same damage claimed by the victim's employer in Commonwealth of the N. Mar. I. v. Saburo, 2002 MP 3 ¶ 22, who paid the medical expenses of the actual victim in that case. Because the Supreme Court of the Commonwealth of the Northern Mariana Islands ("Supreme Court") in Saburo found that the act of paying the medical bills for the actual victim only makes the payer an indirect third-party victim, the Court finds that the economic harm incurred by DFEMS and CHCC in providing medical services to the actual victim, Milton Agulto, makes DFEMS and CHCC indirect third-party victims.

Therefore, because DFEMS and CHCC are Government agencies and as Government agencies would only be entitled to restitution under 6 CMC § 4109 if they were "direct victims" of Defendant Smith's crimes, the Court finds that DFEMS and CHCC are only Indirect Third-Party Victims, therefore DFEMS and CHCC are not entitled to restitution here.⁸

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⁵ The California Supreme Court in *People v. Martinez*, 36 Cal. 4th 384 (2005) interpreted Cal. Penal Code § 1202.4(k)(2), which is essentially identical to 6 CMC § 9101(a)(4). Cal. Penal Code § 1202.4(k)(2) ("A corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental 23 subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime." (emphasis added)).

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⁶ See 9 CMC § 7110(a) ("Whoever shall unlawfully and unintentionally cause the death of another person while engaged in the violation of any law applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of homicide when the violation is the proximate cause of the death." (emphasis added)). Defendant Smith pled guilty to the violation of 9 CMC § 6101(a) (leaving an accident scene) and 9 CMC § 7104(a) (reckless driving).

⁷ 6 CMC § 9101(a)(4).

⁸ As the Supreme Court stated in Commonwealth of the N. Mar. I. v. Saburo, 2002 MP 3 ¶ 22, "[s]uch a result does not preclude third parties, such as [DFEMS and CHCC], the freedom to seek a remedy by civil tort action." See also 6 CMC § 4109(f).

B. The Tort Defense of Comparative Negligence Is Not Applicable Here

The Supreme Court, in articulating a defendant's rights regarding restitution in criminal cases, stated that, "a civil defendant has certain due process rights not available to the accused criminal, including defenses such as *contributory [negligence] and third-party negligence.*" Saburo, 2002 MP 3 ¶ 21 (emphasis added) (quoting Grey v. Allstate Ins. Co., 363 Md. 445 (Md. Ct. App. 2001)). This is because "restitution is a *criminal sanction*, not a civil remedy [and] does not, and cannot, establish civil liability for anything beyond the matter it concludes." Id. (emphasis in original) (citation omitted); see also Commonwealth v. Mendiola, 2017 MP 10 ¶ 7 ("In the criminal context, restitution is a part of the sentence.").

However, the Supreme Court in *Saburo*" left open the question of whether **criminal** defendants are barred from using the **civil** tort defense of comparative negligence (also called "comparative fault") in the criminal restitution context. *Saburo*, 2002 MP 3 ¶ 21 n.7.¹⁰

Pursuant to 7 CMC § 2901 ("the Uniform Comparative Fault Act"), "[i]n an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." 7 CMC § 2901. However, 6 CMC § 4109(d) states that, "[i]n determining the amount of any restitution award, [courts] shall order the probationer to pay

⁹ The use of the word "contributory" by the Supreme Court of the Commonwealth of the Northern Mariana Islands was the consequence of quoting the California Supreme Court's decision in *Grey v. Allstate Ins. Co.*, 363 Md. 445 (Md. Ct. App. 2001). The Commonwealth of the Northern Mariana Islands is a Comparative Negligence jurisdiction. *See* 7 CMC § 2901.

¹⁰ The Tort Defense of **Comparative** Negligence "diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." 7 CMC § 2901. This is different from the common law Tort Defense of **Contributory** Negligence, which bars plaintiffs from recovery when they are found to have contributed to their own damages. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 166 (2007) (citation omitted) ("At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief.").

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full restitution, unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." 6 CMC § 4109(d) (emphasis added).

Whether the tort defense of comparative negligence may be used to lessen the restitution owed by criminal defendants is a question that several courts in the United States have addressed. Some courts have outright rejected the concept of applying comparative negligence in the criminal restitution context. See People v. Sieck, 2014 COA 23 ¶ 7 ("[A] trial court is not required to conduct a 'mini-trial' on restitution issues and is not obligated to resolve such questions as comparative negligence or other affirmative defenses that might apply in a civil suit brought by the victim against the defendant." (internal citation omitted)); State v. Wagner, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992) ("We determine comparative fault principles do not apply to restitution for criminal acts [....]"). Other courts have accepted the application of the comparative negligence defense in the criminal restitution context. See City of Whitefish v. Jentile, 2012 MT 185 ¶ 41 (holding that the lower court failed to engage in "a comparative negligence analysis in determining restitution"); People v. Millard, 95 Cal. Rptr. 3d 751, 780 (2009) (concluding that "a trial court is not precluded from applying the doctrine of comparative negligence to reduce the amount of [...] victim restitution that a criminally negligent defendant must pay when the victim's negligence was also a substantial factor in causing his or her economic losses"). Finally, other courts have seemingly left the question open. See State v. Roache, 920 N.W.2d 93, 103-04 (Iowa 2018) (accepting the findings of the Wagner court, but only as to intentional criminal acts); State v. Oliver, 2018 UT App 101 ¶ 43 (stating that it will decide on a later date "[t]he question of whether concepts of comparative fault apply in the restitution context").

This Court, for the moment, need not decide whether the tort defense of comparative negligence applies in the criminal restitution context because, assuming arguendo that the tort defense of comparative negligence does apply in the criminal restitution context, Defendant

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Smith would be unable to rely on the tort defense of comparative negligence under these particular set of facts.

California is a state that allows for defendants to assert the tort defense of comparative negligence in the criminal restitution context. However, a California appellate court stated that "the [tort defense] of comparative negligence [has] no application where the surviving family members seek [...] restitution for their own economic loss." People v. Nichols, 213 Cal. Rptr. 3d 524, 531 (2017). The California Appellate Court in *People v. Nichols*, noted that third party victims "do not step into the shoes of the [actual] victim for purposes of comparative negligence where they seek restitution for their own personal losses." 213 Cal. Rptr. 3d 524, 534 (2017). Therefore, assuming arguendo that the tort defense of comparative negligence were to apply here, the restitution claims of the actual victim's family members are only affected by the negligence of those family members with respect to their damages, not the negligence of the actual victim. Because the *Nichols* Court found that the parents of the actual victim, who sought restitution for the economic harm they experienced as a result of the crime, did not negligently contribute to their own loss, the Nichols Court concluded that tort defense of comparative negligence did not apply and the parents of the actual victim were entitled to be fully reimbursed for the economic harm they experienced.

Here, the only victim entitled to restitution is Milton Agulto's mother, Ms. Gloria Cabrera, who is seeking restitution for the economic harm she experienced. Therefore, pursuant to Nichols, any alleged negligence on the part of Agulto in contributing to the accident is inapplicable here. Instead, the only source of negligence, if any, that would be relevant here would be from Ms. Gloria Cabrera. However, there is no evidence on the record that Ms. Gloria Cabrera contributed to the economic loss she experienced. Therefore, because Defendant Smith failed to show that Ms. Gloria Cabrera negligently contributed to her

economic harm,¹¹ and as Ms. Gloria Cabrera is only seeking restitution for her own economic loss, the Court finds that the tort defense of comparative negligence is inapplicable here.¹²

C. Amount of Restitution Owed by Defendant Esekiel "Easy" Smith

1. Undisputed Restitution

As stated above, the Commonwealth Government requested a total of \$8,613.76 in restitution, \$4,972 of which is conceded by Defendant Smith in Defendant's Brief. Therefore, based on Defendant Smith's concession, the Court will award the \$4,972 in restitution to Ms. Gloria Cabrera.

2. The Department of Fire and Emergency Medical Services and The Commonwealth Health Care Corporation Are Not Entitled to Restitution Here Because They Are Only Third-Party Indirect Victims

As stated above, the Court found that DFEMS and CHCC are Commonwealth Government agencies that are not eligible for restitution under these particular set of facts because they were indirect third-party victims of Defendant Smith's crimes. Therefore, the Court will deny the \$1,866.76 restitution request for the medical services provided by DFEMS and CHCC.¹³

3. Unproven Claims for Restitution

As for the remaining \$1,775 disputed by Defendant, the Commonwealth Government had the burden to prove by a preponderance of the evidence that Defendant Smith owed that amount. 6 CMC § 4019(e). Notwithstanding the admitted exhibits and the credible sworn testimonies of the witnesses, the Commonwealth Government failed to carry its burden and

A defendant that asserts a civil affirmative defense has the burden to prove it. See Tano Grp., Inc. v. Dep't of Pub. Works, 2009 MP 18 ¶ 51 ("Failure to mitigate is an affirmative defense, so [the party claiming the defense] bears the burden of proof in establishing as much.").. See Nightingale v. Leach, 2004 ME 22 ¶ 3 ("Comparative negligence is an affirmative defense, for which the burden of proof lies with the defendants.").

¹² As stated above, because the civil tort defense of comparative negligence would be inapplicable under the particular set facts of this case, the Court need not reach the issue of whether the civil tort defense of comparative negligence applies to restitution in the criminal restitution context.

prove by a preponderance of the evidence that Defendant Smith owes the disputed amount of \$1,775.

The alleged payments of \$100 for the social hall for the funeral gathering; \$125 for a picture frame; \$250 for the Heart of Worship Choir to perform at the funeral mass; \$380 for printing the funeral program; and \$720 for the ice and drinks, were all testified to by victim's mother, Ms. Gloria Cabrera.

However, Ms. Gloria Cabrera did not herself contract or pay for these services and she did not know who did. Additionally, though the Commonwealth Government did produce a ledger showing the alleged payments, the ledger did not say who paid for the services. ¹⁴ And in the instances where Ms. Gloria Cabrera did have receipts for the services provided, the recipes either differed from their purported costs on the ledger or did not show what was received for the expenses paid.

The Court is cognizant of the fact that the disputed items—use of the social hall, the picture frame, the choir, printing the funeral program, and the ice and drinks—fall well within the category of funeral expenses. However, the Commonwealth Government failed to provide credible evidence to address the discrepancies and ambiguities in the amount of restitution sought by the Commonwealth Government for these items—such as providing additional documentation or calling witnesses from the Diocese, the Choir, the Printing Company, and Ice and Water Company. Therefore, the Court finds that the Commonwealth Government failed to carry its burden to prove by a preponderance of the evidence that Defendant Smith is liable for these payments.

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¹⁴ Exhibit 1.7.

4. A Voluntary Gift from Victim's family to the Priest Performing the Funeral Mass is Not an Economic Loss for Purposes of Restitution

Finally, the \$200 offertory gift to the priest performing the funeral mass cannot be described as an economic loss that was the result of Defendant Smith's criminal conduct because, though the definition of "restitution" includes funeral expenses, 6 CMC § 4019(b)(4), the \$200 offertory was a voluntary gift.

Funeral expenses are the natural consequential results of the commission of a homicide—hence their inclusion as an "economic loss" for the purposes of restitution. 6 CMC § 4019(b)(4). However, voluntarily gifts by their very nature are not natural consequential results of the commission of a homicide.

Restitution under 6 CMC § 4109 is a "criminal sanction," Saburo, 2002 MP 3 ¶ 21 (emphasis in original) (citation omitted). For criminal defendants to compensate victims for making voluntary gifts as restitution would not be a punishment for the harm the defendants caused but instead make restitution a mechanism for victims or victims' families to have their goodwill gestures compensated by someone else under the guise of restitution.

Therefore, the Court declines to find that gestures of goodwill, such as a voluntary offertory gift to a priest performing the funeral mass, as economic losses for purposes of restitution under 6 CMC § 4109.

IV. CONCLUSION

In summary, (1) the Department of Fire and Emergency Medical Services and the Commonwealth Health Care Corporation are Commonwealth Government agencies and as such cannot recover the cost of providing medical services under these particular set of facts because they are only "Indirect Third-Party Victims;" (2) the Tort Defense of Comparative Negligence does not apply here because Melton Agulto's family members did not negligently contribute to their damages; and (3) voluntary offertory gifts to a priest performing the funeral

mass are gifts and, therefore, are not economic losses for purposes of restitution under 6 CMC § 4109.

Therefore, for the reasons stated above, the Court finds that Defendant Esekiel "Easy" Smith is liable for \$4,972 in restitution payments.¹⁵

IT IS SO ORDERED this day of March 2020.

JOSEPH N. CAMACHO, Associate Judge

¹⁵ The initial \$1,000 was paid to the victim's mother, Ms. Gloria Cabrera. At the Restitution Hearing, the Assistant Attorney General argued that restitution, if any, should be paid to Ms. Gloria Cabrera.