

No. 19-120903-A

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**IN THE  
SUPREME COURT OF THE  
STATE OF KANSAS**

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**STATE OF KANSAS**  
Plaintiff-Appellee

**vs.**

**ROBERT J. ROBISON, III**  
Defendant-Appellant

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**BRIEF OF APPELLEE**

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Appeal from the District Court of Lyon County, Kansas  
The Honorable Merlin G. Wheeler, District Judge  
District Court Case No. 2018-CR-000004

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**STATE OF KANSAS**  
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The Honorable Merlin G. Wheeler, District Judge  
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**NATURE OF THE CASE**

Robert J. Robison, III was convicted of battery on a law enforcement officer, and at sentencing, he was ordered to pay restitution to an insurer for the Lyon County Detention Center. Mr. Robison appeals claiming the district court's imposition of restitution violated his right to a jury trial, and the rule in *Apprendi*.

## **ISSUES PRESENTED**

**ISSUE I: The Kansas restitution scheme does not violate section 5 of the Kansas Constitution Bill of Rights and is constitutional.**

**ISSUE II: Restitution is not punishment and does not violate the rule in *Apprendi*.**

**ISSUE III: The district court did not err in ordering restitution to an insurance company who was an “aggrieved party.”**

## **STATEMENT OF FACTS**

The State agrees with the statement of facts provided by Mr. Robison in his brief with the addition of the following facts. Ms. Hastert testified at the restitution hearing that the victim, Bobby Cutright, was the patient and responsible party named on the Newman Memorial Hospital billing records. (R XII, 8). The insurance carrier, TriStar Risk Management Company, paid the total amount due under a medical claim as the worker’s compensation carrier for the Lyon County Detention Center, Mr. Cutright’s employer. (R. XII, 9, 17). Mr. Robison did not dispute that he caused Mr. Cutright’s injuries when he battered him. (R. XII, 14). Nor did he dispute the amount of the claim paid by TriStar for Mr. Cutright’s medical expenses. (R. XI, 4, R. XII, 14-15).

## **ARGUMENTS AND AUTHORITIES**

**ISSUE I: The Kansas restitution scheme does not violate section 5 of the Kansas Constitution Bill of Rights and is constitutional.**

Mr. Robison asserts that the Kansas restitution scheme violates the Kansas constitution by encroaching on his right to a civil jury trial. The constitutionality of a statutory provision presents a question of law over which the appellate courts exercise unlimited review. *State v. Riojas*, 288 Kan. 379, 388, 204 P.3d 578 (2009).

Mr. Robison raises this issue for the first time on appeal as he failed to object to the constitutionality of our Kansas restitution statutes before the district court. Constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three exceptions to this rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095.

Mr. Robison asserts that this matter falls under the first two exceptions. However, neither exception applies. This Court has previously found in several unpublished opinions that neither of these exceptions applies in this context. See *State v. Jones*, 366 P.3d 667, 2016 WL 852865 (Kan.App. 2016); *State v. Patterson*, 400 P.3d 676, 2016 WL 3207149 (Kan.App. 2017); *State v. Bradwell*, 386 Kan. 524, 2016 WL 3207149 (Kan.App. 2016). This Court reasoned that the constitutionality of our Kansas restitution scheme is in no way finally determinative of this case, and fundamental rights are not denied where there has been no objection to the imposition or amount of restitution before the district court. See *Jones*, 366 P.3d 667, 2016 WL 852865; *Patterson*, 400 P.3d 676, 2016 WL 3207149; *Bradwell*, 386 Kan. 524, 2016 WL 3207149.

In the present matter, the constitutionality of the Kansas restitution statutes is not finally dispositive of this case because, if Mr. Robison were to prevail on this issue pursuant

to his position, the issue of restitution would still remain unresolved as the case would require remand for resentencing, and a civil jury trial on the issue of damages. See, e.g. *State v. Cole*, 37 Kan.App. 2d 653, 640, 155 P.3d 739 (2007)(remanding restitution-centered case for further proceedings). Further, ruling on this issue will not definitively remove Robison's obligation to pay restitution. See *State v. Jones*, 366 P.3d 667, 2016 WL852865, at 9, (Kan.App. 2016) (unpublished opinion) (declining to apply this exception to the same issue). Furthermore, Mr. Robison did not contest he had an obligation or duty to pay restitution to his victim, the causal link between his criminal conduct to the victim's damages, or the amount of restitution, but rather, he objected to reimbursement for that amount to the workers compensation insurance carrier claiming they had assumed a risk when issuing the policy to the Lyon County Sheriff's Department, and as such, the victim had no "out of pocket" losses. (R. XI, 4, R. XII, 14-15). In other words, Mr. Robinson did not dispute there had been restitution owing as a result of his criminal conduct, he simply argued that the insurance carrier was not entitled to reimbursement as an "aggrieved party." (R. XII, 14-15). Mr. Robinson's fundamental rights were not violated where he made no attempt to dispute the restitution figure or duty to pay restitution before the district court. See *Jones*, 366 P.3d 667, 2016 WL852865, at 9. The only issue Mr. Robinson preserved for appeal was whether the insurance carrier was an "aggrieved party" entitled to reimbursement for the amounts paid under their policy.

Nevertheless, if this Court elects to address the constitutionality of the Kansas restitution statutes for the first time on appeal, Mr. Robison is not entitled to relief on the merits. Section 5 of the Bill of Rights states: "The right of trial by jury shall be inviolate."



Section 5 “preserves the jury trial right as the right existed at common law when our Constitution was adopted.” *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012).

In *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990), *abrogated on other grounds by Miller*, 295 Kan. 636, 289 P.3d 1098, the Kansas Supreme Court described the common law:

The common law can be determined only from decisions in former cases bearing upon the subject under inquiry. As distinguished from statutory or written law, the common law embraces that great body of unwritten law founded upon general custom, usage, or common consent, and based upon natural justice or reason. It may otherwise be defined as custom long acquiesced in or sanctioned by immemorial usage and judicial decision.

In a broader sense, the common law is the system of rules and declarations of principles from which our judicial ideas and legal definitions are continually derived. It is not a codification of exact or inflexible rules for human conduct, the redress of injuries, or protection against wrongs; rather, it is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men.

*Samsel*, 246 Kan. 336, 349. As Justice Stegall explained in *Hilburn v. Enerpipe Ltd.*, \_\_\_ Kan. \_\_\_, 442 P.3d 509 (2019),

[t]he section 5 “right of trial by jury” that “shall be inviolate” is a procedural right to *who* decides contested questions in Kansas courts. It does not guarantee or prescribe the substantive matter of *which* questions Kansas courts can decide. A different provision of the Kansas Constitution—section 18—governs the latter. So the *procedural* right to have a jury (rather than, say, the Legislature) decide the kinds of contested questions juries historically decided is sacrosanct under the Kansas Constitution. But the *substantive* decision about what kinds of questions—in legalese, what causes of action—Kansas courts have the power to resolve is untouched by the section 5 guarantee. Put another way, just because a jury would have resolved a particular substantive question under Kansas common law in 1859 does not mean that a party has a constitutional right to a jury resolution of that question today. This is because the scope of contested questions that Kansas courts may answer can and does change—and this does not violate section 5.

Historically, which questions—which causes of action—Kansas courts have the power to resolve has been a matter of common law decision-making by Kansas courts. But it is a universally accepted principle that the Legislature has the power to abrogate or modify the common law. See, e.g., *Manzanares v. Bell*, 214 Kan. 589, 616, 522 P.2d 1291 (1974) (“[T]he Legislature has the power to modify the common law.”). That is, the Legislature has the power to substantively change or even eliminate common law causes of action; or to create new statutory causes of action. See *Shirley v. Glass*, 297 Kan. 888, 893, 308 P.3d 1 (2013) (“Legislatures may create private causes of action that the common law did not recognize.”); see also *Stanley v. Sullivan*, 300 Kan. 1015, 1018, 336 P.3d 870 (2014) (“As a general rule, statutory law supersedes common law.”). With respect to civil remedies, the constitutional restraint on this legislative discretion is found in section 18 of the Kansas Constitution Bill of Rights. Put simply, so long as it does not run afoul of the Constitution, the Legislature has the power to describe and define *which* questions Kansas courts can resolve. And when those questions are of the kind historically given to juries to decide, section 5 only requires that those questions *remain* with Kansas juries.

*Hilburn v. Enerpipe Ltd.*, \_\_ Kan. \_\_, 442 P.3d 509, 525 (2019).

“There are two basic questions in any Section 5 analysis: In what types of cases is a party entitled to a jury trial as a matter of right? And when such a right exists, what does the right protect? In answering the second question, this court has consistently noted, Section 5 guarantees defendants the right to a jury trial on any issue of fact that would have been tried before a jury at common law.” *State v. Love*, 305 Kan. 716, 735, 387 P.3d 820 (2017) (citations omitted).

There was no common-law right to a jury trial to determine restitution in criminal cases, and Mr. Robison fails to cite any cases to the point. Conversely, at common law, criminal courts were authorized to order restitution when a defendant had been convicted of a criminal offense. In *State v. Ragland*, 171 Kan. 530, 233 P.2d 740 (1951), the Kansas Supreme Court explained,

[t]he statutes of 2 Henry 8, Ch. 11, provided for the issuance by the court in which the thief was convicted of a writ of restitution after the conviction.

The right of the owner to recover property stolen from him was made dependent on his prosecuting the thief. Before too long the courts no longer went to the trouble of issuing the writ but the end was attained by the trial court ordering the property delivered to the owner after conviction. Such is the procedure the complaining witness adopted here and if we had affirmed the conviction our statute would have provided for it. See G.S.1949, 62-1810. That section provides as follows: 'If such property shall not have been delivered to the owner, the court before which a conviction shall be had for the stealing or embezzling thereof may, on proof of the ownership of any person, order the same to be restored to him on payment of the expenses incurred in the preservation thereof.

*Ragland*, 171 Kan. 530, 534-35, citing to *United States v. Murphy*, 41 U.S. 203, 10 L.Ed. 937 (1842). Mr. Robison concedes that at common law, judges were generally permitted to impose "restitution-like orders." (Appellant's Brief, 9).

Furthermore, contrary to Mr. Robison's claim, the early Kansas territorial statutes requiring that the jury find the value of property taken, embezzled or received was not for the purpose of determining restitution, but rather was an element of the various offenses for the purpose of determining the severity level of the offense for sentencing purposes. Territory of Kansas, General Laws, 1859, Ch. 27, Title IX, § 219; Territory of Kansas, General Laws, 1859, Ch. 28, Title IX, §§ 72-74, 82-88, 91. Property-type crimes in the State of Kansas were punishable as grand larceny if the value of the property was \$20.00 or more, which allowed the court to impose a sentence of confinement and hard labor for specified periods of time dependent upon the type of property involved. Territory of Kansas, General Laws, 1859, Ch. 28, Title IX, §§ 72-74, 82-88, 91. If the property was valued at less than \$20.00, the crime was classified as a petty larceny offense which allowed the court to impose a sentence of up to a year in the county jail and a fine of up to \$100.00, or both fine and imprisonment. Territory of Kansas, General Laws, 1859, Ch. 28, Title IX, §§ 74. The valuation element in the early Kansas statutes is consistent with the current statutory

requirement of a jury's determination of value to establish the severity level of theft or criminal damage at the misdemeanor or felony level.

"The district court's authority to order restitution in a criminal case is established by K.S.A. 2016 Supp. 21-6604(b)(1), which allows the court to order the defendant to pay restitution as part of the sentence. K.S.A. 21-6604(b)(1) provides, "[i]n addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances that would render a plan of restitution unworkable." Further, K.S.A. 21-6607(c)(2) requires, as a condition of probation, that the defendant shall "make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable." Restitution is an aspect of a criminal defendant's sentence. *State v. Huff*, 50 Kan.App.2d 1094, syl. ¶4, 336 P.3d 897 (2014). Historically, the court, not the juries, have determined the appropriate sentence or other disposition of a case in non-capital cases. See *State v. Hill*, 257 Kan. 774, 895 P.2d 1238 (1995). Therefore, Kansas restitution statutes do not implicate a right historically understood to constitute part of the jury trial right.

In addition, restitution is a remedy blending elements of tort and equity, but is neither one nor the other, but is grounded in fairness. Restitution is, "an act of restoring or a condition of being restored: such as a restoration of something to its rightful owner; a making good of or giving an equivalent for some injury; or a legal action serving to cause restoration of a previous state." [www.merriam-webster.com](http://www.merriam-webster.com).

Reparation means, "the act of making amends, offering expiation, or giving satisfaction for a wrong or injury; or something done or given as amends or satisfaction. www.merriam-webster.com. The goal of restitution is to make victims whole, and to rehabilitate and deter an offender from future criminal conduct by requiring the offender to "recognize the specific consequences of his criminal activity and accept responsibility for those consequences." *State v. Applegate*, 266 Kan. 1072, 1076, 976 P.2d 936, 939 (1999). Kansas's restitution statutes require the court to take into consideration factors unique to the defendant when determining whether a plan of restitution is workable and should be ordered, such as the defendant's resources, ability to earn money, living expenses, financial obligations, and other special needs. *State v. Meeks*, 307 Kan. 813, 820-21, 415 P.3d 400 (2018).

Although no Kansas case has directly characterized restitution in criminal cases as an equitable remedy, many other jurisdictions have done so. In *United States v. Barnette*, 10 F.3d 1553 (11th Cir. 1994), the Court stated,

[a]n order of restitution is not a judicial determination of damages. Damages measure the amount of compensable loss a victim has suffered. Restitution, by contrast, is an equitable remedy, subject to the general equitable principle that [it] is granted to the extent and only to the extent that justice between the parties requires . . . "VWPA" specifically directs a sentencing judge to consider not only the victim's injury, but also the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

*Barnette*, 10 F.3d 1553, 1556. See also, *United States v. Newman*, 144 F.3d 531 (7th Cir.1998)("Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions."); *Hughey v. United States*, 495 U.S. 411, 416, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); *United States v.*

*Florence*, 741 F.2d 1066 (8th Cir.1984); *United States v. Visinaiz*, 344 F. Supp. 2d 1310 (D. Utah 2004), *aff'd*, 428 F.3d 1300 (10th Cir. 2005); *In re State ex rel. T.L.B.*, 218 P.3d 534, 538 (Okla 2009) (“restitution has historically been viewed as an equitable proceeding, we agree with the majority of federal courts finding no Seventh Amendment violation for the denial of a jury trial on the issue of restitution.”).

With that being said, the right to jury trial depends on the essential nature of a claim, and the issues presented determine whether the essential nature of a claim is legal or equitable. *Carnes v. Meadowbrook Executive Bldg. Corp.*, 17 Kan.App.2d 292, 836 P.2d 1212 (1992), *rev. denied*. The right to jury trial applies only to legal claims, but not to actions which are essentially equitable in nature. *Vanier v. Ponsoldt*, 251 Kan. 88, 833 P.2d 949 (1992). The fact that there are some legal issues in what is otherwise essentially an equitable case does not entitle one to a jury trial; when it is established that the essential nature of the case is equitable, the court will take jurisdiction for all purposes and determine all issues so as to administer complete relief. *Koerner v. Custom Components, Inc.*, 4 Kan.App.2d 113, 603 P.2d 628 (1979).

Restitution orders in criminal cases are unique to the circumstances of the particular case and are grounded in fairness and equity. They are intended to make the victim whole again or to restore the victim to the position he or she was in prior to the defendant’s criminal acts. They not only account for the victim’s loss or damages, but account for the defendant’s circumstances. Restitution orders may not always result the payment of money to the victim. For these reasons, restitution orders are unique to the facts of the crime of conviction, the victim’s loss, and the defendant’s circumstances present in a particular case.

Our restitution statutes recognize the uniqueness of each particular case and the equitable nature of restitution by the language used within the statute itself. Statutory construction dictates that the intent of the legislature governs if that intent can be ascertained. An appellate court must attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings, and judicial interpretation must be reasonable and sensible to effectuate the legislative design and the true intent of the law. Further, when construing statutes to determine legislative intent, appellate courts must consider various provisions of an act in *pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. See *State v. Keel*, 302 Kan. 560, 560–61, 357 P.3d 251, 253 (2015). While K.S.A. 21-6604 provides, defendants shall “*pay* restitution, which shall include, but not be limited to, damage or loss caused by the defendant’s crime,” K.S.A. 21- 6607 includes provides that defendants shall “*make* reparation or restitution to the aggrieved party for the damage or loss caused by the defendant’s crime, in an amount and *manner* determined by the court.” K.S.A. 21-6607 (emphasis added). These statutes recognize that restitution for a theft or property crime may differ from restitution for a person crime and still yet from other types of crimes. Even among person offenses, restitution may differ drastically from a battery case involving bodily injury to a stalking, violation of protective order, or phone harassment case. Therefore, restitution in cases may include, among other provisions, an order to return property, repair damages, perform community service work, or to cease contact with the victim, depending on the crime of conviction.

Further, the restitution statutes require the court to take into consideration the defendant’s unique circumstances prior to ordering restitution in a case as previously

discussed. Consideration of a defendant's circumstances and the workability of a restitution order are founded on fairness and equity.

Because restitution orders in criminal cases inherently blend concepts founded in both law and equity, they are issues reserved for the court and not subject to the rights to jury trial found in section 5 of the Kansas Constitution bill of rights, and are reserved for the court's determination and not a jury's. Therefore, the Kansas restitution scheme in criminal cases does not infringe on an issue historically constituting part of the jury trial right.

Mr. Robison asserts that because "judicial restitution orders are, effectively, civil orders for a defendant to pay damages for tortious conduct, they encroach upon a defendant's common law right to a jury's factual findings," and abrogated his "section 5 right to a civil jury trial." (Appellant's brief, 9, 11). This position is unfounded. As this court expressly explained in *State v. Applegate*, 266 Kan. 1072, 976 P.2d 936 (1999), "[r]estitution ordered in criminal proceedings and civil damages are separate and independent remedies under Kansas law.... The judge's order of restitution in a criminal action does not bar a victim from seeking damages in a separate civil action." *Applegate*, 266 Kan. 1072, 1078.

Further, restitution orders in criminal cases differ dramatically from compensatory damages in a civil suit. They serve different purposes and allow for different damages. The U.S. Supreme Court has noted these differences and stated, "aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from (though they overlap with) the purposes of tort law. Legal fictions developed in the law of torts cannot be imported into criminal restitution and



applied to their utmost limits without due consideration of these differences." *Paroline v. United States*, 572 U.S. 434, 453–54, 134 S. Ct. 1710, 1724, 188 L. Ed. 2d 714 (2014) (recognizing restitution serves penological purposes but should only be awarded in an amount comporting with a defendant's relative role in the causal process underlying a victim's general losses). Restitution orders are limited to actual damages or loss caused by the defendant's criminal acts and are subject to reduction due to the defendant's unique circumstances as discussed previously. See *Applegate*, 266 Kan. at 1078. Civil compensatory awards on the other hand, allow for both the actual loss as well as the future loss in terms of lost wages and earning capacity, pain and suffering, and mental anguish. Restitution orders revolve around the losses caused by the defendant's past conduct and not the long-term or continuing effects of the offense. This court in *Applegate* stated, "K.S.A. 21-4610(d)(1) provides a general statement of legislative intent, requiring the sentencing court to exercise discretion in ordering reparation or restitution to the aggrieved party for the actual damage or loss caused by the defendant's crime. In addition, the district judge must have some basis for determining the amount of damages, but the same rigidity and proof of value required in a civil action does not apply to determining restitution." *Applegate*, 266 Kan. At 1078–79.

Several federal courts have determined that restitution differs from civil litigation in many ways even though it is enforceable in a similar manner. The Tenth Circuit explained, "[t]he enforcement method does not however determine the nature of the order nor how the amount is determined. The victim does not appear as a party, control the hearing as to losses, nor take an appeal." *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984). Likewise, the Second Circuit stated,

though the [federal restitution scheme] was intended to compensate the victim, it does so in a manner distinct from the normal functioning of a civil adjudication. A court imposing an order of restitution is required to consider the defendant's ability to pay. 18 U.S.C. § 3580(a). The victim may therefore be awarded less than full compensation solely because of the offender's financial circumstances. Furthermore, unlike a civil suit, the victim is not a party to a sentencing hearing and therefore has only a limited ability to influence the outcome. The victim cannot control the presentation of evidence during either the criminal trial or the sentencing hearing and is not even guaranteed the right to testify about the extent of his losses. Neither can he appeal a determination he deems inadequate.

*United States v. Brown*, 744 F.2d 905, 910 (2d Cir. 1984). These differences have led a number of federal circuits to find that a defendant is not entitled to a jury trial to determine the amount of restitution. *U.S. v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985); *U.S. v. Keith*, 754 F.2d 1388, 1391-92 (9<sup>th</sup> Cir. 1985); *U.S. v. Watchman*, 749 F.2d 616, 617 (10<sup>th</sup> Cir. 1984); *United States v. Brown*, 744 F.2d 905, 909-10 (2d Cir. 1984); *U.S. v. Florence*, 741 F.2d 1066, 1067-68 (8<sup>th</sup> Cir. 1984).

And as previously discussed, restitution orders differ from civil suits because they are subject to reduction due to the defendant's resources, ability to earn money, living expenses, financial obligations, other special needs, and the overall workability of a restitution plan. *State v. Meeks*, 307 Kan. 813, 820-21, 415 P.3d 400 (2018). Civil suits do not account for these special circumstances unique to the defendant.

Even if, for arguments sake, the Kansas restitution statutes infringe on the section 5 right to jury trial in some manner, the statutes serve a compelling state interest and are narrowly tailored to further that interest. The restitution statutes serve a compelling state interest in seeing that victims of crime receive justice without delay under section 18 of the Kansas Constitution Bill of Rights providing that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice

administered without delay.” Kansas’s restitution statutes promote offender reformation by allowing a defendant to recognize the specific consequences of his criminal activity and accept responsibility for those consequences. Furthermore, Kansas’s restitution scheme allows defendants due process to a hearing to contest the amounts and imposition of restitution, and allow for an adjustment to the obligation to make restitution based upon the defendant’s financial situation, other special needs, and the overall workability of such a plan. *Meeks*, 307 Kan. 813, 820-21.

For the reasons set forth above, Kansas’s restitution scheme is constitutional and does not violate section 5 of the Kansas Constitution Bill of Rights. This court should affirm the district court’s order for restitution.

**ISSUE II: Restitution is not punishment and does not violate the rule in *Apprendi*.**

The appellate court exercises unlimited review over the constitutionality of a statute. *State v. Riojas*, 288 Kan. 379, 388, 204 P.3d 578 (2009).

Mr. Robison claims that the Kansas restitution scheme violates the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). (Appellant’s Brief, 14-19). Mr. Robison failed to raise this issue before the district court, and for the same reasons discussed in Issue I, the State’s position is that this issue has not been preserved for appellate review. If this court disagrees, Mr. Robison is nevertheless not entitled to relief.

This Court has previously dealt with and rejected a very similar *Apprendi* based challenge to the Kansas restitution scheme. See *State v. Huff*, 50 Kan. App. 2d 1094, 336 P.3d 897 (2014), *rev. denied*. In *Huff*, this court held that *Apprendi* was not implicated when the trial court ordered Huff to pay \$105,000 in restitution, because restitution was

neither a penalty nor an increase in a defendant's maximum sentence to which the sixth amendment right to jury trial applied. *Huff*, 50 Kan. App. 2d 1094.

The *Huff* court stated,

[w]hile it is undeniable that restitution is part of a defendant's sentence, it does not mean restitution is punishment. See *State v. McDaniel*, 292 Kan. 443, 446, 254 P.3d 534 (2011); *State v. Hall*, 45 Kan.App.2d 290, 298, 247 P.3d 1050 (2011) (restitution not part of punishment or sanction for defendant's conduct), aff'd 297 Kan. 709, 304 P.3d 677 (2013). In fact, a sentence does not contain only punishment or sanctions. See *State v. Robinson*, 281 Kan. 538, 543, 132 P.3d 934 (2006) (BIDS attorney fees imposed at sentencing not part of punishment or sanction for defendant's criminal conduct but a "recoupment").

*Huff*, 50 Kan. App. 2d 1094, 1099. Further, the *Huff* court in determining that *Apprendi* does not apply to restitution, relied on *U.S. v. Day*, 700 F.3d 713, 716, 732 (4<sup>th</sup> Cir. 2012), *cert. denied* \_\_ U.S. \_\_, 133 S.Ct. 2038, 185 L.Ed.2d 887 (2013), a case that emphasized that the "uniform rule adopted in the federal court to date" is that *Apprendi* does not apply to restitution, and concluded that the logic remains sound. *Day*, 700 F.3d at 732. Federal courts continue to reject *Apprendi* challenges to restitution. See *U.S. v. Burns*, 800 F.3d 1258, 1261-62 (10<sup>th</sup> Cir. 2015).

Finally, Mr. Robison claims that the Kansas restitution scheme violates *Apprendi* by raising the mandatory minimum penalty imposed by the district court. (Appellant's brief, 18-19). Again, this argument is predicated on the idea that restitution is a punishment or penalty. See *Huff*, 50 Kan. App. 2d at 1099 (rejecting argument that restitution increases the statutory maximum punishment because "[r]estitution, although part of a defendant's sentence, is not punishment."). Because *Apprendi* applies only to increases in the minimum applicable punishment and restitution, by definition, is not punishment, this argument must fail. See *Alleyne v. U.S.*, \_\_ U.S. \_\_, 133 S.Ct. 2151, 186

L.Ed.2d 314 (2013) (applying *Apprendi* to increases in the minimum applicable penalty; *Apprendi*, 530 U.S. 466 (requiring jury rather than judicial factfinding to increase a defendant's punishment). None of Mr. Robison's arguments warrant this court departing from *Huff* or the numerous cases in which appellate courts have rejected attempts to apply *Apprendi* to restitution.

**ISSUE III: The district court did not err in ordering restitution to an insurance company who was an "aggrieved party."**

"The amount of restitution and manner in which it is made to the aggrieved party is to be determined by the court exercising its judicial discretion and is subject to abuse of discretion review. ... Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable person would take the view adopted by the trial court." *State v. Hunziker*, 274 Kan. 655, 660, 56 P.3d 202 (2002). An abuse of discretion may also occur if the court fails to consider or to properly apply controlling legal standards. *State v. Woodward*, 288 Kan. 297, 299, 202 P.3d 15 (2009). To the extent this issue involves the interpretation of a statute, this Court exercises unlimited review. *State v. Robinson*, 281 Kan. 538, 528, 132 P.3d 934 (2006).

Mr. Robison claims the district court erred in ordering restitution to the insurance carrier who paid the medical costs incurred by the victim as a result of Mr. Robison's crime. Mr. Robison did not contest that the victim's injuries and subsequent medical costs were the direct result of his criminal conduct. The victim, Bobby Cutright, an employee of the Lyon County Detention Center, did not request restitution, and neither he nor the insurance carrier appeared at the restitution hearing.

The district court's authority to order restitution in a criminal case is established by K.S.A. 21-6604(b)(1) and K.S.A. 21-6607(c)(2). K.S.A. 21-6604(b)(1) states,

(b)(1) In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime, unless the court finds compelling circumstances that would render a plan of restitution unworkable.

K.S.A. 21-6607(c)(2) provides in part,

(c) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of the following conditions:

...  
(2) make reparation or restitution to *the aggrieved party* for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable.

K.S.A. 21-6607(c)(2) (emphasis added). "When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act in *pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible." *State v. Keel*, 302 Kan. 560, 560-61, 357 P.3d 251 (2015). Therefore, while these two statutes differ slightly, they were enacted together, are closely related and should be construed together. *State v. Bills*, 401 P.3d 1063, 2017 WL 4216089, 2 (Kan. App. 2017), (unpublished opinion) *rev. denied*, referencing *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 919, 349 P.3d 469 (2015).

The legislature in enacting the restitution statutes specifically chose to use the term "aggrieved party." The appellate courts have previously determined that an "aggrieved party includes a secondarily or tertiarily aggrieved party." *State v. Beechum*, 251 Kan. 194, 203, 833 P.2d 988 (1992). See also *State v. Yost*, 232 Kan. 370, 654 P.2d 458

(1982), *overruled in part on other grounds*, *State v. Haines*, 238 Kan. 478, 712 P.2d 1211. A tertiarily aggrieved party is a party secondarily aggrieved who had compensated the original aggrieved party. See *Yost*, 232 Kan. 370, *overruled in part on other grounds*. Kansas courts have also held that an aggrieved party includes an insurance company paying claims under a crime victim's policy. See *State v. Hand*, 45 Kan. App. 2d 898, Syl. ¶ 3, 257 P.3d 780 (2011), *rev'd on other grounds* 297 Kan. 734, 304 P.3d 1234 (2013); *State v. Jones*, 285 P.3d 395, 2012 WL 4121119, 3 (Kan. App. 2012) (unpublished opinion), *rev. denied* (2013).

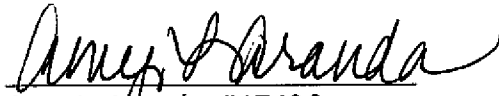
Nothing in the statute or the caselaw requires an aggrieved party, who is not a party to the case, to request restitution or to appear at any hearing. See *Jones*, 285 P.3d 395, 2012 WL 4121119, 4. In the present matter, TriStar Risk Management Company, as the worker's compensation insurance carrier for the Lyon County Detention Center, that paid Mr. Cutright's medical expenses according to its policy, became an aggrieved party. Because restitution is part of a defendant's sentence, the district court did not err in ordering Mr. Robison to pay restitution to TriStar for the medical costs associated with the victim's injuries.

### **CONCLUSION**

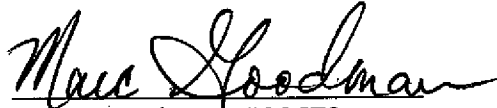
For the above reasons, the State of Kansas, Plaintiff-Appellee, respectfully requests this Court find that the Kansas restitution statutes are constitutional and affirm the district court's decision.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

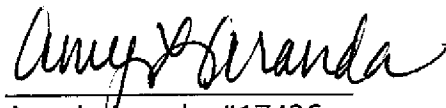
I, the undersigned, Amy L. Aranda, hereby certify that copies of the above and foregoing Brief of Plaintiff-Appellee were caused to be served upon the following via e-mail and e-filing:

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