

*STATE V. KALAL*¹

In *State v. Kalal*, the Montana Supreme Court held that a victim of a criminal act has a duty to mitigate restitution damages and that such a duty is satisfied if the victim acted as a reasonable and prudent person would under the circumstances.² The mitigation of damages in the context of restitution for a criminal action was a case of first impression for the State of Montana.³

After being charged with theft of a tractor, Daniel Kalal pleaded guilty and received a two-year deferred imposition of his sentence, along with an order to pay restitution in the amount of \$23,513.43 for the value of the tractor and other items of stolen property.⁴ Kalal satisfied the restitution obligation but appealed the court order requiring him to pay additional restitution of \$15,960 for the victim's lost income.⁵

The victim of the theft, Jim Petranek, testified that he planned on using the tractor for the income-generating purposes of: (1) building a two-and-a-half mile long fence, which "would allow his property to be leased for summer grazing," (2) constructing "a cabin which could be rented for 60 days a year," and (3) seeding "120 acres for grass production and farming."⁶

During the cross-examination of Petranek, Kalal argued that Petranek could rent another tractor for a reasonable price.⁷ Kalal stated that "Petranek had a duty to mitigate his damages by renting a tractor" to complete his projects in the expected time frame.⁸ However, because Petranek also worked full-time as a city public works specialist, Petranek would not have been

¹ *State v. Kalal*, 204 P.3d 1240 (Mont. 2009).

² *Id.* at 1242.

³ *Id.* at 1241.

⁴ *Id.* at 1240.

⁵ *Id.*

⁶ *Id.* at 1240–1241.

⁷ *Kalal*, 204 P.3d at 1241.

⁸ *Id.*

able to complete his projects “in one continuous period of time.”⁹ Consequently, the district court concluded that the cost and effort to obtain a tractor was unreasonable.¹⁰

In determining the appropriate damages awarded, the district court cited the Montana Code Annotated, which defines the restitution and damages owed to the victim. Section 46–18–241 of the Montana Code Annotated provides: “a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss.”¹¹ A pecuniary loss is defined as “all special damages . . . that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender’s criminal activities, including . . . loss of income.”¹²

Because the relevant statutes requiring restitution in criminal actions “are based upon damages available in a ‘civil action,’” the Court looked to the precedents set out in tort and contract law.¹³ While an injured party has a duty to reduce or mitigate damages, that duty is not absolute; rather, “it has limits. The test is: What would an ordinarily prudent person be expected to do if capable, under the circumstances?”¹⁴ In compliance with this test, an injured person does not have to mitigate when it is unreasonable or impracticable to do so.¹⁵

This issue of mitigation in *Kalal* is on point with the civil case of *McPherson v. Kerr*.¹⁶ In *McPherson*, the plaintiff’s trailer was used for a hauling job which the plaintiff had no knowledge of, and therefore, had not consented to.¹⁷ In the process of this unauthorized job, the

⁹ *Id.*

¹⁰ *Id.*

¹¹ Mont. Code Ann. § 46–18–241 (2007).

¹² *Id.* at § 46–18–243(1)(a).

¹³ *Kalal*, 204 P.3d at 1241.

¹⁴ *Spackman v. Ralph M. Parsons Co.*, 414 P.2d 918, 921 (Mont. 1966).

¹⁵ *Kalal*, 204 P.3d at 1242 (citing *McPherson v. Kerr*, 636 P.2d 852, 856 (Mont. 1981)).

¹⁶ 636 P.2d 852 (Mont. 1981).

¹⁷ *Id.* at 854.

plaintiff's trailer suffered damage; it was then towed to a local storage place.¹⁸ Although McPherson tried to release his trailer from storage, he lacked the funds to pay for the storage bill; however, McPherson was able to purchase another trailer, thus replacing the old one and enabling him to take on occasional jobs.¹⁹ The district court concluded that McPherson acted in a reasonable manner to mitigate his damages, that "it was impossible for him to further mitigate," and that "the law would not require him to perform an impossibility."²⁰

In *Kalal*, the Montana Supreme Court creates a clear precedent for the issue of restitution of victims in criminal actions. While the Court recognizes the duty to mitigate, it affirmed the district court's conclusion that "no reasonable man could be expected to spend money (or time) he does not have to mitigate an injury for which he is not responsible."²¹ To expect anything more would be to further victimize the victim.

Montana practitioners should be aware of this case for the new authority it presents. While this case does not present a significant shift in criminal sentencing, it defines the scope of what a victim of a criminal action must do when that victim is seeking restitution from the guilty party. If a victim wants to receive restitution, he or she must mitigate the damages enough to meet the civil standard of a reasonable and prudent person under the circumstances.

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¹⁸ *Id.* at 854.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Kalal*, 204 P.3d at 1242.