**[Cite as *In re Z.N.*, 2015-Ohio-1213.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

| | | |
|---|---|---|
| IN THE MATTER OF:<br>Z.N.,DELINQUENT CHILD | **:** | **O P I N I O N** |
| | **:** | |
| | **:** | **CASE NO. 2014-L-030** |

Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2013 DL 01579.

Judgment: Reversed and remanded.

*Charles E. Coulson*, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Charles R. Grieshammer*, Lake County Public Defender, and *Michael L. Gabelman*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

**{¶1}** This appeal is from the Lake County Court of Common Pleas, Juvenile Division. Appellant Z.N. pled "true" to attempted trespass in a habitation in violation of R.C. 2911.12(B), a charge which would be a fifth-degree felony if committed by an adult. At the restitution hearing, Z.N. was ordered to pay $1,458 for the installation of a new security system at the victim's house. On appeal, Z.N. argues ordering restitution

for the cost of installing a new security system violates R.C. 2152.20, the applicable restitution statute. We agree. For the following reasons, we reverse and remand.

**{¶2}** At the restitution hearing, the victim Terri Findlay-Jones testified that the day after Z.N. broke into her home, she and her husband purchased a security system. She testified that after the break-in, she was extremely afraid, was up throughout the night and no longer felt safe in her home. She further testified that but for Z.N.'s conduct, she would not have purchased the security system, that the security system provided the maximum amount of peace of mind that could be expected and that without the security system she could not be home alone without her husband. An alarm certificate showed that the cost of installing the security system was $199 and monthly fees would amount to $34.95 plus tax. The term of the security system agreement is for three years.

**{¶3}** In his closing argument, Z.N. argued the purchase of a security system was not a direct and proximate result of the Z.N.'s conduct and that the purchase of the security system was not an economic loss. The trial court found otherwise and ordered Z.N. to pay restitution for the amount of the security system. This appeal follows.

**{¶4}** As his sole assignment of error, Z.N. alleges:

**{¶5}** "The juvenile court erred to the prejudice of the delinquent child-appellant when it ordered him to pay restitution for an alarm system installed by a homeowner after he trespassed in her home in violation of his due process rights, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

**{¶6}** Although Z.N.'s assignment claims his constitutional rights were violated his brief solely argues that the trial court's restitution order violates R.C. 2152.20. Furthermore, at the restitution hearing, Z.N.'s objections to restitution were solely based upon R.C. 2152.20, not the U.S. or Ohio constitutions. Z.N.'s failure to raise constitutional arguments before the trial court, results in waiver. *Russin v. Shepherd*, 11th Dist. Geauga No. 2006-G-2708, 2007-Ohio-3206, ¶32. Consequently, we will only address the statutory arguments.

**{¶7}** Z.N. argues that the cost of installing the security system is not an economic loss as defined under R.C. 2152.02(L) for two reasons: (1) the installation of a security system does not fall within the exhaustive items defined to constitute an economic loss and (2) the impetus for the purchase of the security system (i.e. the loss of security in the victim's home) is nonpecuniary in nature.

**{¶8}** Questions of statutory interpretation are reviewed de novo. *State v. Best*, 7th Dist. Mahoning No. 04 MA 203, 2005-Ohio-4375, ¶34. "'In construing a statute, a court's paramount concern is the legislative intent in enacting the statute. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319. Under Ohio law, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. *Shover v. Cordis* (1991), 61 Ohio St.3d 213, 218, 574 N.E.2d 457; S.R., supra, 63 Ohio St.3d at 595. In interpreting a statute, words and phrases shall be read in context and construed according to the rules of grammar and common usage. *Independent Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814; R.C. 1.42. Courts do not have authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must

give effect to the words used. *Wray v. Wymer* (Sept. 11, 1991), Scioto App. No. 1867, unreported, p. 13. In other words, courts may not delete words used or insert words not used. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77[.]'" *State v. Hiatt*, 120 Ohio App.3d 247, 254 (4th Dist.1997), quoting *State v. Boso*, 4th Dist. Washington No. 95CA10, 1996 Ohio App. LEXIS 4215, *7-8 (Sept. 11, 1996).

**{¶9}** R.C. 2152.20(A)(3) provides that "[i]f a child is adjudicated a delinquent child * * * the court may * * * require the child to make restitution to the victim of the child's delinquent act * * * in an amount based upon the victim's economic loss caused by or related to the delinquent act * * *." R.C. 2152.20(A)(3) also prevents restitution orders from exceeding "the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act * * *."

**{¶10}** Economic loss is defined under R.C. 2152.02(L), and it states that: "'Economic loss' means any economic detriment suffered by a victim of a delinquent act * * * as a direct and proximate result of the delinquent act * * * and includes any loss of income due to lost time at work because of any injury caused to the victim and any property loss, medical cost, or funeral expense incurred as a result of the delinquent act * * *. 'Economic loss' does not include non-economic loss or any punitive or exemplary damages." Non-economic loss is defined under R.C. 2152.02(DD) as "nonpecuniary harm suffered by a victim of a delinquent act * * * as a result of or related to the delinquent act * * * including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention,

protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss."

**{¶11}** First, Z.N. argues that the enumerated list of items in R.C. 2152.02(L) (i.e. that any loss of income due to lost time at work because of any injury caused to the victim and any property loss, medical cost, or funeral expense be considered an economic loss) demonstrates an intent to exclude all other items as non-economic losses under the statutory construction rule known as expression unius exclusion alterius. That rule of construction holds that when a law specifies certain items in a list, there is an intention to exclude all others items from that list. *State v. Barksdale*, 11th Dist Lake No. 12-117, 1987 Ohio App. LEXIS 10444, at *5 (Dec. 31, 1987), quoting Black's Law Dictionary, 521 (5 Ed. Rev. 1979). Because installing a new security system is not on the list of items included in the definition of an economic loss, Z.N. argues the installation of the security system is not considered an economic loss.

**{¶12}** The state responds by arguing that the word "include" or "including" indicates the legislature's intent to be illustrative, rather than exhaustive. Specifically, in *Gilam v. Hamilton County Board of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, ¶15, the Ohio Supreme Court interpreted a list of items in R.C. 323.151(A)(2)'s definition of the word "owner" to be merely illustrative rather than exhaustive. There, the court noted that under the statute's definition, owner "would not even have included the holder of full legal title to property that was not subject to a purchase agreement, land contract, mortgage, or joint tenancy." *Id.* Therefore, "the creation of an exhaustive list was not the intent of the General Assembly." *Id.*

**{¶13}** Similarly, in *Trans Rail Am., Inc. v. Enyeart*, 123 Ohio St.3d 1, 2004-Ohio-3624, ¶28, the Ohio Supreme Court had to consider whether an agency's determination that a licensing application was incomplete could be appealed even though the list of decisions that could be appealed were enumerated to (only) include "the issuance, denial, modification, or revocation of a license." The Ohio Supreme Court concluded, without further explanation, that the word "includes" indicates that the list was merely illustrative rather than exhaustive.

**{¶14}** The issue here however does not turn on whether the word "includes" denotes an exhaustive or illustrative list. An economic loss is generally defined as "any economic detriment suffered by a victim of a delinquent act * * * as a direct and proximate result of the delinquent act * * * *and* includes [the enumerated list of items]." (Emphasis added.) By having the list in question connected to the first clause through the use of a conjunction, the General Assembly has indicated that an economic loss is principally defined as "any economic detriment suffered by a victim * * * as a direct and proximate result of the delinquent act" and that the listed items that follow are examples of items that meet the criteria laid out in the first clause. As such, determining whether a financial expenditure is an economic loss does not depend upon whether the state can fit a purported loss into one of the categories after the conjunction; rather, the determination turns on whether the loss is economic detriment suffered by the victim that is the proximate result of the juvenile's conduct. Therefore, we reject Z.N.'s argument that the listed items are exhaustive of the types of recoverable expenses.

**{¶15}** Z.N. also argues the economic loss definition excludes the cost of the security system because the security system was purchased to ameliorate

nonpecuniary harm of the victim's lack of the security in her home. According to Z.N., the purchase of the security system circumvents the prohibition for recovery for loss of protection, "mental anguish" and "any other intangible loss." *See* R.C. 2152.02(DD) (defining these items as noneconomic loss, and therefore excluded from the definition of an economic loss). The state has conceded that the harm of not feeling safe in one's home constitutes either mental anguish or any other tangible loss. As such, the issue is whether the General Assembly intended economic losses to include financial expenditures undertaken to ameliorate nonpecuniary harm.

**{¶16}** We have been unable to find any Ohio case law directly on this point; however, several Ohio cases suggest that financial expenditures to remedy nonpecuniary loss are economic and subject to reimbursement by way of restitution. As previously noted, medical costs are one of the enumerated items that are specifically included in the definition of an economic loss. Although no court has defined what medical costs entail, two courts expressly found that restitution covers costs for therapy as a medical expense. *State v. Johnson*, 3d Dist. Auglaize No. 2-98-39, 1999 Ohio App. LEXIS 3107, at *11-12 (Jun. 30, 1999); *State v. Bush*, 83 Ohio App. 3d 717, 718-719 (12th Dist.1992). Furthermore, several Ohio court cases reveal that therapy or counseling expenses to address nonpecuniary loss constitute economic loss subject to restitution orders. *See, e.g.*, *State v. Russell*, 5th Dist. Richland No. 08 CA 82, 2009-Ohio-2692, ¶3; *State v. Bigsby*, 5th Dist. Richland No. 05-CA-105, 2006-Ohio-5546, ¶6. Because victims often seek counseling due to the mental anguish suffered from a crime, awarding the costs of therapy as restitution is an example of ordering restitution for a financial expenditure that arose due to a nonpecuniary harm.

Therefore, the fact that the victim's nonpecuniary harm was the impetus for the financial expenditure does not in itself make restitution for that expense improper.

**{¶17}** Finally, Z.N. argues that the cost of the security system was not a "direct and proximate result" of Z.N.'s conduct. In determining whether an expense was the proximate result of the juvenile's conduct, the Ohio Supreme Court has found that we must distinguish between "consequential costs incurred subsequent to" the conduct at issue and expenditures that are a proximate result of the culpable conduct. *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, ¶25.

**{¶18}** In *Lalain*, an employee stole various documents and other intellectual property from the victim-corporation. *Id.* at ¶6. In response to the theft, the victim-corporation conducted an internal investigation to determine what was stolen, and hired a forensic accounting firm to appraise the value of the intellectual property stolen. *Id.* at ¶8. Lalain pled guilty to a fifth degree felony theft offense, and, at sentencing, the company sought restitution "for the time spent by its employees in support of this case" which amounted to $55,456, as well as for the cost to value the items stolen, which amounted to $7,665. *Id.* at ¶13. The Ohio Supreme Court, without further explanation, found these costs to be consequential costs resulting from the theft offense as opposed to a direct and proximate result from the crime. *Id.* at ¶25.

**{¶19}** So far, only one appellate court has elaborated on the definition of consequential cost. *See State v. Olson*, 2d Dist. Montgomery No. 25452, 2013-Ohio-4403. There, the Second District found that *Lalain* barred a restitution order for a victim-corporation's legal fees in pursuing recovery against the defendant, as well as accounting fees documenting losses. *Id.* at ¶15.

**{¶20}** Z.N. argues that the expense of the new security system is barred by *Lalain* because the harmful result of Z.N.'s conduct (i.e. the victim's loss of security in her home) is non-economic in nature. Therefore, Z.N. argues that *Lalain* establishes a categorical rule that a victim is not entitled to restitution for any financial expenditures undertaken to ameliorate nonpecuniary harm. The state does not offer a different interpretation of *Lalain* or otherwise suggest Z.N's interpretation is wrong. However, there is a slight hitch in Z.N's interpretation. As previously noted, restitution for the costs for therapy are specifically allowed as medical expenses under R.C. 2152.20. But, if Z.N.'s argument were correct, then it would appear that restitution for counseling expenses or therapy would violate *Lalain*.

**{¶21}** However, we are of the view that this supposed conflict between *Lalain* and counseling expenses is avoidable. The definition of economic losses without the list of items that are specifically included as economic losses would read as follows: "'Economic loss' means any economic detriment suffered by a victim of a delinquent act * * * as a direct and proximate result of the delinquent act * * *." R.C. 2152.02(L). If the conjunction "and includes * * *" were not in the economic loss definition it would be unclear whether all lost income, medical costs, funeral expenses, or property loss constitutes an economic loss. Therefore, we read the conjunction of "and includes * * *" to mean that costs that fall into this category, as a matter of law, are a direct and proximate result of the juvenile's conduct. Any item that does not fall into that category however is subject to the limitation imposed in *Lalain*. Were we to rule otherwise, we would either run afoul of the statute or *Lalain*.

**{¶22}** Although the parties and this court were unable to find case law from Ohio deciding whether the purchase of a new security system is the proximate result from a juvenile or defendant's conduct, courts from several other states have found that the purchase of the new security system is either not the proximate result of the juvenile/defendant's conduct or not allowed because it is not an enumerated item in the state's restitution statute. *See Rich v. State*, 890 N.E.2d 44, 50 (Ind.App. 2008) ("Although we understand that the victims may have suffered emotional distress as a result of Rich's crime, and that they may have installed the security system as an attempt to alleviate this angst, we disagree that our restitution statute authorizes a trial court to order a defendant to pay for such an expense."); *People v. Reyes*, 166 P.3d 301, 304 (Colo.App. 2007) ("[W]e conclude that the victim's expense of installing the interior locks, as a prophylactic against future break-ins, was not proximately caused by defendant's conduct, and, consequently, does not qualify for a restitution award."); *J.M. v. State*, 658 So.2d 1128, 1128-29 (Fla.App. 1995) (concluding that the cost of a security system was not encompassed in the restitution statute for "any damage or loss caused by the child's offense," as "the relationship between the system and [the child's] delinquent acts was not the significant causal relationship contemplated by the statute"); *In re T.W.*, 268 Ill. App. 3d 744, 644 N.E.2d 438 (Ill.App. 1994) (concluding that payment for installation of security lights did not fall within the statutory provision allowing restitution 'for out-of-pocket expenses, damages, losses, or injuries' sustained by victims of a crime"); *State v. Chambers*, 36 Kan. App. 2d 228, 138 P.3d 405 (Kan.App. 2006) (holding that the purchase of a new security system is "tangential costs incurred as a result of a crime," not a cost caused by the crime.) (Quotation

omitted.); *Howell v. Commonwealth*, 652 S.E.2d 107, 109 (Va. 2007) (holding that the cost of a new security system did not fall under restitution statute because the "attenuation is too great"); *see also Myers v. State*, 629 So. 2d 279, 280 (Fla.App. 1993) ("[T]he trial court should not have included the cost of the home lighting and alarm system in the restitution order since there is no significant causal relation between the loss and the offense for which [Myers was] convicted . . . .") (Internal quotation omitted). Furthermore, when restitution for the installation of new security systems is permitted, those states' restitution statutes generally enumerate new security systems as a covered cost or otherwise permit such restitution under "special damages." *See State v. Fries*, 2013 WI App 13, 345 Wis. 2d 845, ¶7, 12 (concluding that the purchase of a new security system was a "special damage" under restitution statute where "special damages" were defined as "[a]ny readily ascertainable pecuniary expenditure paid out because of the crime."); *People v. Douglass*, Cal. App. No. C065820, 2011 Cal. App. Unpub. LEXIS 2741, *14 (Apr. 14, 2011) (holding that the installation of new alarm system is specifically covered under restitution statute); *People v. Burkhardt*, Mich. App. No. 255396, 2005 Mich. App. LEXIS 2261, at *7 (Mich.App. Sept. 20, 2005) (concluding purchase of new security system "qualifies as a cost for a device reasonably expected to be incurred relating to the victims' psychological care" where restitution statute allowed court to order defendant to "pay [for] devices actually incurred and reasonably expected to be incurred relating to physical and psychological care."). Accordingly, there is an emerging consensus from other states that supports our view that installation of a security system is not covered

under Ohio's restitution statute unless the state can show how such an expense fits into an enumerated category.

**{¶23}** In response, the state has directed our attention to only three cases that conclude that the money spent on new home security systems are the proximate result of the offender's conduct. *In re Miranda M.*, Ariz. App. No. 2 CA-JV 2010-0129, 2011 Ariz. App. Unpub. LEXIS 479 (Mar. 30, 2011); *In re Breanna G.*, Ariz. App. No. 2 CA-JV 2010-0148, 2011 Ariz. App. Unpub. LEXIS 443 (Mar. 30, 2011); *In re Joe D.*, Cal. App. No. F040695, 2003 Cal. App. Unpub. LEXIS 4284 (Apr. 29, 2003). In *Miranda M.* and *Breanna G.*, the court relied upon the following definition of an economic loss: "'Economic loss' means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages." A.R.S. § 13-105(16); *In re Breanna G.*, at ¶4; *In re Miranda M.*, at ¶9. In both *In re Miranda M.* and *In re Breanna G.*, the Arizona courts of appeals found that ordering restitution for the purchase of a security system was not a consequential damage, because it was analogous to a previously upheld restitution award for a victim's moving expenses to get away from the defendant. *In re Miranda M.*, at ¶11, 15 citing *State v. Brady*, 169 Ariz. 447, 819 P.2d 1033 (Ariz.App. 1991); *In re Breanna G.*, at ¶5-6, citing *State v. Brady*, 169 Ariz. 447, 819 P.2d 1033 (Ariz.App.1991). In *Brady*, the Arizona appeals court upheld the restitution award there, because it analogized moving expenses to a previously upheld restitution award for mental health counseling expenses. *Brady*, 169 Ariz. at 448.

**{¶24}** Finally, the state cites *In re Joe D.*, Cal. App. No. F040695, 2003 Cal. App. Unpub. LEXIS 4284 (Apr. 29, 2003). There, a California court of appeals had to interpret whether the purchase of a new security system was a covered expense under a restitution statute that stated "[a] restitution order * * * shall be of a dollar amount sufficient to fully reimburse the victim or victims for all determined economic losses incurred as the result of the minor's conduct * * * including all of the following: (1) Full or partial payment for the value of stolen or damaged property. * * * (2) Medical expenses. (3) Wages or profits lost due to injury incurred by the victim * * *. (4) Wages or profits lost by the victim." Cal Wel & Inst Code § 730.6(h) (2014); *In re Joe D.*, at *4-5. The California court of appeals interpreted the list following the word including after the phrase "all determined economic losses incurred as a result of the minor's conduct" to indicate that "the Legislature's intention not to limit the court to the kinds of losses specified, but to allow the court broad discretion to determine the victim's economic loss." *Id.* at *6. Furthermore, the court relied upon the legislative history of the relevant code section and the proclamation in the 1982 Proposition 8 which stated in pertinent part that "[i]t is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for the losses they suffer . . . ." *Id.* at *7. From that language the court concluded that "[an] interpretation that limits a victim's right to restitution would be contrary to the expressed intent and purposes of Proposition 8" and therefore "the phrase 'economic losses incurred as a result of the minor's conduct' is entitled to expansive interpretation." *Id.* Finally the court

emphasized that the public policy of promoting rehabilitation for the juvenile and deterring unlawful conduct were furthered by upholding the restitution award. *Id.* at *8.

**{¶25}** *In re Joe D.* can be distinguished from this case and the plethora of contrary state authority, as California's legislative history and Proposition 8 appear to make it an outlier. As the state concedes, the definition of economic loss was amended in 2004 to exclude non-economic losses from the definition of economic loss. Thus, contrary to the California restitution statute, our General Assembly has clearly indicated that our restitution awards should be more limited in scope.

**{¶26}** Furthermore, *Lalain* forecloses an expansive interpretation of restitution as seen in the California and Arizona cases. Those out of state cases essentially hold that a victim can recover any foreseeable, reasonable financial expense that the victim makes to ameliorate their nonpecuniary harm. However, if we were to hold that, then financial costs of valuing an item and the financial costs to investigate a theft should also be reimbursed through restitution. After all, it is foreseeable that a victim would incur those expenses as a consequence of the juvenile's conduct. Therefore, because of *Lalain*, we cannot agree with the state.

**{¶27}** The assignment of error is sustained.

**{¶28}** Based on the foregoing, the trial court's order as to payment for the security system is reversed and this matter is remanded for further proceedings.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.