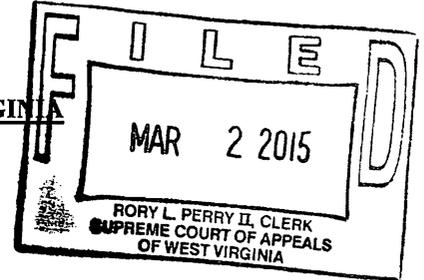


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0950



**TAYLOR R. WASSON, JR.,**  
*Petitioner*

V.)

**STATE OF WEST VIRGINIA,**  
*Respondent*

Appeal from a final order  
of the Circuit Court of Berkeley County  
(13-F-213)

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**Petitioner's Reply Brief**

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## **I PETITIONER'S REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"**

In the State's "Statement of the Case" section of its brief, it states that restitution was "contemplated and agreed to by the parties." (Respondent's Brief p. 2). While restitution was made part of the plea agreement, the Petitioner wants to clarify with this Court that the terms of restitution were never agreed upon by the parties.

Attached to Petitioner's Reply Brief is the signed plea letter wherein it states "The Defendant agrees to pay restitution for any charge listed in the indictments, whether pled to or dismissed." (Attachment A). The State, in its brief, accurately states that it was understood that a hearing would be conducted to determine the amount of restitution. (Respondent's Brief p. 2). At all times, counsel for Mr. Wasson preserved this issue for appeal and argued against restitution being ordered to State Farm Insurance. (A.R. pp. 54-55; 108-109; 115).

## **II PETITIONER'S REPLY TO "AN INSURANCE COMPANY IS A PROPER RECIPIENT OF RESTITUTION UNDER W.VA. CODE § 61-11A-4(e)."**

The State turns to case law from other jurisdictions, specifically the ones cited to in Petitioner's Brief<sup>1</sup>, to assist the Court in examining the issue of whether restitution can be ordered to an insurance company as an indemnitor to a victim of crime. The State argues that the courts in the cases cited did not absolve the defendants of the financial responsibility of their crimes just because the victims had insurance. (Respondent's Brief p. 6). Specifically, the State argues that in the cases cited, "the victim was allowed to receive an order of restitution from the defendant for the full and total amount of damage suffered whether or not insurance compensated the victim for all or part of that loss." (Respondent's Brief p. 6). However, only two

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<sup>1</sup> The cases cited to in the Petitioner Brief were in a footnote under Petitioner's argument that insurers are not victims for purposes of restitution unless they are direct victims of crime. They all support the principle that an insurer is not a victim for purposes of restitution unless the insurer was a direct victim of crime. The primary purpose for which Petitioner cited to other jurisdictions was to illustrate to this Court that, for purposes of restitution, other jurisdictions treat insurance companies differently.

of the six cases in the string cite actually support this proposition; State v. Tuialii, 121 Haw. 135, 214 P.3d 1125 (Ct. App. 2009) and Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999). These cases only deal with restitution payments to victims, not restitution payments to insurance companies. However, they are persuasive when considering their perception of insurance companies for purposes of restitution. Of particular note is the Nevada Supreme Court's reasoning when ruling that restitution is made payable to a victim of crime despite having received insurance proceeds:

“The situation is different regarding an insurance company. When an insurance company pays for a victim's medical expenses, it does so pursuant to a contractual obligation to its insured. *Hewitt v. State*, 113 Nev. 381, 390, 936 P.2d 330, 332 (1997). The insurance company is not a victim as defined in NRS 176.015.(5)(b). *See id.* Further, it does not suffer an unexpected harm or loss, as the very purpose of insurance is to cover such expense. *Id.* Therefore, a sentencing court may not order a defendant to pay restitution to an insurance company for the company's payment of a claim by or on behalf of a crime victim.<sup>3</sup> *ID.* AT 390–91, 936 p.2d at 332. THIS RULING DOES NOT prevent an insurance company that reimbursed a crime victim from seeking subrogation from a criminal defendant, if a statutory or common law right of subrogation exists.<sup>4</sup> *Id.* at 391 n. 3, 936 P.2d at 332 n. 3. A defendant's obligation to pay restitution to the victim may not, of course, be reduced because a victim is reimbursed by insurance proceeds.<sup>5</sup> Thus, restitution of medical expenses, while inappropriate when payment is ordered to be made to an insurer, is not inappropriate when the payment, regardless of reimbursement, is ordered to be made to the victim.”

Martinez v. State, 115 Nev. 9, 12; 974 P.2d 133, 135 (1999). The Nevada Supreme Court uses similar language and policy reasons that support Petitioner's argument that insurance companies are not to receive restitution as an indemnitor. The insurance proceeds paid to a victim are pursuant to a contractual obligation. The payment is not unexpected as it is the very reason insurance companies are in business.

One of the primary goals for an insurance company is to maintain profitability. They utilize complex formulas in determining insurance premiums, what is covered in a particular

insurance product, and how much is covered. Premiums paid for their insurance product, along with its subrogation rights, helps ensure that profitability.

The State argues that West Virginia's statutory scheme could operate in similar fashion but for the provision which prohibits restitution to a victim in the amount the victim has received compensation from a third party. (Respondent's Brief p. 6). The primary purpose of the Victim Protection Act of 1984 (hereinafter the "Act") is to protect and compensate victims of crime, yet there is a provision limiting the amount of restitution payable to a victim of crime to the actual amount lost. W.Va. Code § 61-11A-1 (2015). Why, then, would the legislature allow a third party to receive more than what was paid to compensate the victim? As previously argued by the Petitioner, an insurance company is a for-profit business that receives insurance premiums for its insurance product. An insurance company will receive more than what was paid to an insured because the insurance company not only receives premiums paid by the insured, but will also receive restitution from the defendant.

Here, no accounting was done to determine how much was paid in insurance premiums to State Farm compared to the actual amount of insurance proceeds State Farm paid to the Boyntons. The primary purpose of the Act is to protect and make whole victims of crime. W.Va. Code § 61-11A-1 (2015). Allowing an indemnitor to profit, by virtue of the Act through a criminal prosecution, runs contrary to legislative intent.

The State further argues that the Petitioner neglected the rehabilitative aspect of restitution and that a defendant will not be "forced to face the full and actual consequences of his criminal activity" if an insurance company is not ordered restitution as an indemnitor. (Respondent's Brief p. 7). However, the State fails to recognize the subrogation rights an insurance company has against the defendant. Subrogation allows the insurance company to

stand in the shoes of the injured insured and prosecute a civil claim against the tortfeasor, or in this instance, a criminal defendant. The defendant is not off the hook because the victim has insurance. The defendant will be required to face the full and actual consequence of his criminal activity and pay the total damage caused by his criminal activity. The primary difference between the procedural mechanisms by which an insurance company receives payment from a defendant is whether he can lose his freedom for failure to pay the subrogatable amount to the insurance company. Potential incarceration for failure to pay an insurance company is fundamentally unfair due to the special, contractual relationship insurers have with their insured.

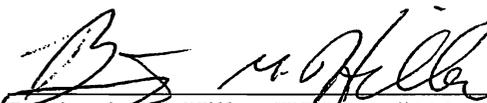
Prohibiting an insurance company from being a third party under the Act does not frustrate the legislative intent of the Act and does not relieve the defendant of the burden of facing the full financial consequences of his criminal activity.

### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the order of restitution to State Farm Insurance be reversed.

Respectfully Submitted,

Taylor Wasson  
By Counsel

  
Benjamin M. Hiller (WV Bar #12254)  
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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V.)

**STATE OF WEST VIRGINIA,**  
*Respondent*

Appeal from a final order  
of the Circuit Court of Berkeley County  
(13-F-213)

**VERIFICATION**

Benjamin M. Hiller, Esq., counsel for petitioner, being duly sworn, affirmatively swears that the contents of the attachment to Petitioner's Reply Brief are a true and accurate representation of what was filed in the court below.

  
\_\_\_\_\_  
Benjamin M. Hiller, Esq.

# ATTACHMENT A

Pamela Jean Games-Neely  
*Prosecuting Attorney*

Christopher C. Quasebarth  
*Chief Deputy Prosecuting Attorney*

Heather Deeds  
*Victims Advocate*

*Berkeley County*



*Office of the Prosecuting Attorney*

380 W South St, Suite 1100  
Martinsburg, WV 25401

phone (304) 264-1971  
fax (304) 263-6092

COPY

December 12, 2013

Thomas Stanley  
Public Defender Corporation  
295 Monroe St  
Martinsburg, WV 25404

*State of West Virginia v. Taylor R. Wasson, Jr.*  
*Berkeley County Circuit Court Cases 13-F-213, 215, 216*

Dear Mr Stanley

The State extends the following offer to resolve this matter. This offer expires at  
**5:00 p.m. on Tuesday, December 17, 2013**

- 1 The Defendant will plead guilty to the following counts
  - a 13-F-213 Count One Burglary
  - b 13-F-215 Count One Gross Child Neglect Creating Risk of Serious Bodily Injury
  - c 13-F-216 Count One Robbery in the First Degree
- 2 In exchange for the Defendant's pleas, the State agrees to dismiss the remaining counts of 13-F-213
- 3 In further exchange for his pleas, the State agrees not to file a recidivist action against the Defendant to enhance a sentence in these cases pursuant to W Va Code §61-11-18
- 4 The Defendant agrees to pay restitution for any charge listed in the indictments, whether pled to or dismissed

5 In exchange for his pleas the State agrees to *recommend* the following sentences

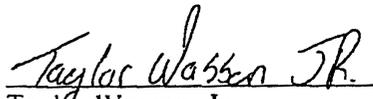
a	13-F-213	Count One	Burglary	1-15 years
b	13-F-215	Count One	Gross Child Neglect	1-5 years
c	13-F-216	Count One	Robbery in the First Degree	20 years

6 The State will further recommend that the Defendant be ordered to serve 10 years of supervised release pursuant to W Va Code §62-12-26. Supervised release is mandatory based upon his conviction of Count One in case no 13-F-215

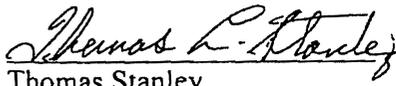
Sincerely,

  
Gregory K. Jones  
Assistant Prosecuting Attorney

After having consulted with my attorney I fully understand the terms of the agreement, and I hereby accept this agreement as proposed by the State

  
Taylor Wasson, Jr

12/13/13  
Date

  
Thomas Stanley  
Counsel for Defendant

12/13/13  
Date

IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA

State of West Virginia

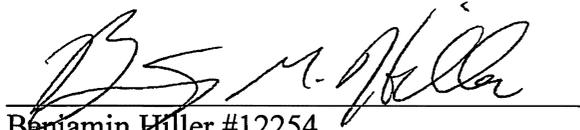
v.

Taylor R. Wasson  
Petitioner/Defendant.

Docket No. 14-0950  
Criminal Case Below: 13-F-213  
Berkeley County Circuit Court  
Judge Silver, Div. III

CERTIFICATE OF SERVICE

I, Benjamin Hiller, Public Defender Corporation, hereby certify that I have caused a copy of the attached **Petitioner's Reply Brief** with its associated documents to be delivered to the office of the Clerk of the Berkeley County Circuit Court, the Berkeley County Prosecuting Attorney, at 380 W. South Street, Martinsburg, West Virginia 25401 on this 27 day of February 2015.



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