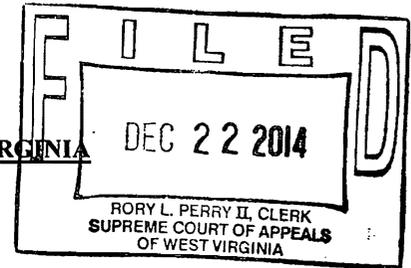


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 Brief**

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**Counsel for Petitioner,**

Benjamin M. Hiller (WV Bar #12254)  
Public Defender Corporation, 23<sup>rd</sup> Judicial Circuit  
295 Monroe Street  
Martinsburg, WV 25404  
PH: (304) 263-8909  
FX: (304) 267-0418  
benjamin.m.hiller@gmail.com

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**ASSIGNMENT OF ERROR**

- I. THE CIRCUIT COURT ERRED WHEN IT ORDERED THE PETITIONER TO PAY RESTITUTION TO STATE FARM INSURANCE COMPANY.**

## STATEMENT OF THE CASE

On January 16, 2014, Taylor R. Wasson (hereinafter “Petitioner”) pleaded guilty to one (1) count of burglary in violation of West Virginia Code § 61-3-11(a) as charged in Berkeley County case number 13-F-213. (A.R. pp. 6-8). On March 17, 2014, the Petitioner was sentenced to an indeterminate sentence of one to fifteen (1-15) years to be served in a state penitentiary. (A.R. pp. 9-12). At sentencing, the circuit court scheduled a restitution hearing to be held on April 28, 2014. (A.R. p. 11). Prior to the restitution hearing, the State filed a motion requesting that the circuit court order the Petitioner to pay \$5,739.80 to Samuel and Betty Boynton (hereinafter “the Boyntons) and \$5,478.93 to State Farm Insurance Company (hereinafter “State Farm”). (A.R. p. 13-14).

The restitution hearing was eventually held on June 3, 2014, wherein evidence was introduced to determine the value of lost property. (A.R. pp. 59-110). Through testimony and State’s exhibits, it was determined that the Boyntons filed a claim with their insurance company, State Farm. (A.R. p. 76). The total dollar amount of the claim filed by the Boyntons was \$12,404.95; however, the amount of the claim was reduced to \$11,218.73 due to depreciation. (A.R. p. 48). Pursuant to the insurance contract the Boyntons had with State Farm, they received a \$5,478.93 settlement. Id. That left the Boyntons \$5,739.80 short of being made whole. The Petitioner did not contest the \$5,739.80 restitution the State sought for the Boyntons, but argued that the \$5,478.93 restitution the State was seeking for State Farm was improper. (A.R. pp. 115-116). The circuit court reserved ruling and had counsel submit proposed orders with findings of fact and conclusions of law. (A.R. pp. 116-117). The circuit court adopted the State’s proposed order which required the Petitioner to pay \$5,478.93 in restitution to State Farm. (A.R. pp. 40-45).

This is an appeal from the final order entered by the Berkeley County Circuit Court on August 25, 2014, that orders the Petitioner to pay State Farm \$5,478.93 in restitution.

### **SUMMARY OF ARGUMENT**

The circuit court erred when it ordered the Petitioner to pay restitution to State Farm because State Farm is not a victim under the Victim Protection Act of 1984 (hereinafter “Act”) because it was not a direct victim of Petitioner’s conduct. This Court has ruled that the victims contemplated by the Act are those that are directly affected by the criminal conduct at issue. Previous case law establishes that an insurance company may collect restitution from a criminal defendant when the insurance company is a direct victim of the criminal defendant’s conduct. Here, State Farm was not the direct victim of Petitioner’s conduct. State Farm simply paid a settlement pursuant to an insurance contract.

The Act permits the circuit court, in the interest of justice, to order restitution to a “person” that has compensated the victim. An insurance company may be considered a person when using the West Virginia Rules of Statutory Construction to interpret a statute. However, any and all interests of justice are violated if an insurance company is considered a person under the Act because of the inherent nature of the business dealings that an insurance company engages in. Furthermore, the legislative intent and clear purpose of the Act was to protect and compensate individuals that are directly harmed by the criminal acts at issue and not society as a whole.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner affirmatively states that the issue raised in the assignment of error is an issue of fundamental public importance and an issue of first impression in the State of West Virginia and

may be selected for oral argument pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure.

### **STANDARD OF REVIEW**

“The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant’s sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.”

Syl. Pt. 1 State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997).

“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.”

Syl. Pt. 1 Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

### **ARGUMENT**

#### **I. THE CIRCUIT COURT ERRED WHEN IT ORDERED THE PETITIONER TO PAY RESTITUTION TO STATE FARM INSURANCE COMPANY.**

The Petitioner challenges the circuit court order that requires him to pay restitution to State Farm on two grounds. First, under the facts of this case, State Farm is not a victim under the Act for which restitution can be ordered. Second, the interests of justice preclude State Farm from being considered a person under the Act that collects restitution as a third-party payor.

The Victim Protection Act of 1984 states that courts shall, when sentencing a defendant convicted of a crime that causes psychological, economic, or physical injury or loss to a victim, order the defendant to pay restitution to that victim. W.Va. Code § 61-11A-4(a) (2006). The Act prohibits courts from ordering restitution for an amount that the victim received compensation. W.Va. Code § 61-11A-4(e) (2006). The court may, however, “*in the interest of justice*, order restitution to any person who has compensated the victim for loss to the extent that the person paid the compensation.” Id. emphasis added.

The Act does not define “victim,” nor does it define “person” as those terms are used in W.Va. Code § 61-11A-4. However, recent case law from this Court and from other jurisdictions, along with sound statutory construction, shed insight on how these terms are to be construed with regards to restitution.

**a. STATE FARM INSURANCE COMPANY IS NOT CONSIDERED A VICTIM UNDER THE VICTIM PROTECTION ACT OF 1984.**

The order of restitution to State Farm was improper because State Farm is not a direct victim of the Petitioner’s criminal conduct. The relevant portion of the Act reads as follows:

“(a) The court, when sentencing a defendant convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim, shall order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense, unless the court finds restitution to be wholly or partially impractical as set forth in this article.”

W.Va. Code § 61-11A-4(a). (2006).

The Act does not explicitly define victim, but this Court addressed the issue of who is a victim entitled to restitution under the Act in State v. McGill, 230 W.Va. 85, 736 S.E.2d 85 (2012) and State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). These cases establish that an insurance company may receive restitution, but only when it is the direct victim of the criminal act under consideration. State v. McGill, 230 W.Va. at 90, 736 S.E.2d at 90; State v. Lucas, 201 W.Va. at 286-87, 496 S.E.2d at 236-37.

An insurance company may be considered a direct victim when the criminal defendant intends to and does obtain money or other benefit from the insurance company through his criminal conduct. State v. Lucas, 201 W.Va. at 287, 496 S.E.2d at 236. In Lucas, the defendant committed arson on his grocery store. Id. 201 W.Va. at 275, 496 S.E.2d at 225 . The defendant was paid \$1,430,000 in fire insurance proceeds. Id. The defendant netted \$200,000 of the insurance proceeds while the rest went to satisfy his outstanding debts. Id. The defendant was

ordered to pay restitution to the insurance company. Id. The defendant argued that the insurance company was not a victim. Id. 201 W.Va. at 286-87, 496 S.E.2d at 236-37. The Court disagreed and upheld the restitution order. Id. The Court reasoned that the defendant intended to and did obtain money from the insurance company through his criminal act of arson because the defendant received a net amount of proceeds and a discharge of debts. Id. Therefore, the Court held, when an insurance company is the *direct victim* of the criminal conduct at issue, then it is eligible for restitution under the Act. Id.

In State v. McGill, this Court was called upon to determine the propriety of restitution ordered to the State for expenses the State incurred in apprehending an individual who had escaped from State custody. State v. McGill, 230 W.Va. at 86, 736 S.E.2d at 86. In its decision, the Court noted that when the Act was applied in other types of situations, the Court had found that the “intended beneficiaries of restitution ordered pursuant to the Act are the *direct victims* of the criminal act under consideration.” Id. 230 W.Va. at 90, 736 S.E.2d at 90. emphasis added. The Court was unwilling to expand the scope of statutorily-defined restitution and held that restitution for the expenses incurred by governmental agencies in apprehending the criminal defendant was improper. Id. 230 W.Va. at 91, 736 S.E.2d at 91.

Limiting restitution to insurance companies to only when they are the direct victims of the criminal conduct at issue is consistent with case law in other jurisdictions.<sup>1</sup> These

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<sup>1</sup> Petitioner has found that California, Hawaii, Kentucky, Nevada, North Carolina, Tennessee, and Vermont prohibit insurance companies from collecting restitution unless they are a direct victim of a defendant’s criminal conduct. People v. O’Casey, 106 Cal. Rptr.2d 263 (Cal Ct. App. 2001); State v. Afa Tuialii, 214 P.3d 1125 (Haw. Ct. App. 2009); Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky. Ct. App. 1985); Martinez v. State, 974 P.2d 113 (Nev. 1999); State v. Stanley, 339 S.E.2d 668 (N.C. Ct. App. 1986); State v. Alford, 970 S.W.2d 944 (Tenn. 1998); State v. Webb, 559 A.2d 658 (Vt. 1989). Iowa’s restitution statute specifically precludes insurance companies from collecting restitution as a victim and removes any right of subrogation from the insurance company. Iowa Code § 910.1-1(5).

jurisdictions refused to consider an insurance company as a victim when the insurance company, pursuant to an insurance contract, reimbursed the direct victim of the criminal conduct at issue.<sup>2</sup>

Here, the Petitioner burgled a home that was covered by an insurance contract with State Farm. The direct victims of the burglary, the Boyntons, filed a claim with State Farm for personal property that was covered by the insurance contract. State Farm paid a settlement to the Boyntons as agreed to and pursuant to the insurance contract. The Petitioner did not intend to, nor did he obtain, any monies, property, or other benefit from State Farm by virtue of his criminal conduct. The Petitioner did not engage in criminal conduct that would make State Farm a direct victim of his criminal conduct. Therefore, any and all restitution ordered to State Farm by virtue of State Farm being a victim is improper because State Farm was not the direct victim of Petitioner's criminal conduct.

The legislative findings behind the Act further establish that insurance companies that compensate the victim pursuant to an insurance contract should not be considered a victim under the Act.

**b. THE LEGISLATIVE INTENT BEHIND THE VICTIM PROTECTION ACT OF 1984 ESTABLISHES THAT IT IS DIRECT VICTIMS WHO ARE THE INTENDED BENEFICIARIES.**

The legislature codified the legislative findings and purpose behind the Act which provides guidance on how the statute is to be construed. The findings and purpose are:

“(a) The legislature finds and declares that without the cooperation of victims and witnesses, the criminal justice system would cease to function, yet too often these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

The legislature finds further that all too often the victim of a serious crime is forced to suffer physical, psychological or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system not totally responsive to the needs of such victims.

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<sup>2</sup> Id.

The legislature finds further that under the current law, law-enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated.

The legislature finds further that while the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted or a court date is changed.

The legislature finds further that the victim or witness who cooperates with the prosecutor often finds that the transportation, parking facilities and child care services at the court are unsatisfactory and they must often share the pretrial waiting room with the defendant or his family and friends.

The legislature finds further that the victim may lose valuable property to a criminal only to lose it again for long periods of time to law-enforcement officials, until the trial and appeals are over; many times the property is damaged or lost, which is particularly stressful for the elderly or poor.

(b) The legislature declares that the purposes of this article are to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process and to ensure that the state and local governments do all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.”

W.Va. Code § 61-11A-1 (2006).

Nowhere in the legislative findings does it mention a concern for society as a whole or concern for insurance companies that pay a victim for loss due to a crime. The legislature makes clear that the purpose and focus of the Act is to protect and make whole victims of crime.

Here, State Farm paid the Boyntons, pursuant to an insurance contract, half of their claimed losses. Petitioner was ordered to pay to the Boyntons the remainder balance in order to make them whole. The Boyntons, therefore, will be made whole pursuant to the restitution order entered against the defendant. The legislative purpose and findings behind the Act have been fulfilled and will not be frustrated by precluding State Farm from collecting restitution as a third-party payor. Allowing State Farm to rise to the status of victim under the Act essentially bootstraps a civil subrogation claim into a criminal restitution order. The legislature did not

expressly allow for such consideration and instead focused on the true purpose of the Act, the actual, direct victims of the criminal conduct at issue.

The State may argue that State Farm can recover restitution from Petitioner because State Farm was a “person” that compensated the victims pursuant to W.Va. Code § 61-11A-4(e). Proper statutory construction and sound public policy demonstrate that an insurance company that compensates a victim of a crime pursuant to an insurance contract should not be considered a “person” under W.Va. Code § 61-11A-4(e).

**c. STATUTORY CONSTRUCTION PRECLUDES STATE FARM FROM BEING CONSIDERED A “PERSON” THAT COMPENSATED THE VICTIM.**

The Act states that:

“(e) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court *may, in the interest of justice*, order restitution to any person who has compensated the victim for loss to the extent that the person paid the compensation.”

W.Va. Code § 61-11A-4(e) (2006). emphasis added.

The Act does not expressly define who may be considered a “person” or what constitutes the “interest of justice” that permits a sentencing court to order restitution to a “person” who compensated the victim. W.Va. Code § 61-11A-4(e) (2006). The West Virginia Rules for Construction of Statutes states that “[t]he word ‘person’ or ‘whoever’ shall include corporations, societies, associations and partnerships, if not restricted by the context.” W.Va. Code § 2-2-10(i). At first blush, it appears that an insurance company can be considered a person when construing the Act using West Virginia’s general rules of statutory construction; however, there are two qualifying phrases in both of the previously cited statutes that tend to narrow, rather than broaden, who may be considered a person under W.Va. Code § 61-11A-4.

The first qualifying phrase is found under W.Va. Code § 2-2-10(i); the term person will not include corporations, societies, associations, or partnerships if it is restricted by the *context* of the statute. Therefore, the words and phrases surrounding the term “person” must be examined to give full effect and meaning to that term. Looking at the context of the term “person” leads the analysis to the second qualifying phrase which is found in W.Va. Code § 61-11A-4(e); it states that when a court orders restitution to a person who compensated the victim it is to be *in the interest of justice*. Black’s Law Dictionary defines interest as “[t]he object of any human desire” and justice as “[t]he fair and proper administration of laws.” Black’s Law Dictionary (3<sup>rd</sup> edition 1996). Therefore, it can be said that “interest of justice” is a generic phrase that generally refers to fairness and equity when a judge has discretion in making a decision in a particular situation. There is a number of reasons why it is inherently unfair and contrary to the interest of justice to permit an insurance company to collect restitution from an indigent defendant when the insurance company’s only involvement in a criminal case is a settlement paid to a victim-claimant pursuant to an insurance contract.

First, insurance companies are for-profit businesses that assess and assume risk pursuant to the insurance contract. The risk analysis is performed prior to the insurance company offering the insurance contract to potential customers. Insurance companies use actuarial tables and complex formulas that include several variables to determine what a policy will cover, how much loss will be covered, and the premiums the insured will pay. Depending on the insurance product, variables used may include, but are not limited to, where the insured lives, the criminal activity where the insured lives, the value of the property insured, and the age and sex of the insured. Insurance contracts typically cover theft up to a certain sum. The losses paid pursuant to an insurance contract for theft from criminal activity is not an unexpected cost for insurance

companies; rather, it is fully expected with provisions made to ensure profitability. The insurance company does not reimburse an insured out of the kindness of its heart, but rather it is pursuant to a contractual obligation that was carefully calculated prior to entering into the contractual agreement. Ordering restitution to an insurance company because it paid a settlement pursuant to an insurance contract allows the insurance company to receive a double windfall from an indigent defendant because it has received premiums from the insured and monies paid pursuant to the insurance contract.

Second, insurance companies are fully protected by a civil subrogation claim. Subrogation allows the insurance company to file a civil suit against a party or a party's insurance company to receive a judgment for claims paid to an insured as a result of the party's tortious or criminal conduct. Insurance companies have legal departments that specifically handle such claims.

Third, an order of restitution shall be made a term of probation or parole. W.Va. Code § 61-11A-4(g) (2006). The failure to pay restitution could result in the imprisonment of the parolee or probationer. A good faith effort to pay restitution may prevent a parole or probation revocation, however, such good faith effort is subjective and open to wide interpretation. This Court has held that probation cannot be revoked for failure to pay restitution unless the failure to pay restitution is contumacious. State v. Minor, 176 W.Va. 92 at 94, 341 S.E.2d 838 at 840. A circuit court hearing a petition for probation revocation may have a different contumacious standard than another circuit court; the same can be said for a parole board hearing a petition to revoke parole. The standard must necessarily be applied on a case by case basis and applied to the pertinent facts of each case. However, with discretion and subjectivity, there is an inevitable disparate treatment of criminal defendants. This is particularly true when considering the varying

financial resources of similarly situated defendants. A defendant with sufficient financial resources to pay restitution will avoid having to go before the court and have his efforts to pay restitution questioned. The indigent, however, almost always must go before the court and demonstrate why restitution cannot be paid. What are essentially being created are debtor's prisons for indigent defendants and the possibility of *any* defendant's imprisonment for failure to pay restitution to insurance companies for settlements paid pursuant to an insurance contract is fundamentally unfair.

Here, the State may argue that the statute specifically permits insurance companies to receive restitution as a third-party payor because insurance companies are the typical entities that reimburse victims. However, this argument ignores the many situations where a victim could be reimbursed by neighbors, friends, family, charities, service providers, churches, or the many other entities that could help a victim of a crime. Furthermore, this argument ignores the fact that under the statute, the interest of justice must be served when ordering restitution to a person who has compensated the victim.

Therefore, it is not in the interest of justice and is inherently unfair to order an indigent defendant to pay restitution to an insurance contract for a settlement paid pursuant to an insurance contract because the insurance company assesses and assumes risk and has an appropriate and adequate remedy through a civil subrogation claim. Therefore, Petitioner respectfully requests this Court to reverse the restitution order as it relates to State Farm.

### **CONCLUSION**

Permitting insurance companies to collect restitution for settlements paid pursuant to an insurance contract goes beyond the intended scope of the Act and is contrary to the interest of

justice. Therefore, Petitioner respectfully requests that the restitution order as it pertains to State Farm be reversed.

Respectfully Submitted,

Taylor R. Wasson, Jr.,  
By Counsel,



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Benjamin M. Hiller  
PDC 23<sup>rd</sup> Judicial Circuit  
295 Monroe Street  
Martinsburg, WV 25401  
PH: 304-263-8909  
FX: 304-267-0418

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V.)

**STATE OF WEST VIRGINIA,**  
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Appeal from a final order  
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(13-F-213)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of December, 2014, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Cheryl Saville  
Assistant Prosecuting Attorney  
380 West S. Street  
Martinsburg, WV 25401



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Benjamin M. Hiller  
PDC 23<sup>rd</sup> Judicial Circuit  
295 Monroe Street  
Martinsburg, WV 25401  
PH: 304-263-8909  
FX: 304-267-0418