

\* Pass Appeal

STATE OF MICHIGAN  
IN THE SUPREME COURT

**People of the State of Michigan,**  
Plaintiff-Appellant,

vs.

**Chad James Garrison,**  
Defendant-Appellee.

Supreme Court  
No.

OK 12-20-12

Court of Appeals  
No. 307102

Cheboygan County  
53rd Circuit Court  
No. 11-4309-FC

OK /

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**PLAINTIFF-APPELLANT'S APPLICATION  
FOR LEAVE TO APPEAL**

FILED

FEB 4 2013

GOVERNOR DAVID  
GRAY  
MICHIGAN SUPREME COURT

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## **STATEMENT OF JUDGMENT APPEALED AND RELIEF SOUGHT**

The People seek leave to appeal from the December 20, 2012 opinion of the Court of Appeals (Attachment A) reversing the Trial Court and remanding to that Court for a “redetermination of restitution” of mileage for the victims.

The People request:

1. Leave to appeal to fully brief and argue the issue presented, or
2. In the alternative, an order of peremptory reversal of the Court of Appeals for the reasons set forth in the opinion of Judge Meter (concurring in part and dissenting in part).

**STATEMENT OF QUESTION INVOLVED**

**Question**

*Are the victims of Defendant's criminal conduct constitutionally and statutorily entitled to restitution that includes mileage to secure their damaged property and to testify at the restitution hearing?*

The Court of Appeals answered: **NO**

Plaintiff-Appellant contends the answer is: **YES**

Defendant-Appellee will contend the answer should be: **NO**

## STATEMENT OF FACTS

On January 3, 2011, Defendant entered into a plea agreement in which he agreed to plead guilty to one count of larceny \$1,000 - \$20,000 and to being a habitual offender 2<sup>nd</sup>. He also agreed to pay restitution "AMOUNT TBD". On February 15, 2011, Defendant was sentenced from 28 months to 7-1/2 years in prison. In addition, he was ordered to pay \$11,134.84 restitution based on the claims filed by three victims: Frederick Mikolon, \$5,926.50; Neil Casaceli, \$639.83; and, Auto-Owners Insurance, \$4,568.51. Defendant noted his objection to the restitution amount (Transcript of February 15, 2011 Sentencing – ST – p. 10), and the Trial Court gave him 30 days to file a motion for a restitution hearing. (ST, pp. 9-10).

A restitution hearing was held March 29, 2011. (Attachment B). Michael Mikolon – son of Frederick Mikolon – testified about property damages he suffered totaling \$2,173.00. (Transcript of March 29, 2011 Restitution Hearing – RT – pp. 6-8). He also testified about mileage expenses of \$175.00 (350 miles @ .50 cents per mile) incurred to secure the property and to testify at the restitution hearing. His total claim was for \$2,348.00. (RT, pp. 8-9). The Trial Court awarded him \$2,200.00 "for the damage done", without further explanation. (RT, p. 33). Given the testimony regarding property damage of \$2,173.00, the Trial Court's award of \$2,200.00 included only \$27.00 for mileage, i.e.,  $\$2,200.00 - \$2,173.00 = \$27.00$ .

Frederick Mikolon testified about property damages he suffered, including mileage incurred to secure the property and to testify at the restitution hearing, totaling \$3,683.50. (RT, pp. 11-17). His total damages included \$210.00 for mileage (420 miles @ .50 cents per mile) (RT, pp. 16-17). The Trial Court awarded Frederick Mikolon \$3,200.00. (RT, p. 33). Other than the Triton trailer, the Trial Court "accept[ed] the rest of [Frederick Mikolon's] figures." (RT, p. 33), including \$210.00 for mileage.

Neil Casaceli testified about property damages he suffered totaling \$150.00 plus a \$100.00 insurance deductible. (RT, pp. 21-24). He also testified about mileage expenses of \$740.00 (1,480 miles @ .50 cents per mile) incurred to secure the property and to testify at the restitution hearing. (RT, pp. 22-23). His total claim was for \$990.00. (RT, pp. 23-24). The Trial Court awarded him \$990.00. (RT, pp. 32-33).

At the conclusion of the restitution hearing, the Trial Court awarded total restitution of \$10,957.00 which included insurance company claims of \$4,567.00. (RT, p. 33).

The Court of Appeals granted Defendant leave to appeal to contest the amount of restitution awarded by the Trial Court to the victims for mileage and to Frederick Mikolon for the Triton trailer. In a 2-1 decision, the Court of Appeals affirmed the Trial Court's restitution award to Frederick Mikolon for the Triton trailer.<sup>1</sup> The Court of Appeals also held that the Trial Court "abused its discretion in ordering defendant to pay for travel expenses", reversed that portion of the Trial Court's decision, and remanded to the Trial Court for a "redetermination of restitution". *People v Garrison*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2012 (Docket No. 307102).

The People timely sought leave to appeal to this Court.

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<sup>1</sup> Defendant has not sought leave to appeal that portion of the Court of Appeals opinion.



## ARGUMENT

### I. INTRODUCTION

#### A. Standard of Review

“Trial courts do not have discretion to order a convicted defendant to pay restitution; they must order the defendant to pay restitution and the amount must fully compensate the defendant’s victims. See *People v Gahan*, 456 Mich 264, 270 n 6; 571 NW2d 503 (1997). [Footnote omitted] Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes. *People v Bemmer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). However, this Court reviews the findings underlying a trial court’s restitution order for clear error. MCR 2.613(C). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *People v Atkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).”

*People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012).

#### B. Constitutional and Statutory Bases for Restitution

Article 1, §24 of the Michigan Constitution provides that “[c]rime victims ... shall have the following rights, as provided by law: ... *The right to attend* trial and *all other court proceedings* the accused has the right to attend... The right to make a statement to the court at sentencing. *The right to restitution...*” (Emphasis added).

The Crime Victim’s Rights Act, MCL 780.751, *et seq.*, directs that “when sentencing a defendant convicted of a crime, *the court shall order...* that the defendant make *full restitution* to any victim of the defendant’s course of conduct that gives rise to the conviction”. MCL 780.766(2). (Emphasis added).

Likewise, the Code of Criminal Procedure, MCL 769.1, *et seq.*, requires that “when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, *the court shall order...* that the defendant make *full restitution* to any victim of the defendant’s course of conduct that gives rise to the conviction”. MCL 769.1a(2). (Emphasis added).

### **C. Trial Court Proceedings**

After a restitution hearing, the Trial Court awarded total restitution of \$10,957.00 which included \$977.00 to all three victims for mileage incurred to secure their damaged property and to testify at the restitution hearing.

\$740.00	Restitution awarded to Neil Casaceli for mileage (\$740.00 requested)
210.00	Restitution awarded to Frederick Mikolon for mileage (\$210.00 requested)
<u>27.00</u>	Restitution awarded to Michael Mikolon for mileage (\$175.00 requested <sup>2</sup> )
\$977.00	Total restitution for mileage

The Trial Court determined that restitution for the victims' mileage incurred securing their damaged properties and testifying at the restitution hearing was a "proper ... type of restitution". As the Trial Court noted:

"I think the mileage is reasonable...it's a direct result of this criminal activity...Somebody breaks into your property, destroys [it]...[A]re you asking citizens that they not come up and inventory what's been stolen from them – and assess the damages? Clearly anyone's going to do that. It's not voluntary...it's a direct result of criminal activity."

"And then they come to court today for this restitution hearing. What else do they do? ... {T]here's a legitimate dispute about the amount of restitution, but if victims have to travel up to court...clearly they would receive mileage. And let's face it: to make a 600-mile round trip and you're going to get paid mileage and that's it? ... [T]hey're not making out a profit here; they're just getting out-of-pocket mileage expenses."

(RT, p. 32).

### **D. Court of Appeals**

In a 2-1 decision, the Court of Appeals held that the Trial Court "abused its discretion in ordering defendant to pay for travel expenses", reversed that portion of the Trial Court's decision, and remanded to that Court for a "redetermination of restitution".

The Court of Appeals majority reasoned that:

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<sup>2</sup> In the Court of Appeals, Defendant erroneously stated that he was ordered to pay \$175.00 to Michael Mikolon for mileage restitution. Defendant-Appellant's Court of Appeals Brief, p. 6.

“Restitution is not a substitute for civil damages, but encompasses only those losses that are easily ascertained and directly result from defendant’s criminal conduct. *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995). A trial court may require a convicted felon to pay costs only if such costs are expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Both MCL 769.1a and the Crime Victim’s Rights Act (CVRA), MCL 780.751 *et seq.*, provide that the sentencing court shall order a defendant to pay restitution in addition to any other penalty authorized by law. See MCL 769.1a; MCL 780.766.

“This Court has previously held that neither MCL 769.1a nor the CVRA, MCL 780.766, authorizes the sentencing court to order a defendant to pay restitution to reimburse the victim for traveling expenses. *People v Jones*, 168 Mich App 191; 423 NW2d 614 (1988). [Footnote omitted]. We agree with the *Jones* court, and do not read either statute to provide a court with the authority to order the defendant to pay such expenses. Therefore, the trial court abused its discretion in ordering defendant to pay for travel expenses. *Allen*, 295 Mich App at 281 n 1.”

*Garrison, supra*, majority slip opinion pp. 2-3.

In dissent, Judge Meter noted that, “[b]ecause *Jones* was decided before November 1, 1990, the prosecution correctly asserts that it is not binding law.”<sup>3</sup> He went on to explain that:

“The purpose of restitution is to make victims whole for the losses they have suffered as a result of a defendant’s criminal course of conduct. MCL 780.766(2); *People v Gahan*, 456 Mich 264, 271-272; 571 NW2d 503 (1997); *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006). In *Gubachy, id.*, this Court stated that ‘the Legislature has clearly manifested an intent to make victims of a crime as whole as they can be fairly made and to leave the determination of how best to do so at the trial court’s discretion . . . .’ The Court concluded that a victim’s labor costs in inventorying and restocking lost merchandise were properly included in a restitution award. *Id.* at 713-714. In reaching this conclusion, the Court indicated that MCL 780.766 provides a non-exhaustive list of remedies. *Id.* at 711-714.

“Especially in light of *Gubachy*, I believe that the designation of victims’ travel expenses as restitution is allowable under MCL 780.766. It serves the intended purpose of making victims as whole as possible. [Footnote omitted].”

*Garrison, supra*, minority slip opinion pp. 1-2.

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<sup>3</sup> “*Precedential Effect of Published Decisions*. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” MCR 7.215(J)(1).

Judge Meter also took issue with the majority's reliance on *People v Slocum*, 213 Mich App 239; 539 NW2d 572 (1995):

“The majority cites *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995), for the proposition that assessed ‘costs’ must be expressly authorized by statute. Even assuming that restitution-based travel expenses are encompassed by the term ‘costs’ as employed in *Slocum*, I find that these expenses are authorized by virtue of MCL 780.766”

*Garrison, supra*, minority slip opinion p. 2, fn. 1.

#### **E. Claim on Appeal**

The People contend that the Trial Court's award of restitution to the three victims for mileage was required by both constitution and statute, and should be reinstated by this Court.

### **II. QUESTION**

**The victims of Defendant's criminal conduct are constitutionally and statutorily entitled to restitution that includes mileage to secure their damaged property and to testify at the restitution hearing**

The Trial Court awarded restitution to all three victims of Defendant's criminal conduct that included \$977.00 for mileage to secure their damaged property and to testify at the restitution hearing. The Court of Appeals reversed that award.

Both MCL 780.766(2) of the Crime Victim's Rights Act and MCL 769.1a(2) of the Code of Criminal Procedure require that a “defendant make *full restitution* to any victim of the defendant's course of conduct that gives rise to the conviction”. (Emphasis added). However, “full restitution” is not defined in the Crime Victim's Rights Act or in the Code of Criminal Procedure. Nevertheless, “full restitution” has been found to include the wages of an insurance company-victim's employee investigating the defendant's insurance fraud, *Allen, supra*, the wages of a contractor-victim's employees inventorying and replacing property lost due to the defendant's conduct, *People v Gubachy*, 272 Mich App 706; 728 NW2d 891 (2006), an embezzlement-victim's loss of

income due to the defendant's embezzlement, *People v Cross*, 281 Mich App 737; 760 NW2d 314 (2008), and a homeowner-victim's temporary rent payments and ambulance expense for a stress-induced heart attack due to the defendant's contractor fraud. *People v Ballard*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket Nos. 298986, 299626) (Attachment C). Also, restitution specifically includes "transportation" services provided by others to a crime victim. MCL 780.766(8).

*People v Jones*, 168 Mich App 191; 423 NW2d 614 (1988), *lv den* 431 Mich 873 (1988), relied on by the Court of Appeals majority and by Defendant, held, with little explanation or analysis, that "\$450 in restitution to reimburse the victim for traveling expenses" was not authorized by statute. However, *Jones* is not binding precedent. MCR 7.215(J)(1). Moreover, *Jones* was decided before the 2005 amendments to the Crime Victim's Rights Act, 2005 PA 184, which made the award of restitution mandatory, not discretionary.

Likewise, the Court of Appeals majority's reliance on *People v Slocum*, 213 Mich App 239; 539 NW2d 572 (1995) is misplaced. In *Slocum*, the Court of Appeals vacated the trial court's order that the defendant pay: (1) \$250 costs for carrying a concealed weapon and (2) his extradition expenses.<sup>4</sup> As to the \$250 costs, the Court of Appeals noted that "[a] trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute. [Citation omitted]." *Slocum, supra*, p. 242. It found no such authorization. *Id.*

Indeed, the costs authorized to be imposed in criminal cases are limited. See, e.g., MCL 769.1j. However, "costs" and "restitution" are neither synonymous nor is one contained within the other. Although it does not define "restitution", the Crime Victim's

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<sup>4</sup> Extradition expenses are now allowed as costs by statute enacted after *Slocum* was decided. MCL 769.1k(2).

Rights Act specifically recognizes that “costs” and “restitution” are distinct items. MCL 780.766a. Accordingly, *Slocum* has no relevance to this case.

MCL 780.767(4) provides that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.”

In this case, the Trial Court determined that restitution for the victims’ mileage incurred securing their damaged properties and testifying at the restitution hearing was a “proper ... type of restitution”. (RT, p. 32).

“In our view, *the Legislature has clearly manifested an intent to make victims of a crime as whole as they can fairly be made* and to leave the determination of how best to do so to the trial court’s discretion on the basis of the evidence presented and subject to the prosecuting attorney’s burden of proving losses attributable to defendant’s crime-related acts. The CVRA was not intended to be narrowly construed merely as a special-purpose replevin action: *the focus is consistently not on what a defendant took, but what a victim lost because of the defendant’s criminal activity*. No other interpretation is consistent with purpose of the act and its specific provisions.” (Emphasis added).

*Gubachy, supra*, p. 713.

The restitution mileage awarded to the victims in this case merely made them “as whole as they [could] fairly be made” by focusing on what they “lost because of the defendant’s criminal activity.” Mileage expenses incurred by a victim to secure property damaged by a defendant’s criminal conduct is no different than wages paid to determine the extent of insurance fraud, *Allen, supra*, wages paid to inventory and replace stolen property, *Gubachy, supra*, or income lost to embezzlement. *Cross, supra*. The mileage expenses never would have been incurred absent Defendant’s criminal conduct.

Likewise, the victims would have had no constitutional right to attend Defendant’s restitution hearing – or the need to do so – absent his criminal conduct. Defendant’s exercise of his right to contest restitution necessitated the victims’

attendance at the restitution hearing. They incurred considerable expense to do so. That expense never would have been incurred absent Defendant's criminal conduct.

Accordingly, the Court of Appeals erred by finding that the Trial Court "abused its discretion in ordering defendant to pay for travel expenses", reversing that portion of the Trial Court's decision, and remanding to the Trial Court for a "redetermination of restitution".

## CONCLUSION

The victims of Defendant's criminal conduct are constitutionally and statutorily entitled to restitution that includes mileage to secure their damaged property and to testify at the restitution hearing. Both the Crime Victim's Rights Act and the Code of Criminal Procedure require that a "defendant make *full restitution* to any victim of the defendant's course of conduct that gives rise to the conviction". "Full restitution" has been found to include the wages of an insurance company-victim's employee investigating the defendant's insurance fraud, the wages of a contractor-victim's employees inventorying and replacing property lost due to the defendant's conduct, an embezzlement-victim's loss of income due to the defendant's embezzlement, and a homeowner-victim's temporary rent payments and ambulance expense for a stress-induced heart attack due to the defendant's contractor fraud. Also, restitution specifically includes "transportation" services provided by others to a crime victim.

The Court of Appeals majority relied on one case that provided little explanation or analysis for its holding, is not binding precedent, and was decided before the 2005 amendments to the Crime Victim's Rights Act which made the award of restitution mandatory, not discretionary. The majority also mistakenly relied on a case that discussed criminal costs, not restitution. Criminal "costs" and "restitution" are neither synonymous nor is one contained within the other. Indeed, the Crime Victim's Rights Act specifically recognizes that "costs" and "restitution" are distinct items.

The restitution mileage awarded to the victims in this case merely made them "as whole as they [could] fairly be made" by focusing on what they "lost because of the defendant's criminal activity." Mileage expenses incurred by the victims to secure their property never would have been incurred absent Defendant's criminal conduct. Likewise, Defendant's exercise of his right to contest restitution necessitated the victims'



attendance at the restitution hearing. They incurred considerable expense to do so. That expense never would have been incurred absent Defendant's criminal conduct.

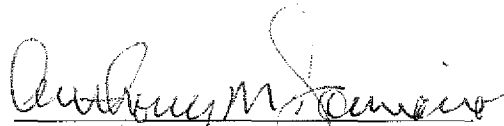
Accordingly, the Court of Appeals erred by finding that the Trial Court "abused its discretion in ordering defendant to pay for travel expenses", reversing that portion of the Trial Court's decision, and remanding to the Trial Court for a "redetermination of restitution".

**RELIEF**

This Court should either:

1. Grant leave to appeal to fully brief and argue the issue presented, or
2. In the alternative, issue an order of preemptory reversal of the Court of Appeals for the reasons set forth in the opinion of Judge Meter (concurring in part and dissenting in part).

DATED: January 31, 2013



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