

2016

## State of Utah, Plaintiff and Appellee, v. Gary W. Nielsen, Defendant and Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

### Recommended Citation

Brief of Appellant, *State of Utah vs. Nielsen*, No. 20160438 (Utah Court of Appeals, 2016).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3346](https://digitalcommons.law.byu.edu/byu_ca3/3346)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**THE UTAH COURT OF APPEALS**

---

STATE OF UTAH,  
*Plaintiff and Appellee,*

v.

GARY W. NIELSEN,  
*Defendant and Appellant.*

---

**BRIEF OF APPELLANT**

---

On appeal from the Third Judicial District Court, Summit County,  
Honorable Paige Petersen, District Court No. 091500159

---

Thomas B. Brunker  
OFFICE OF THE ATTORNEY GENERAL  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
[tbrunker@utah.gov](mailto:tbrunker@utah.gov)  
(801) 244-4636

*Attorneys for Appellee*

Timothy R. Pack (12193)  
CLYDE SNOW & SESSIONS  
201 S. Main St., 13<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
[trp@clydesnow.com](mailto:trp@clydesnow.com)  
(801) 322-2516

*Attorneys for Appellant*

---

Oral Argument Requested

FILED  
UTAH APPELLATE COURTS

AUG 01 2016

**THE UTAH COURT OF APPEALS**

---

STATE OF UTAH,  
*Plaintiff and Appellee,*

v.

GARY W. NIELSEN,  
*Defendant and Appellant.*

---

**BRIEF OF APPELLANT**

---

On appeal from the Third Judicial District Court, Summit County,  
Honorable Paige Petersen, District Court No. 091500159

---

Thomas B. Brunker  
OFFICE OF THE ATTORNEY GENERAL  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
[tbrunker@utah.gov](mailto:tbrunker@utah.gov)  
(801) 244-4636

*Attorneys for Appellee*

Timothy R. Pack (12193)  
CLYDE SNOW & SESSIONS  
201 S. Main St., 13<sup>th</sup> Floor  
Salt Lake City, Utah 84111  
[trp@clydesnow.com](mailto:trp@clydesnow.com)  
(801) 322-2516

*Attorneys for Appellant*

---

Oral Argument Requested

## Table of Contents

Jurisdictional Statement .....	1
Introduction .....	1
Statement of the Issues .....	4
Determinative Provisions .....	4
Statement of the Case .....	5
1. Nature of the Case and Course of Proceedings.....	5
2. Statement of Facts.....	5
Summary of the Argument.....	10
Argument.....	12
1. The Trial Court Has a Non-Discretionary Duty to Determine Complete Restitution and Only Orders of Complete Restitution Can be Entered as Civil Judgments .....	12
2. The Trial Court Erred When it Entered the Civil Judgment Pursuant to Utah R. Crim. P. 30(b).....	13
2.1 Rule 30(b) Purpose and Standards.....	13
2.2 The Failure to Determine Complete Restitution was the Result of Judicial Decision Making and Therefore Not Correctable Under Rule 30(b) .....	14
2.3 There is No Evidence in the Record Indicating That the Trial Court Actually Intended to Make a Determination of Complete Restitution .....	15
2.3.1 Because the Judgment and Commitment and the Modified Restitution Order Are Unambiguous it is Improper to Consider the Trial Court's Intent.....	15

2.3.2	There is No Evidence in the Record Indicating That the Trial Court Actually Intended to Make a Determination of Complete Restitution.....	17
3.	The Trial Court Erred When it Entered the Civil Judgment Because it Never Made a Finding of “Complete Restitution” .....	21
	Conclusion and Relief Requested .....	25

**Addenda**

- A. Excerpts of May 9, 2016 Hearing Transcript (R.289.)
- B. Judgment and Commitment (R.59-60.)
- C. Order Modifying Terms and Conditions of Probation (R.125-126.)
- D. Determinative Provisions.

## Table of Authorities

### Cases

<i>Bishop v. GenTec, Inc.</i> , 2002 UT 36, 48 P.3d 218 .....	13
<i>Lindsay v. Atkin</i> , 680 P.2d 401 (Utah 1984) .....	15
<i>Peterson v. Jackson</i> , 2011 UT App 113, 253 P.3d 1096.....	14
<i>Stanger v. Sentinel Security Life Insurance Co.</i> , 669 P.2d 1201 (Utah 1983) .....	14
<i>State ex rel. C.S.B.</i> , 2000 UT App 362, 17 P.3d 1131.....	15
<i>State v. Barrett</i> , 2004 UT App 239 .....	12, 15, 21, 23
<i>State v. Denney</i> , 776 P.2d 91 (Utah Ct.App.1989).....	16, 17, 25
<i>State v. Garcia</i> , 99 N.M. 466, 659 P.2d 918 (App.1983).....	16, 17
<i>State v. Laycock</i> , 2009 UT 53, 214 P.3d 104 .....	passim
<i>State v. Moya</i> , 815 P.2d 1312 (Utah Ct. App. 1991).....	13
<i>State v. Rodrigues</i> , 2009 UT 62, 218 P.3d 610 .....	passim
<i>United States v. Daugherty</i> , 269 U.S. 360, 46 S.Ct. 156, 70 L.Ed. 309 (1926) .....	16

### Statutes

Section 77-38a-302 .....	12, 14, 24
Section 77-38a-401(1).....	passim
Utah Code Ann. § 77-38a-401 .....	4, 18
Utah Code Ann. § 77-38a-302(5) .....	10, 17, 23
Utah Code Ann. § 77-38a-302(d)(i) .....	2
Utah Code Ann. § 78A-4-103(2)(e).....	1
Utah Code section 78-38a-302(2).....	24
§ 77-38a-302(5)(a)-(b) .....	23

**Rules**

Utah R. App. P. 24(f)(1)..... 27  
Utah R. App. P. 24(f)(1)(B) ..... 27  
Utah R. App. P. 27(b)..... 27  
Utah R. Civ. P. 60(a)..... 13, 15, 16  
Utah R. Crim. P. 30(b)13 ..... passim

## **Jurisdictional Statement**

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

### **Introduction**

In 2010, Mr. Nielsen pled guilty to theft and was ordered to pay restitution. Mr. Nielsen has complied with that order and to date, has paid over \$106,000 in restitution. Under Utah law, a trial court has a nondiscretionary duty to make two restitution determinations: (1) complete restitution; and (2) court-ordered restitution. Complete restitution' means restitution necessary to compensate a victim for all losses caused by the defendant. Court-ordered restitution' means the restitution the court orders the defendant to pay as a part of the criminal sentence. In determining "complete restitution," the trial court is required to review several statutory restitution factors and support its determination with findings of fact. While "complete restitution" cannot be adjusted in any way, "court-ordered" restitution can be adjusted into an installment payment plan to take the defendant's ability to pay into account.

In this case, the trial court did not review the statutory restitution factors, did not make findings of fact to support the restitution order, and even ordered Mr. Nielsen to pay restitution in installments by paying 25% of his income towards restitution. Thus, the trial court clearly entered "court-ordered" restitution and never determined "complete restitution." This distinction is important because only orders of "complete restitution" may be entered on the civil judgment docket. When the trial court ordered "court-ordered" restitution in 2010, Mr. Nielsen rightfully believed and expected that the



restitution amount would never, and could never, be converted into a civil judgment. Indeed, because the trial court never reviewed the restitution factors, never made findings of fact, and never determined complete restitution, he had no reason or cause to object to the hypothetical entry of a civil judgment.

However, more than five years later the State requested that the trial court enter a civil judgment in the amount of the unpaid restitution. Mr. Nielsen objected, arguing that a civil judgment could not be entered because the trial court never entered an order of “complete restitution” in 2010. The trial court acknowledged that it never determined complete restitution, but nevertheless ordered that a civil judgment could be entered pursuant to Utah R. Crim. P. 30(b) on the grounds that the trial court’s failure to determine complete restitution was a “clerical” error. Because the trial court lost jurisdiction to enter an order of complete restitution a year after sentencing occurred (Utah Code Ann. § 77-38a-302(d)(i)), the only way for the trial court to enter a civil judgment was to find that a Rule 30(b) “clerical error” had occurred.

First, because only orders of complete restitution can be entered on the civil judgment docket, the trial court erred by entering a civil judgment because it never previously determined complete restitution. Second, the trial court also erred because the failure to determine complete restitution is not a clerical error capable of being corrected under Rule 30(b). Rather, it was a judicial error and the Utah Supreme Court has confirmed that the determination of restitution requires “judicial reasoning and decision making.” Thus, as a matter of law, the trial court was not permitted to correct its failure to determine complete restitution.

The Utah Supreme Court has stated that an order to *pay* restitution is legally different from a trial court's *determination* of complete restitution. Mr. Nielsen is not appealing his obligation to pay restitution in installments as ordered by the trial court. He is appealing the trial court's decision that it made a clerical error when it failed to determine complete restitution and its decision to thereafter enter the court-ordered restitution amount as a civil judgment. Entering a civil judgment more than five years after sentencing is not only contrary to law, it is also unjust because Mr. Nielsen rightfully believed that the court-ordered restitution amount would never be converted into a civil judgment. The trial court ordered Mr. Nielsen to pay restitution in installments and allowing a civil judgment to be entered and enforced all at once will circumvent that restitution order.

For these reasons, Mr. Nielsen requests that this court reverse the trial court's decision to enter a civil judgment.

## Statement of the Issues

**Issue 1:** Whether the trial court erred in entering a civil judgment pursuant to Utah R. Crim. P. 30(b) when the failure to determine complete restitution is not a correctable clerical error and when it made findings of fact not supported by the record.

**Standard of Review:** “[T]he interpretation of a rule of procedure is a question of law that we review for correctness.” *State v. Rodrigues*, 2009 UT 62, ¶ 11, 218 P.3d 610, 613.

**Preservation:** This issue is preserved. (R.289; Addn. A at 14-15.)

**Issue 2:** Whether the trial court erred in entering a civil judgment when it did not determine complete restitution.

**Standard of Review:** “[I]n the case of restitution, a reviewing court will not disturb a district court's determination unless the court exceeds the authority prescribed by law or abuses its discretion.” *State v. Laycock*, 2009 UT 53, ¶ 10, 214 P.3d 104, 108.

**Preservation:** This issue is preserved. (R.163-170)

## Determinative Provisions

The following provisions are set forth in Addendum D:

Utah Code Ann. § 77-38a-401.

## **Statement of the Case**

### **1. Nature of the Case and Course of Proceedings**

At the time of sentencing in 2010, the trial court ordered Mr. Nielsen to pay court-ordered restitution. However, it is undisputed that the trial court did not review the required restitution factors, did not make corresponding findings of fact, and never determined “complete restitution.” Over five years later, the State attempted to have the court-ordered restitution amount converted into a civil judgment. The trial court found that its failure to determine “complete restitution” in 2010 was a clerical error that could be corrected under Utah R. Crim. P. 30(b). Based on its finding that the failure to determine complete restitution was a Rule 30(b) clerical error, the trial court entered a judgment on the civil judgment docket for the unpaid restitution amount.

### **2. Statement of Facts**

#### **Mr. Nielsen is Sentenced and Ordered to Pay Restitution in 2010**

On March 22, 2010, Mr. Nielsen pled guilty to the charge of theft. (R.27-34.) On July 26, 2010, the Court entered the Judgment and Commitment stating that Mr. Nielsen had pled guilty to the referenced offense and entering a sentence for a period of one (1) to fifteen (15) years. (R.59-60; Addn. B.) In addition, the Judgment and Commitment stayed the sentence and placed Mr. Nielsen on probation for a period of six (6) years. (R. 60; Addn. B.) As part of probation, Mr. Nielsen was ordered to serve one year in the county jail and ordered to pay restitution to the victim Creekside Investments, Inc. (“Creekside”) in the amount of \$346,248.58. (*Id.*) No findings of fact or any other analysis accompany the trial court’s decision to enter this restitution amount. There is no

reference in the Judgment and Commitment that the trial court was making a finding of “complete restitution.”

On November 12, 2010, following a review hearing, the trial court released Mr. Nielsen from jail and modified the court-ordered restitution as follows:

That the defendant pay restitution in the amount of \$346,248.58 to Creekside Funding. . . . Defendant shall pay 25% of his gross income as restitution up to an income of \$120,000. If defendant’s income is more than \$120,000, restitution shall be reassessed.

(“Modified Restitution Order,” R.125-126; Addn. C.) Again, no findings of fact or any other analysis accompany the trial court’s decision to enter the above restitution amount. There is no reference in the Modified Restitution Order that the trial court was making a finding of “complete restitution.”

### **The State Requests the Trial Court Enter a Civil Judgment in 2015**

More than five years after sentencing, the State requested that the trial court enter a civil judgment in the amount of unpaid restitution and submitted a proposed civil judgment. (R.157.) Mr. Nielsen filed an objection to the entry of the civil judgment arguing that the trial court lacked authority to enter a civil judgment for the reasons set forth herein (the “Objection”). (R.161-181.) Following oral argument on the Objection, the trial court made findings of fact and conclusions of law (R.289; Addn. A) and then entered a civil judgment on the civil judgment docket (the “Civil Judgment”). (R.207-208.)

### **The Trial Court’s Findings and Conclusions**

In analyzing the arguments of the parties, the Court made several material findings

and conclusions, which are numbered below.

First, the trial court acknowledged that the relevant statutes and case law were not followed regarding the trial court's duty to determine complete restitution:

1. Well, I find this frustrating because the statute just wasn't followed. . . . [State v.] Laycock seems to say that you have to [make a finding of complete restitution] . . . and it didn't happen in this case and, so, it's messy to retroactively, five years later, go back and decide what to do.

(R.289; Addn. A at 34:23 – 35:5) (emphasis added).

2. So there is not an explicit finding in the judgment in this case as to whether restitution--the restitution number was complete, court-ordered or both.

(R.289; Addn. A at 42:2-4.)

3. I just have a hard time when I have these clear cases saying it's an abuse of discretion not to lay out what is complete restitution and court-ordered restitution, I have a hard time saying it was just a clerical error for the Clerk to not record complete restitution as a judgment and nothing was called that.

(R.289; Addn. A at 42:2-4; 36:21 – 37:1.)

4. 77-38A-401 says upon the Court determining that a defendant owes restitution, the Clerk of the Court shall enter an order of complete restitution on the civil judgment docket. This didn't happen.

(R.289; Addn. A at 42:9-12) (emphasis added).

The trial court then acknowledged that "complete restitution" in this case would have been more than the amount of restitution Mr. Nielsen was ordered to pay:

5. If anything, complete restitution would be more than this number. It wouldn't inure to the detriment of the defendant. It's--the restitution that was clearly court-ordered is the bottom amount that complete restitution could be. It certainly has to be supported by the facts of what was owed and complete restitution, if anything, would only be more.

(R.289; Addn. A at 35:18-23) (emphasis added).

Regarding the State's argument that the trial court's failure to determine complete restitution at the time of sentencing could be remedied as a "clerical error" under Utah R. Crim. P. 30(b), the trial court stated:

6. So I really am not--I'm not certain of the right thing to do because to correct it, as a clerical error, would be to say the Clerk should have done this because it's clear there should have been a complete restitution ordered, but nothing was called complete restitution and the statute and the Supreme Court has clearly said we're supposed to call things complete and court-ordered and that didn't happen. So it makes it difficult to say it was just a clerical error.

(R.289; Addn. A at 36:9-16.)

7. I have a hard time saying it was just a clerical error for the Clerk to not record complete restitution as a judgment and nothing was called that.

(R.289; Addn. A at 36:24 – 37:1.)

The trial court ultimately held that because Mr. Nielsen did not object that the trial court failed to make a finding of complete restitution that Mr. Nielsen therefore agreed the restitution amount listed in the Judgment and Commitment was the "complete restitution" amount:

8. Well, I wish there were a cleaner record on this. I will just make the findings that I can from the information that I have and then rule the best that I can based on the record in this case. So there is not an explicit finding in the judgment in this case as to whether restitution--the restitution number was complete, court-ordered or both. However, at the time and since then there was not a dispute as to the restitution amount and it was agreed upon by the parties at the time of sentencing and it hasn't been disputed. Amount has not ever been disputed. So this was an agreed upon amount.

(R.289; Addn. A at 41:23-8.)

To support its decision to enter a civil judgment pursuant Utah R. Crim. P. 30(b), the trial court made findings fact regarding the parties and the trial court's intentions and the alleged agreement from 2010:

9. In looking at Rule 30(b), it states that you can correct a clerical mistake and when looking at what the factors are to determine if something is clerical, one is whether the order or judgment rendered reflects what was done or intended. I think that the restitution amount was clearly the one that was agreed upon by the parties and that the Court intended to order and that's what should have been.

(R.289; Addn. A at 43:3-9) (emphasis added).

10. Second, whether the error was the result of judicial reasoning or decision-making. I don't think this is. The Court should have called it complete and court-ordered, but the fact that everyone agreed to this number, I don't think there's a dispute about what the Court meant to do. This wasn't a Court decision to not enter it as a civil judgment. It should have happened and then, finally, whether the error is clear from the record. I think it's clear that this restitution amount was entered and it was not entered as a civil judgment.

So under Rule 30(b), I'll say that this can be entered in the docket as a civil judgment.

(R.289; Addn. A at 43:13-23) (emphasis added).

However, the trial court failed to cite any part of the record to support its finding that Mr. Nielsen agreed that the restitution amount listed in the Judgment and Commitment would be considered "complete restitution" or to support its finding that the trial court intended to determine complete restitution in 2010. (*See generally*, R.289; Addn. A.)



## Summary of the Argument

In a criminal matter, the trial court has a “non-discretionary” duty to determine “complete restitution” and the failure to do so is reversible error. In this case, the Judgment and Commitment merely orders Mr. Nielsen to pay restitution, i.e., “court ordered restitution.” The trial court never made a determination of complete restitution and in fact admits that it failed to make this required determination. Pursuant to Section 77-38a-401(1), *only* orders of “complete restitution” can be entered on the civil judgment docket. Accordingly, the trial court erred when it entered the court-ordered restitution amount as a civil judgment.

The trial court also erred by entering the civil judgment pursuant to Utah R. Crim. P. 30(b). The purpose of Rule 30(b) “is to correct clerical errors so that the record reflects what was actually ‘done or intended.’” First, only clerical errors, rather than judicial errors, can be corrected under Rule 30(b). The Utah Supreme Court has confirmed “that the district court’s determination of restitution require[s] judicial reasoning and decision making.” Accordingly, the failure to determine complete restitution was a judicial error which cannot be corrected through Rule 30(b).

Second, when analyzing an error under Rule 30(b), the trial court may “not examine [the trial court’s] intent where the written order is unequivocal.” In this case, the Judgment and Commitment is unambiguous as it makes no reference to “complete restitution,” the restitution factors listed in Utah Code Ann. § 77-38a-302(5), or reference any findings of fact which would support a determination of complete restitution. The Judgment and Commitment simply requires Mr. Nielsen to *pay*

restitution which is legally different from a court's *determination* of complete restitution.

Thus, the trial court erred when it reviewed extrinsic evidence of its intent when the orders at issues are unambiguous.

Third, even if the failure to determine complete restitution was a correctable clerical error, and even if the trial court was permitted to review extrinsic evidence of its intent, there is still insufficient evidence in the record to support the trial court's findings that: (1) it intended to determine complete restitution: or (2) that Mr. Nielsen agreed that the restitution amount listed in the Judgment and Commitment would be considered "complete restitution" and therefore capable of being entered as a civil judgment. Because the record does not support the trial court's findings, this court must reverse.

## Argument

### 1. **The Trial Court Has a Non-Discretionary Duty to Determine Complete Restitution and Only Orders of Complete Restitution can be Entered as Civil Judgments.**

In a criminal case, “restitution is mandated by statute and is a part of a criminal sanction imposed by the state.” *State v. Laycock*, 2009 UT 53, ¶ 18, 214 P.3d 104, 109. Trial courts are required “to make two separate restitution determinations, one for complete restitution and a second for court-ordered restitution.” *Id.* at ¶ 20. “Court-ordered restitution may be identical in amount to complete restitution, but it need not be so. The trial court has a non-discretionary duty to make a finding of complete restitution together with findings of fact supporting the determination.” *See State v. Barrett*, 2004 UT App 239, 2 (unpublished). “[A] court does not, however, have discretion to not make restitution determinations with supporting findings. By express language, the Act imposes a nondiscretionary duty upon a judge to make the appropriate determinations regarding restitution, along with the rationale to explain the decision.” *Id.* (emphasis added); *State v. Laycock*, 2009 UT 53, ¶ 23 (Utah Code Ann. § 77-38a-401(1) “commands . . . that complete restitution be determined.”).

The Utah Crime Victims Restitution Act, at Section 77-38a-401(1), provides:

Upon the court determining that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Section 77-38a-302 on the civil judgment docket and provide notice of the order to the parties.

(*Id.*) (emphasis added); *State v. Barrett*, 2004 UT App 239, n. 2 (“[§ 77-38a-401(1)] provides that the amount of complete restitution ‘shall be entered’ on the civil docket and

is enforceable as a civil judgment.”) Thus, pursuant to Section 77-38a-401(1), *only* orders of “complete restitution” can be entered on the civil judgment docket. In this case, the trial court determined that it never entered an order of complete restitution.

## **2. The Trial Court Erred When It Entered the Civil Judgment Pursuant to Utah R. Crim. P. 30(b).**

### **2.1 Rule 30(b) Purpose and Standards.**

The purpose of Rule 30(b) of the Utah Rules of Criminal Procedure “is to correct clerical errors so that the record reflects what was actually ‘done or intended.’” *State v. Rodrigues*, 2009 UT 62, ¶ 14, 218 P.3d 610, 614 (quoting *Bishop v. GenTec, Inc.*, 2002 UT 36, ¶ 30, 48 P.3d 218. Rule “30(b) is virtually identical to Utah R. Civ. P. 60(a), and the ‘clerical error’ analysis under both sections is often indistinguishable.” *Rodrigues*, 2009 UT 62, n. 3; *State v. Moya*, 815 P.2d 1312, n. 3 (Utah Ct. App. 1991) (“review of an order based on either rule results in the same conclusion.”) Accordingly, decisions analyzing clerical errors under Utah R. Civ. P. 60(a) and Utah R. Crim. P. 30(b) will be discussed below.

Because the trial court only has authority to correct “clerical” errors, it must determine whether the error is judicial or clerical in nature:

[t]he distinction ... depends on whether [the error] was made in rendering the judgment or in recording the judgment as rendered. A clerical error is one made in recording a judgment that results in the entry of a judgment which does not conform to the actual intention of the court. On the other hand, a judicial error is one made in rendering the judgment and results in a substantively incorrect judgment.

*Rodrigues*, 2009 UT 62, ¶ 14 (internal citations and quotations omitted); *see also State v. Moya*, 815 P.2d 1312, 1317 (Utah Ct. App. 1991) (“the substantive purpose of Rule 60(a)

of the Utah Rules of Civil Procedure is limited to curing errors in *accurately memorializing* a judgment.”) (emphasis in original). In sum, the “clerical error analysis generally focuses on (1) whether the order or judgment that was rendered reflects what was done or intended, (2) whether the error is the result of judicial reasoning and decision making, and (3) whether the error is clear from the record.” *Rodrigues*, 2009 UT 62, ¶ 14.

## **2.2 The Failure to Determine Complete Restitution was the Result of Judicial Decision Making and Therefore Not Correctable Under Rule 30(b).**

The failure to determine complete restitution is a judicial error, not a clerical error. “The distinction . . . depends on whether [the error] was made in rendering the judgment or in recording the judgment as rendered.” *Peterson v. Jackson*, 2011 UT App 113, ¶ 46, 253 P.3d 1096, 1108; *see also Stanger v. Sentinel Security Life Insurance Co.*, 669 P.2d 1201 (Utah 1983) (a clerical error “is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment.”).

In this case, the failure to determine complete restitution was not a mechanical mistake and or a clerical omission. Rather, it was an error in rendering a legal decision. The Utah Supreme Court has confirmed “that the district court’s determination of restitution require[s] judicial reasoning and decision making.” *Rodrigues*, 2009 UT 62, ¶ 25 (emphasis added) (finding that trial court made a clerical error by miscalculating the amount of restitution). The determination of complete restitution is an act of judicial decision making which requires the trial to review the restitution factors, determine complete restitution, and then support its determination with findings of fact. *See Utah*

Code Ann. § 77-38a-302; *State v. Barrett*, 2004 UT App 239, 2. It is an act in rendering a judicial decision, not an act in recording one.

In this case, the trial court entered the Civil Judgment pursuant to Rule 30(b) because it ruled that the failure to determine complete restitution was a clerical error. This was error because the trial court's failure to determine complete restitution was a clear judicial error which cannot be corrected through Rule 30(b). For this reason alone, the trial court's decision to enter a civil judgment must be reversed.

**2.3 There is No Evidence in the Record Indicating That the Trial Court Actually Intended to Make a Determination of Complete Restitution.**

In order to enter the Civil Judgment under Utah R. Crim. P. 30(b), the trial court was required to determine whether it "actually intended" to determine complete restitution. *Rodrigues*, 2009 UT 62, ¶ 14; *Lindsay v. Atkin*, 680 P.2d 401, 402 (Utah 1984) ("The correction contemplated by Rule 60(a) must be undertaken for the purpose of reflecting the actual intention of the court and parties."). Even if the failure to determine complete restitution is a "clerical" error, there is no evidence in the record that the trial court intended to determine complete restitution.

**2.3.1 Because the Judgment and Commitment and the Modified Restitution Order Are Unambiguous it is Improper to Consider the Trial Court's Intent.**

Although the purpose of Rule 30(b) is to determine what the trial court actually intended, the trial court is not permitted to explore what was intended unless the language of the judgement is ambiguous. *State ex rel. C.S.B.*, 2000 UT App 362, ¶ 9, 17 P.3d 1131, 1133 ("[w]here the language of a judgment is clear and unambiguous, it must be given

effect as it is written.”) (analyzing Utah R. Civ. P. 60(a), Utah R. Crim. P. 30(b) and citing *State v. Denney*, 776 P.2d 91, 93 n. 2 (Utah Ct.App.1989).

In *State v. Denny*, the issue was whether the duration of defendant’s probation was for a period of 18 months or 3 years. The probation order stated that the defendant “be placed on probation for a period of three (3) years. . . .” *Denney*, 776 P.2d at 92.

However, the Utah Court of Appeals found that “[a]fter reviewing the record, it appears that the trial court may have intended to sentence defendant to two consecutive terms of probation lasting eighteen months each” because the trial court stated on the record that “[t]he eighteen months probation was imposed on each felony to run consecutively.” *Id.* at 92-93. But despite the strong evidence of the trial court’s intention that probation last only 18 months, the Utah Court of Appeals declined to alter the unambiguous probation order. It reasoned that:

‘Where the language of a judgment is clear and unambiguous, it must be given effect as it is written. . . .’ (citing *State v. Garcia*, 99 N.M. 466, 659 P.2d 918, 923 (App.1983). It is necessary that sentences be rendered with clarity and accuracy in order to avoid the possibility of confusion and injustice.

Broad and uniform recognition has been given to the precept that a sentence imposed by a court acting in a criminal case should be definite, unequivocal and unambiguous, so that both the defendant and the officials charged with executing the sentence will be fairly apprised of the intentions of the court.

This principle was first articulated by the United States Supreme Court in *United States v. Daugherty*, 269 U.S. 360, 363, 46 S.Ct. 156, 157, 70 L.Ed. 309 (1926), where the Court held that “[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.” However, “where the meaning is ambiguous, the pleadings and other documents of record may be reviewed for purposes of construing the meaning of the judgment.’ (quoting *Garcia*, 659 P.2d at 923.)

*Id.* at 93. The *Denny* Court then articulated the rule that “we do not examine [the trial court’s] intent where the written order is unequivocal.” *Id.*

In this case, the Judgment and Commitment and the Modified Restitution Order are unambiguous. Neither order makes any reference to “complete restitution,” the restitution factors listed in Utah Code Ann. § 77–38a–302(5), or reference any findings of fact which would support a determination of complete restitution. These orders simply require Mr. Nielsen to *pay* restitution which is legally different from a court’s *determination* of complete restitution. *See State v. Laycock*, 2009 UT 53, ¶ 23. Because these orders make no reference to complete restitution, they are unequivocal and unambiguous on this point. As a result, the trial court erred by looking to the record in an attempt to ascertain whether it actually intended to determine complete restitution, and then ultimately erred by entering the Civil Judgment pursuant to Utah R. Crim. P. 30(b).

**2.3.2 There is No Evidence in the Record Indicating That the Trial Court Actually Intended to Make a Determination of Complete Restitution.**

Even if it the Judgment and Commitment and the Modified Restitution Order were somehow ambiguous there is still no evidence in the record indicating that the trial court intended to determine complete restitution. First, the record does not support a finding that the trial court intended to determine complete restitution because the trial court admitted that “it didn’t happen in this case” and that “the statute just wasn’t followed”:

Well, I find this frustrating because the statute just wasn’t followed. . . .  
[State v.] Laycock seems to say that you have to [make a finding of complete restitution] . . . and it didn’t happen in this case and, so, it’s messy to retroactively, five years later, go back and decide what to do.



(R.289; Addn. A at 34:23 – 35:5.)

So there is not an explicit finding in the judgment in this case as to whether restitution--the restitution number was complete, court-ordered or both.

(R.289; Addn. A at 42:2-4.)

I just have a hard time when I have these clear cases saying it's an abuse of discretion not to lay out what is complete restitution and court-ordered restitution. . . .

(R.289; Addn. A at 42:2-4; 36:21 – 37:1.)

77-38A-401 says upon the Court determining that a defendant owes restitution, the Clerk of the Court shall enter an order of complete restitution on the civil judgment docket. This didn't happen.

(R.289; Addn. A at 42:9-12) (emphasis added).

Thus, it is difficult, if not impossible, to find that the trial court intended to determine complete restitution when no attempt was made to comply with Utah Code Ann. §§ 77-38a-401 or 77-38a-302(5).

It is also very difficult to find that the trial court intended to determine complete restitution when it found that the complete restitution amount would have been greater than the \$346,248 restitution amount listed in the Judgment and Commitment:

If anything, complete restitution would be more than this number. . . . It certainly has to be supported by the facts of what was owed and complete restitution, if anything, would only be more.

(R.289; Addn. A at 35:18-23) (emphasis added).

Perhaps the strongest evidence that the trial court did not intend to determine complete restitution is the trial court's own statements which demonstrate just how unclear the record was regarding the trial court's intent in 2010:

I don't think there is a clean answer here. I think it's deficient, but that it wasn't objected to. So I really don't think there is a clean answer. I don't find anything that satisfactory in either direction. Because it seems enforceable, both sides agreed to it. It seems unfair to dispute it now, but you know various things went wrong.

So I really am not--I'm not certain of the right thing to do because to correct it, as a clerical error, would be to say the Clerk should have done this because it's clear there should have been a complete restitution ordered, but nothing was called complete restitution and the statute and the Supreme Court has clearly said we're supposed to call things complete and court-ordered and that didn't happen. So it makes it difficult to say it was just a clerical error.

If anyone has any brilliant proposals here, I'm happy to hear it, but it just seems like there are problems with it that make a clear answer difficult.

(R.289; Addn. A at 36:3-19.)

I just have a hard time when I have these clear cases saying it's an abuse of discretion not to lay out what is complete restitution and court-ordered restitution, I have a hard time saying it was just a clerical error for the Clerk to not record complete restitution as a judgment and nothing was called that.

(R.289; Addn. A at 36:21-25 – 37:1.)

But despite the fact that the record did not support a finding that the trial court intended to determine complete restitution, the trial court nevertheless entered the Civil Judgment under Rule 30(b) because it believed that “the restitution amount was clearly the one that was agreed upon by the parties”:

In looking at Rule 30(b), it states that you can correct a clerical mistake and when looking at what the factors are to determine if something is clerical, one is whether the order or judgment rendered reflects what was done or intended. I think that the restitution amount was clearly the one that was agreed upon by the parties and that the Court intended to order and that's what should have been.

(43:3-9)

The Court should have called it complete and court-ordered, but the fact that everyone agreed to this number, I don't think there's a dispute about what the Court meant to do. This wasn't a Court decision to not enter it as a civil judgment. It should have happened and then, finally, whether the error is clear from the record. I think it's clear that this restitution amount was entered and it was not entered as a civil judgment.

So under Rule 30(b), I'll say that this can be entered in the docket as a civil judgment.

(43:14-23) (emphasis added)

The trial court erred. There is no evidence in the record that Mr. Nielsen stipulated or agreed that the restitution amount listed in the Judgment and Commitment would be considered “complete restitution” and therefore capable of being entered as a civil judgment. The trial court failed to support its findings with any citation to the record. The trial court was unable to adequately support its findings because it never complied with Utah Code §§ Section 77-38a-401(1), 77-38a-302(5)(a)–(b), or *State v. Laycock*, 2009 UT 53, by analyzing the restitution factors and making findings of fact supporting its restitution determination. The only potential evidence the trial court raised was the plea agreement<sup>1</sup> but that document does not list any restitution amount that could have been agreed to by Mr. Nielsen. (R.27-34.) In sum, the trial court decided to enter the Civil Judgment pursuant to Utah R. Crim. P. 30(b) based on its finding that the parties agreed to the restitution amount and that finding is incorrect. *See State v. Rodrigues*, 2009 UT 62, ¶ 11, 218 P.3d 610, 613. (“The interpretation of [Rule 30(b)] is a question of law that we review for correctness.”)

---

<sup>1</sup> “What about the plea agreement though that gives that number that everyone signed, the statement of defendant?” (R 31:20-22.)

For these reasons, the trial court's application of Rule 30(b) is not supported by the record, is legally incorrect, and therefore the trial court's decision to enter the Civil Judgment must be reversed.

**3. The Trial Court Erred when it Entered the Civil Judgment Because it Never Made a Finding of "Complete Restitution".**

Utah Code Section 77-38a-401(1) "commands . . . that complete restitution be determined" and the trial court has a "nondiscretionary duty" "to make the appropriate determinations regarding restitution, along with the rationale to explain the decision." *See State v. Barrett*, 2004 UT App 239, 2. In addition, pursuant to Section 77-38a-401(1), *only* orders of "complete restitution" can be entered on the civil judgment docket.

In this case, there can be no dispute that the trial court did not determine "complete restitution" and did not enter an "order of complete restitution." There can be no dispute because the trial court actually found that Utah Code Ann. § 77-38a-401(1) "just wasn't followed" and that, with respect to whether it made a finding of complete restitution in 2010, the trial court found that "it just didn't happen." (R.289; Addn. A at 34:23 – 35:5, 42:9-12.)

The record supports the trial court's finding that it failed to determine complete restitution and failed to enter an order of complete restitution. First, there is no order entered on the docket titled "Order of Complete Restitution" or any order or judgment indicating that the Court made a finding of "complete restitution." Neither the Judgment and Commitment nor the Modified Restitution Order make any reference to "complete restitution."

Second, under Section 77-38a-401(1), when the trial court makes a finding of complete restitution, that order must be entered on the civil judgment docket. But the fact that neither Judgment and Commitment nor the Modified Restitution Order was entered on the civil judgment docket establishes that the trial court did not enter an order of complete restitution. Indeed, if it had, then there would be a preexisting civil judgment.

Third, as set forth above, trial courts are required “to make two separate restitution determinations, one for complete restitution and a second for court-ordered restitution.” *State v. Laycock*, 2009 UT 53, ¶ 20. “Unlike complete restitution, court-ordered restitution may be adjusted to take the defendant’s ability to pay into account.” *Id.* at ¶ 30. In this case, the Modified Restitution Order modified the terms of restitution set forth in the Judgment and Commitment by setting the restitution payments to be equal to “25% of his gross income . . . up to an income of \$120,000.” (R.60; Addn. B.) The trial court likely made this adjustment to account for Mr. Nielsen’s inability to pay the entire restitution amount all at once. But the simple fact that the Judgment and Commitment was adjusted at all definitively establishes that there was no finding of “complete restitution” because the trial court could not modify “complete restitution” orders as a matter of law.

Fourth, “[a] court’s ‘determination’ of restitution is different from ordering a defendant to pay restitution.” *State v. Laycock*, 2009 UT 53, ¶ 23. Here, is undisputed that the trial court ordered Mr. Nielsen to *pay* restitution in 2010 through the Judgment

and Commitment. The fact that the trial court ordered Mr. Nielsen to pay restitution is legally different from the trial court's obligation to determine restitution

Fifth, in determining complete restitution, "a district court looks to section 77-38a-302(5) for the factors it must consider":

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
- (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and
- (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

*State v. Laycock*, 2009 UT 53, ¶ 20 (quoting § 77-38a-302(5)(a)-(b).)

After the trial court considers and reviews these restitution factors, it is then required to enter an order of "complete restitution" supported by findings of fact. It is reversible error if the district court does not support an order of complete restitution "with supporting findings . . . along with the rationale to explain the decision." *See State v. Barrett*, 2004 UT App 239, 2; *State v. Laycock*, 2009 UT 53, ¶ 23.

In *State v. Barrett*, the Utah Court of Appeals stated that "[u]nder the plain language of the [Utah Crime Victims Restitution] Act, a court does not, however, have

discretion to not make restitution determinations with supporting findings. By express language, the Act imposes a nondiscretionary duty upon a judge to make the appropriate determinations regarding restitution, along with the rationale to explain the decision.” *Id.* The *Barrett* Court then held that the trial court erred when it failed to make a finding of complete restitution and when it failed to “explain [its] rationale with findings on the required factors made on the record.” *Id.* at 2. Thus, the failure to determine complete restitution and the failure to support that determination with findings of fact is reversible error under *Barrett*.

In *State v. Laycock*, the trial court did not determine complete restitution<sup>2</sup> because of the “difficulty of ascertaining complete restitution based on incomplete facts and speculation.” *State v. Laycock*, 2009 UT 53, ¶ 23. In response the Utah Supreme Court stated that “[t]he statute<sup>2</sup> commands, however, that complete restitution be determined.”

*Id.* The Court then held that:

A court’s ‘determination’ of restitution is different from ordering a defendant to pay restitution. After determining complete restitution, a district court judge may then order court-ordered restitution as part of the criminal sentence based on facts that would meet the same strict requirements as found in a civil setting.

Here, Judge Laycock failed to make a determination of complete restitution. This was error. She was clearly required to determine complete restitution, as set out in Utah Code section 78–38a–302(2).

*Id.* at ¶¶ 23-24 (emphasis added).

In this case, the trial court did not make any attempt to “determine” complete restitution, review the restitution factors, or issue findings of fact supporting a

---

<sup>2</sup> Utah Code Ann. § 77-38a-302.

determination of complete restitution. In fact, the trial court admitted it did not perform any of these non-discretionary acts. (R.289; Addn. A at 34:23 – 35:5, 42:9-12.)

Accordingly, the trial court did not make a finding of complete restitution. This is reversible error under *Laycock* and *Barrett*. Because only orders of “complete restitution” can be entered as civil judgments and because the trial court never determined “complete restitution,” the trial court’s decision to enter the Civil Judgment must be reversed.

### **Conclusion and Relief Requested**

“It is necessary that sentences be rendered with clarity and accuracy in order to avoid the possibility of confusion and injustice.” *State v. Denney*, 776 P.2d at 93. The Judgment and Commitment was rendered with clarity and accuracy demonstrating that the trial unequivocally intended to enter “court-ordered” restitution and did *not* intend to enter a civil judgment. From the time of sentencing and for over five years thereafter, Mr. Nielsen believed in good faith that the trial court did not intend to determine complete restitution and therefore would never enter a civil judgment. Indeed, because the trial court never reviewed the restitution factors, never made findings of fact, and never determined complete restitution, Mr. Nielsen had no reason or cause to object to the hypothetical entry of a civil judgment. Mr. Nielsen relied on the trial court’s clear decision, but now he and his wife face the prospect of losing their marital home through the complete enforcement of the newly entered Civil Judgment - a judgment that circumvents and violates the trial court’s “court-ordered” restitution order requiring Mr. Nielsen to pay restitution in installments. This is an injustice that *Denny* and Utah Courts



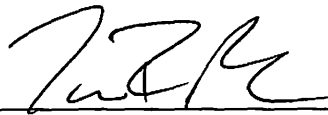
seek to avoid.

Based on the foregoing, the trial court erred when it when it entered the court-ordered restitution amount as a civil judgment because it never previously made a determination of complete restitution. The trial court erred by entering the Civil Judgment pursuant to Utah R. Crim. P. 30(b) because the failure to determine complete restitution was a judicial error which cannot be corrected through Rule 30(b).

This court should reverse the trial court's decision to enter the Civil Judgment.

Dated this 1<sup>st</sup> day of August 2016.

CLYDE SNOW & SESSIONS



---

Timothy R. Pack

*Attorneys for Defendant Gary W. Nielsen*

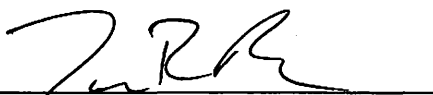
**Certificate of Compliance With Rule 24(f)(1)**

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 7,035 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Times New Roman.

Dated this 1<sup>st</sup> day of August 2016.

CLYDE SNOW & SESSIONS

  
\_\_\_\_\_  
Timothy R. Pack

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of August 2016, I caused the foregoing document to be served on the following via first class mail and email:

Thomas B. Brunker  
OFFICE OF THE ATTORNEY GENERAL  
Post Office Box 45000  
Salt Lake City, UT 84145-5000  
tbrunker@utah.gov

CLYDE SNOW & SESSIONS



---

Timothy R. Pack

# **ADDENDUM A**

Hearing - May 9, 2016

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

Case No. 091500159

v.

Appeal No. 20160438

GARY WILLIAM NIELSEN,

Defendant.

-----  
TRANSCRIPT OF HEARING  
-----

BEFORE THE HONORABLE PAIGE PETERSEN

MAY 9, 2016

1 APPEARANCES:

2 FOR THE STATE OF UTAH:

3 Matthew D. Bates

4 SUMMIT COUNTY ATTORNEY'S OFFICE

5 6300 Justice Center Road

6 Park City, Utah 84098

7

8 FOR THE DEFENDANT:

9 Timothy R. Pack

10 CLYDE SNOW & SESSIONS, PC

11 201 South Main Street, 13th Floor

12 Salt Lake City, Utah 84111

13

14

15

16

17

18

19

20

21

22

23

24

25

1           The second argument they make is that there is a  
2 clerical error that the Court can fix. It's a 30(b) argument. Mr.  
3 Bates says the Clerk failed to fulfill her statutorily mandated  
4 duty to enter the restitution amount on the civil judgment docket  
5 and Mr. Bates cites to the Rodriguez case and I think that's tab  
6 4 in the binder I gave you. I'm going to turn to it really quick.  
7 It's paragraph 14.

8           So at paragraph 14 of the second sentence says in our  
9 analysis. In our analysis under Rule 30(b), we draw a distinction  
10 between clerical errors and judicial errors. A distinction  
11 depends on whether the error was made in rendering the judgment  
12 or in recording the judgment as rendered. A clerical error is one  
13 made in recording a judgment that results in the entry of a  
14 judgment which does not conform to the actual intention of the  
15 Court. On the other hand, a judicial error is one made in  
16 rendering the judgment and results in a substantively incorrect  
17 judgment.

18           So in Rodriguez, in that case the defendant agreed that  
19 restitution was a certain amount and the actual restitution that  
20 was entered reflected a different amount. It was a typo and we  
21 know that under Laycock and Barrett failure to follow the  
22 statutory requirements make those findings of fact. That's not a  
23 clerical error. That's not a typo. That is in the judicial realm  
24 of error.

25           That's not a clerical error and the Rodriguez court

1 also looked at three factors in its 30(b) analysis, one of which  
2 is whether the Court's order reflects what was intended. We don't  
3 know what was intended. There is no findings of fact.

4 Mr. Bates wasn't counsel of record at that time. I  
5 wasn't counsel of record at that time. So we don't know what was  
6 intended. There's no evidence in the record to base that decision  
7 on. This is not a clerical issue and the Clerk did not make a  
8 mistake. There was no order of complete restitution to enter on  
9 the civil judgment docket.

10 We think this is an issue of protecting substantive  
11 rights and substantive procedure which was not followed in this  
12 case and procedure when not followed is reversible error under  
13 Laycock and Barrett.

14 I just want to make a couple final points here. We also  
15 object to the interest calculation. We've pointed out that no  
16 interest should be accruing on this court-ordered restitution  
17 amount. Restitution was ordered as part of Mr. Nielsen's  
18 probation. There's no mention of interest or that interest should  
19 accrue. There's no civil judgment entered wherein post-judgment  
20 interest could accrue and the State didn't oppose this argument  
21 in their response to our objection. So I think this point is  
22 conceded and, as of today, we calculate the principle amount  
23 being owed as \$265,089.00.

24 Last point, Your Honor. Excuse me. I talk too much. The  
25 State also conceded that under Utah Code 77-38A-302.5 the Court



1 obligation to order that that judgment be put on the civil  
2 judgment docket so that she can do that because it should have  
3 been done is years ago.

4 MR. PACK: May I respond, Your Honor?

5 THE COURT: Uh-huh [affirmative].

6 MR. PACK: And I have a draft of this proposed  
7 stipulation if the Court wants to see what we're talking about.  
8 Again, Dr. Maw is not the victim. She does not have any rights  
9 here. Mr. Bates does not have an obligation to stick up for her  
10 and to pursue her rights. She is a third-party commercial  
11 creditor.

12 MR. BATES: Judge, should we get Dr. Maw on the phone?  
13 I feel like maybe she needs to be heard here because I think she  
14 would take a very different path from that.

15 MR. PACK: Ms. Maw could have submitted an affidavit.  
16 She could have been here herself if it was that important.

17 THE COURT: Well, let me read this and I'm not sure if  
18 it matters to me whether she's an indirect victim or if she was  
19 the direct victim. I think the real issue is whether proper  
20 findings were made. Let me just look at these two cases a little  
21 more closely.

22 [Long pause.]

23 THE COURT: Well, I find this frustrating because the  
24 statute just wasn't followed and it seems like we have a wide-  
25 spread practice of not following the statute. You know, we're

1 routinely in statements of defendants not specifying complete and  
2 court-ordered restitution or making findings to support it and  
3 this case, Laycock, seems to say that you have to do that and it  
4 didn't happen in this case and, so, it's messy to retroactively,  
5 five years later, go back and decide what to do.

6           So the statute wasn't followed precisely at the time.  
7 No one disagreed to that. No one objected to that until five  
8 years later. So defendant was participating and didn't say, hey.  
9 I need some findings or I object to this number or I object to  
10 the way that this is happening.

11           So it leaves a question now of what to do with this and  
12 it does seem that the entry onto the civil docket is really just  
13 something that's supposed to happen. It's not a decision the  
14 Judge needs to make. It's something that's supposed to happen  
15 after you have a restitution order and the statute is a little  
16 ambiguous when it says once the judge decides that restitution is  
17 owed the clerk is supposed to enter a civil judgment of complete  
18 restitution. If anything, complete restitution would be more than  
19 this number. It wouldn't inure to the detriment of the defendant.

20           It's--the restitution that was clearly court-ordered is  
21 the bottom amount that complete restitution could be. It  
22 certainly has to be supported by the facts of what was owed and  
23 complete restitution, if anything, would only be more. Court-  
24 ordered restitution, if anything, would be less determining the  
25 defendant's circumstances which wasn't done. So all it can be is

1 complete restitution based on the information that was before the  
2 Court.

3 I don't think there is a clean answer here. I think  
4 it's deficient, but that it wasn't objected to. So I really don't  
5 think there is a clean answer. I don't find anything that  
6 satisfactory in either direction. Because it seems enforceable,  
7 both sides agreed to it. It seems unfair to dispute it now, but  
8 you know various things went wrong.

9 So I really am not--I'm not certain of the right thing  
10 to do because to correct it, as a clerical error, would be to say  
11 the Clerk should have done this because it's clear there should  
12 have been a complete restitution ordered, but nothing was called  
13 complete restitution and the statute and the Supreme Court has  
14 clearly said we're supposed to call things complete and court-  
15 ordered and that didn't happen. So it makes it difficult to say  
16 it was just a clerical error.

17 If anyone has any brilliant proposals here, I'm happy  
18 to hear it, but it just seems like there are problems with it  
19 that make a clear answer difficult. The best proposal seems to be  
20 what Mr. Nielsen is agreeing to be held to. It does prevent the  
21 victim from going after assets unless he defaults, but I just  
22 have a hard time when I have these clear cases saying it's an  
23 abuse of discretion not to lay out what is complete restitution  
24 and court-ordered restitution, I have a hard time saying it was  
25 just a clerical error for the Clerk to not record complete

1 restitution as a judgment and nothing was called that.

2 Do you have any response to that? I mean the problem is  
3 it's a common practice and it would make many, many restitution  
4 orders insufficient.

5 MR. BATES: Judge, I don't think it's an abuse of  
6 discretion where nobody is disputing the number and again I'll  
7 just point out that Laycock and Barrett were contested  
8 restitution cases. There's not a case that anyone can point to  
9 where everybody agreed on restitution, but the Court of Appeals  
10 or the Supreme Court faulted the trial court for not making  
11 findings and not, you know, holding a hearing or making--going  
12 through all the factors again and under subsection (4) of 301, I  
13 think that clearly puts the onus on the defendant. When that  
14 doesn't happen and he doesn't object, everything is kind of  
15 washed.

16 So that seems to me to be the solution here is that  
17 everybody kind of agreed to this and I take just one issue with  
18 the Court's styling of the Clerk's obligation. Under 404(1) there  
19 doesn't have to be restitution ordered. It simply says that upon  
20 the Judge determining restitution. So once he determines this is  
21 restitution, the Clerk is responsible to go enter the order.

22 MR. PACK: If I could respond.

23 THE COURT: So one question for Mr. Bates first. So  
24 what happens in the general case where you don't have a specific  
25 complete and court-ordered restitution identified? Once there's

1 restitution and it's just one number, does the Clerk just assume  
2 that's the complete restitution number and enter that?

3 MR. BATES: There's no other number. There's no reason,  
4 I mean there's nothing in 301 prohibiting the Court from just  
5 saying this is the number, you know, and calling that court-  
6 ordered and complete restitution. It talks about making those  
7 determinations separately, but at the end of the day there's  
8 nothing says it has to enter two separate numbers and if the  
9 Court says this is the number, then I think the way the statute  
10 is, that's the number for all intents and purposes and the Clerk,  
11 in fact, if you look at 401. Again, 401(1) gives us the Clerk's  
12 obligation.

13 When it talks about the Judge's determination and the  
14 first part of that phrase, it doesn't distinguish between court-  
15 ordered or complete restitution. It doesn't say when the Judge  
16 determines complete restitution. It just says when the Judge  
17 determines restitution the Clerk shall go enter an order of  
18 complete restitution in the civil judgment docket which seems to  
19 suggest that if the Court only gives you one number, that's the  
20 number.

21 THE COURT: That's what you enter. Okay. All right.  
22 We're going to take one quick break. I will hear you when I get  
23 back.

24 MR. PACK: Okay.

25 THE COURT: We'll be in recess.

1 [RECESS.]

2 MR. PACK: So I think the Court--I think the Court gave  
3 a hypothetical; that this was maybe occurring quite a bit and you  
4 wanted to know what to do in a situation where there is an order  
5 of restitution entered, but there's no distinction between  
6 whether it's complete restitution or court-ordered restitution.

7 In a situation like that, I think the Court and the  
8 parties can presume that it's complete restitution when that  
9 civil judgment is recorded. It's presumed and that would have  
10 been the same way in our case, but--sorry. One second. Let me get  
11 my notes here.

12 You know, we have a situation where there were on  
13 findings. There was no statement between--that was in the order  
14 of restitution that differentiated between complete restitution  
15 and court-ordered restitution and no civil judgment was entered.  
16 So I think the presumption is that it wasn't complete restitution  
17 and I think it's the filing of that civil judgment which triggers  
18 the defendant's obligation to object to that.

19 I mean, in our case we have no civil judgment entered.  
20 So we had no duty to object. So it's not like we waited five  
21 years to object to this judgment. We objected immediately. We  
22 weren't even put on notice to object to the civil judgment.

23 THE COURT: Well, to the civil judgment, but was there  
24 ever an objection to the restitution amount?

25 MR. PACK: We presume that this was court-ordered

1 restitution. We have been put on notice that this is court-  
2 ordered restitution because no civil judgment was entered. The  
3 Nielsens, specifically Verna Nielsen, has been making upgrades to  
4 her property starting this business under the assumption that  
5 there was no final judgment which could come and take her  
6 property away. Five years later, now that's changing and the  
7 burden to object did not arise or notice to object did not arise  
8 at the time of sentencing. It arose five years later and we're  
9 timely objecting now.

10 THE COURT: I don't think there is any notice that a  
11 civil judgment will be entered. It appears to just be automatic  
12 upon a finding of restitution. The Clerk does it. Once the Judge  
13 determines that restitution is owed, the Clerk just goes in,  
14 enters the judgment. There's no notice. There's nothing to object  
15 to. It just happens. It just happened to not take place here.

16 MR. PACK: Right, but I mean if the Court is trying to  
17 figure out whether it's court-ordered or complete restitution, we  
18 have no findings of fact to know and I think there's every reason  
19 to believe the actual complete restitution amount could have been  
20 higher. We just don't know. There was just nothing to object to  
21 at that time. There was no document that says final civil  
22 judgment.

23 If the Court has any other questions.

24 THE COURT: No, that's all. Anything left that you'd  
25 like to say, Mr. Bates?

1 MR. BATES: Just that I understand Mr. Pack was not  
2 counsel of record at the time this happened. It strikes me as odd  
3 that the defendant would go forward under that assumption; that  
4 the Court has violated its obligation and used its discretion in  
5 not making a complete restitution finding and not having the  
6 Clerk enter that same judgment. That was his thinking going  
7 forward, that there was some sort of detrimental reliance upon  
8 the Court not fulfilling its statutory obligation. I guess I'm  
9 doubtful that actually would occur.

10 MR. PACK: And my last point. I know this is a tough  
11 issue and I think our proposal is the best issue. I think it  
12 avoids it picking up a lot of dust, I think, if one party or the  
13 other is going to definitely appeal this because this is an  
14 unsettled question and let the Court of Appeals decide this, but  
15 I think our proposal can avoid that and can be a win/win for  
16 everyone.

17 THE COURT: And have the parties discussed that?  
18 Because there's a risk of that. There is a risk.

19 MR. BATES: I've had that discussion with the victim,  
20 Your Honor.

21 THE COURT: Okay.

22 [Long pause.]

23 THE COURT: Okay. All right. Well, I wish there were a  
24 cleaner record on this. I will just make the findings that I can  
25 from the information that I have and then rule the best that I



1 can based on the record in this case.

2           So there is not an explicit finding in the judgment in  
3 this case as to whether restitution--the restitution number was  
4 complete, court-ordered or both. However, at the time and since  
5 then there was not a dispute as to the restitution amount and it  
6 was agreed upon by the parties at the time of sentencing and it  
7 hasn't been disputed. Amount has not ever been disputed. So this  
8 was an agreed upon amount.

9           77-38A-401 says upon the Court determining that a  
10 defendant owes restitution, the Clerk of the Court shall enter an  
11 order of complete restitution on the civil judgment docket. This  
12 didn't happen. I do think it's important that that statute says  
13 upon the Court determining that a defendant owes restitution. It  
14 doesn't specifically say that upon the Court labeling a  
15 restitution amount as complete, that then the Clerk must go ahead  
16 and enter that. It says as soon as the Court determines that a  
17 defendant owes restitution, the Clerk shall order that as a civil  
18 judgment.

19           I will note here this before me today is not a dispute  
20 about a restitution amount. It's a dispute as to whether it is  
21 appropriate to enter a civil judgment at this time and looking at  
22 the statute, it's clear that this is supposed to be an automatic  
23 function. This is something that the Clerk is supposed to  
24 automatically do as soon as the Court determines that restitution  
25 is owed. It's not something that there's any particular notice.

1 It's just something that happens after sentencing and for  
2 whatever reason this didn't happen.

3 In looking at Rule 30(b), it states that you can  
4 correct a clerical mistake and when looking at what the factors  
5 are to determine if something is clerical, one is whether the  
6 order or judgment rendered reflects what was done or intended. I  
7 think that the restitution amount was clearly the one that was  
8 agreed upon by the parties and that the Court intended to order  
9 and that's what should have been. Barring some different, lesser  
10 order, lesser amount that was ordered as court-ordered  
11 restitution, that's what should have been placed on the civil  
12 judgment docket.

13 Second, whether the error was the result of judicial  
14 reasoning or decision-making. I don't think this is. The Court  
15 should have called it complete and court-ordered, but the fact  
16 that everyone agreed to this number, I don't think there's a  
17 dispute about what the Court meant to do. This wasn't a Court  
18 decision to not enter it as a civil judgment. It should have  
19 happened and then, finally, whether the error is clear from the  
20 record. I think it's clear that this restitution amount was  
21 entered and it was not entered as a civil judgment.

22 So under Rule 30(b), I'll say that this can be entered  
23 in the docket as a civil judgment.

24 Mr. Bates, since you have agreed to adopt the number  
25 that is without interest, what is that number and are both sides

# ADDENDUM B

DAVID R. BRICKEY, #6188  
Summit County Attorney  
Summit County Justice Center  
6300 North Silver Creek Drive  
Park City, Utah 84098  
Telephone (435) 615-3828  
Attorney for Plaintiff

3RD DISTRICT COURT-SUMMIT  
2010 JUL 26 PM 4:08  
FILED BY da

---

**IN THE THIRD DISTRICT COURT  
in and for SUMMIT COUNTY  
STATE OF UTAH**

---

STATE OF UTAH,	:	
	:	<b>JUDGMENT AND COMMITMENT</b>
PLAINTIFF	:	
VS.	:	
	:	Criminal No. 091500159
GARY WILLIAM NIELSEN,	:	
D.O.B. 02-24-44	:	
	:	
DEFENDANT.	:	Judge

---

On the 26<sup>th</sup> day of July, 2010, David R. Brickey, Summit County Attorney, attorney for the State of Utah, and the defendant, by and through counsel, Gail E. Laser, appeared before the above court for sentencing.

IT IS ADJUDGED that the defendant has been convicted upon plea of guilty to the offense of Theft, a Second Degree Felony. The Court having asked if the defendant had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant be committed to the Utah State Prison for a period of one (1) to fifteen (15) years as provided by law for the offense of which the defendant is adjudged guilty.

IT IS ORDERED that the execution of the foregoing sentence is stayed and the defendant is placed on probation with the Department of Corrections, Adult Probation and Parole, for a period of six (6) years under the following terms and conditions, pursuant to Utah Code Annotated §77-18-1, et. seq.

1. That the defendant maintain good behavior and have no violations of any laws;
2. That the defendant comply with all terms and conditions imposed by Adult Probation and Parole;
3. That the defendant serve one (1) year in the Summit County Jail with commitment to issue forthwith;
4. That the defendant pay restitution in the amount of \$346,248.58 to Creekside Funding, c/o Rick Arnold, 5255 West 11000 North, Suite 100, Highland, Utah, 84003;
5. That the defendant not practice law in the State of Utah without the approval of the Utah State Bar.

DATED this 26<sup>th</sup> day of July, 2010.

BY THE COURT

  
Third District Court Judge

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, this \_\_\_ day of July, 2010, to the following:

Gail E. Laser  
P.O. Box 566  
Park City, Utah 84060-566

000060

# ADDENDUM C

DAVID R. BRICKEY, #6188  
Summit County Attorney  
PAUL R. CHRISTENSEN, #5677  
Prosecuting Attorney  
Summit County Justice Center  
6300 North Silver Creek Drive  
Park City, Utah 84098  
Telephone (435) 615-3828  
Facsimile (435) 615-3833  
Attorney for Plaintiff

THIRD DISTRICT COURT - SUMMIT  
2010 NOV 12 AM 11:35  
FILED BY da

---

IN THE THIRD DISTRICT COURT  
in and for SUMMIT COUNTY  
STATE OF UTAH

---

STATE OF UTAH,	:	<b>ORDER MODIFYING TERMS AND CONDITIONS OF PROBATION</b>
PLAINTIFF	:	
VS.	:	Criminal No. 091500159
GARY WILLIAM NIELSEN, D.O.B. 02-24-44	:	
DEFENDANT.	:	Judge

---

Having heretofore adjudged the defendant guilty of the offense of Theft, a Second Degree Felony, the Court on the 26<sup>th</sup> day of July, 2010, imposed sentence on said defendant that the defendant be placed on probation with the Department of Corrections, Adult Probation and Parole, for a period of six years under various terms and conditions.

On the 8<sup>th</sup> day of November, 2010, the defendant appeared in person and with counsel, Joseph Wrona, for a review hearing. The State of Utah was represented by Paul R. Christensen, Summit County Prosecuting Attorney. Upon review of the matter, it is

ORDERED, ADJUDGED AND DECREED that the defendant's previous sentence be modified as follows:


000125

1. That the defendant complete all terms and conditions previously imposed on July 26, 2010;
2. That the defendant be released from the Summit County Jail on November 8, 2010;
3. That the defendant pay restitution in the amount of \$346,248.58 to Creekside Funding, c/o Rick Arnold, 5255 West 11000 North, Suite 100, Highland, Utah, 84003. Defendant shall pay 25% of his ~~adjusted~~ gross income as restitution up to an income of \$120,000. If defendant's income is more than \$120,000, restitution shall be reassessed.

IT IS FURTHER ORDERED that this Court reserves the right to make further orders in connection with this matter.

DATED this 12<sup>th</sup> day of November, 2010.

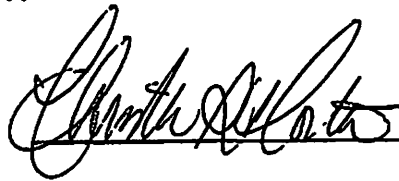
BY THE COURT:

  
\_\_\_\_\_  
Third District Court Judge

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order Modifying Terms and Conditions of Probation in the matter of *State of Utah v. Gary William Nielsen*, postage prepaid, this 12<sup>th</sup> day of November, 2010, to the following:

Joseph E. Wrona  
WRONA LAW FIRM, PC  
1745 Sidewinder Drive  
Park City, Utah 84060

  
\_\_\_\_\_

000126



# ADDENDUM D

West's Utah Code Annotated

Title 77. Utah Code of Criminal Procedure

Chapter 38A. Crime Victims Restitution Act (Refs & Annos)

Part 4. Restitution Judgments

U.C.A. 1953 § 77-38a-401

§ 77-38a-401. Entry of judgment--Interest--Civil actions--Lien

Currentness

(1) Upon the court determining that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Section 77-38a-302 on the civil judgment docket and provide notice of the order to the parties.

(2) The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. In addition, the department may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.

(3) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and reasonable attorney fees.

(4) Notwithstanding Subsection 77-18-6(1)(b)(v) and Sections 78B-2-311 and 78B-5-202, a judgment ordering restitution when entered on the civil judgment docket shall have the same affect and is subject to the same rules as a judgment in a civil action and expires only upon payment in full, which includes applicable interest, collection fees, and attorney fees. Interest shall accrue on the amount ordered from the time of sentencing, including prejudgment interest. This Subsection (4) applies to all restitution judgments not paid in full on or before May 12, 2009.

(5) The department shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

**Credits**

Laws 2001, c. 137, § 9, eff. April 30, 2001; Laws 2008, c. 382, § 2208, eff. May 5, 2008; Laws 2009, c. 111, § 1, eff. May 12, 2009; Laws 2011, c. 37, § 1, eff. May 10, 2011.

**Notes of Decisions (6)**

U.C.A. 1953 § 77-38a-401, UT ST § 77-38a-401

Current through 2016 Second Special Session