

2003

State of Utah v. Matthew Clark : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	BRIEF OF THE APPELLANT
	:	
Plaintiff/	:	
Appellee	:	
	:	
v.	:	
	:	
MATTHEW CLARK,	:	Court of Appeal
	:	Case No.: 20030132-CA
	:	
Defendant/	:	
Appellant.	:	

**APPEAL FROM AN ORDER OF RESTITUTION OF THE
THIRD JUDICIAL DISTRICT OF SUMMIT COUNTY
HONORABLE BRUCE LUBECK PRESIDING**

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to 78-2a-3(2)(c), Utah Code Ann. 1953, as amended.

STATEMENT OF ISSUES

1. Was the trial court's decision in awarding \$25.00 per hour for cleaning supported by the evidence?
2. Was the property management company a "victim" when there was no loss of income or earnings?
3. Did the trial court err in finding a loss due to cleaning costs of the property management company when the employees were already on the payroll and no additional expenses were required in having the cleaning performed?
4. Was there reasonably reliable information on which the trial court could base its decision?

Issues Preserved.

The issues were preserved during the Restitution Hearing (R. 16-18; 19).

Standard of Appellate Review:

An appellate court will not disturb a trial court's restitution order unless it exceeds that prescribed by law or otherwise abused its discretion. *State v. Schweitzer*, 943 P.2d 649, 653 (Utah Ct. App. 1997). It is within the discretion of the trial court to impose sentence, which may include a fine, restitution, probation or imprisonment. See Utah

Code Ann. Section 76-3-201(2), (4) (1999); “However, upon conviction of a crime which has resulted in pecuniary damages, in addition to any other sentence imposed, the trial court is statutorily mandated to order the payment of restitution unless the court finds that restitution is inappropriate.” *State v. Snyder*, 747 P.2d 417 at 420 (Utah 1987); see also Utah Code Ann. Section 76-3-201(4) (1999). Under both the United States and the Utah Constitutions, due process requires reasonably reliable information. See *State v. Gomez*, 887 P.2d 853, 854, (Utah 1994). If the order is premised on a statutory interpretation, the trial court’s interpretation is provided no deference and is reviewed for correctness. *State v. Westerman*, 945 P.2d 695, 696 (Utah Ct. App. 1997). See also *State v. Mast*, 40 P.3d 1143 (2001).

To successfully challenge the sufficiency of the evidence, an appellant must demonstrate that the clear weight of the evidence contradicts the trial court’s verdict. *State v. Gurr*, 904 P.2d 238, 245 (Utah Ct. App. 1995).

DETERMINATIVE LAW

1. Cases: *State v. Gomez*, 887 P.2d 853, 854, (Utah 1994)
State v. Schweitzer, 943 P.2d 649 (Utah Ct. App. 1997).
2. Statutes: Utah Code Ann. Section 76-3-201 (1999).
Utah Code Ann. Section 77-38a-203 (1999).
3. Constitutional: Fifth Amendment to the Constitution of the United States (Due Process Clause).
Article I, Section 7 of the Constitution of Utah (Due Process Clause)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Pursuant to his pleas, Defendant was convicted of one count of theft and one count of burglary, both third degree felonies. At a subsequent sentencing proceeding, Defendant was ordered to pay restitution, but the amount was not determined. If the parties were unable to agree as to an amount, a restitution hearing would be held. A restitution hearing was held. The condominiums burgled by the defendant were managed by a property management company. A representative of the property management company testified at the hearing. Defendant objected to a claim of \$25.00 per hour for cleaning, as the manager stated some of the cleaners were paid less than \$25.00 per hour, including taxes and insurance. Additionally, Defendant argued that the management company was not a victim under the statute as the sums for cleaning were not earnings and were not authorized by statute as there was no loss of income for bodily injury. Further, because the employees were already on the management company's payroll, Defendant argued that there was no loss of income to the management company. Further, it was argued that the management company had not provided sufficient evidence as to the time it took to accomplish the activities and had not proven the loss.

The trial court disagreed, and ordered restitution in the amount of \$512.00 for the lost wages at \$25.00 per hour. Defendant did not contest the amounts for replacing two televisions in the amount of \$488.00.

B. COURSE OF THE PROCEEDING

Defendant pled guilty on July 16, 2002, to one count of burglary and one count of theft, both third degree felonies. (Judgment and Commitment of July 16, 2002, R. 20). Defendant was sentenced on August 27, 2002. (Judgment and Commitment of Judge Hilder signed August 29, 2002, at R. 24-25.) If the parties could not agree as to restitution, a hearing was to be held. A hearing was held on February 4, 2003. (Addendum 1). Also appearing at the hearing was Mr. VanCampen as counsel for a co-defendant, Mr. Aaron Croston. Mr. Aaron Croston did not appeal. (R. 2). Witnesses were called and arguments made before the Honorable Judge Lubeck. Restitution was ordered. (R. 43-44, Order of Restitution of February 6, 2003.) Defendant Clark filed a Notice of Appeal on February 10, 2003. (R. 47-48).

C. DISPOSITION OF THE TRIAL COURT

At February 4, 2003, the trial court ordered restitution for the \$512.00 in lost wages, finding:

[W]hat we have here is indeed loss to the actual owners of the condo units, but someone making the repairs so that they didn't have to do it. If they had to pay someone else, then there would be the loss to them. So it seems to me that it's really no different

that these people do it and without billing them, the loss indeed really is to the homeowners because if they didn't do it, or the condo owners, the condo owners would have to do it themselves. So, while some of these do seem a little hard to understand, Mr. Sheldon obviously isn't the one who did all of them himself. It seems to me that again placing them in the place of the condo owners. The owners had to do these things themselves and either hire someone else to do it or take the time to do it themselves. These things do seem reasonable to me. So I'm going to find in accordance with the exhibit those hours are, expended are reasonable in terms of the hourly wage of the people involved.

I'm crediting Mr. Sheldon with the notion that he believes these are all very conservative in terms of both the time and the other associated issues that go along with the wage. I find that exhibit 1 is a reasonable calculation of wage and accordingly, I am going to order and I think that is the proper subject of restitution. I think it is indeed a loss passed on from the condo owners to this entity. So I'm going to order restitution. I think that's unchallenged in the amount of \$488.00 for the return of the various items that were taken, or the cost of the items, and \$512.00 for wages so that's a total of \$1,000.00 restitution. So with respect to each of the defendants, the probation order signed by Judge Hilder on August 29, 2002 will reflect that total restitution is \$1,000.00 to be joint and several for each of them. Addendum 1.

D. STATEMENT OF THE FACTS

1. Defendant pled guilty to a third degree felony theft and a third degree felony burglary on July 16, 2002. (R. 20).
2. On August 27, 2002, Defendant was sentenced. At that time, restitution was ordered, but not determined. If the parties were unable to agree upon a restitution amount, a restitution hearing would be set. (R. 24-25).
3. A restitution hearing was held on February 4, 2003, before Judge Lubeck. (Addendum 1, Transcript of Restitution Hearing.) At the hearing, Larry Sheldon, an employee of Identity Properties, testified. (Addendum 1 at 3).
4. Exhibit 1 was submitted which contained a breakdown of hours purportedly spent by various employees of Identity Properties. (Addendum 2).
5. Mr. Sheldon testified that Exhibit 1 was "a fair representation. If anything, it's conservative." (Addendum 1 at 3).
6. In explaining how the rate was determined, Mr. Sheldon first indicated that the housekeepers worked on a piece rate and would make in excess of \$25.00 per hour at the end of any pay period. (Addendum 1 at 3). Further, whenever housekeeping was done outside of the set fee, owners or guests would be charged at \$25.00 per hour. (Addendum 1 at 3-4).
7. Mr. Sheldon also testified that fourteen and a half hours to collect information regarding missing items was fair. (Addendum 1 at 4). He also believed that \$25.00 per

hour was a fair amount for this activity. (Addendum 1 at 4-5). This was because of rates done for other "things" and rates in other areas of the company were billed at \$25.00 an hour or more. (Addendum 1 at 5).

8. Mr. Sheldon explained that but for the break-ins and resulting convictions, the staff would not have spent the time set forth in Addendum 2/Exhibit 1. (Addendum 1 at 5).

9. Mr. Sheldon also indicated that time of an unknown amount was spent in re-keying the units. (Addendum 1 at 6).

10. Upon cross examination, Mr. Sheldon advised that Patty Winterer (Addendum 2 under the date 05/06/02), earned in the "magnitude" of \$17.50 per hour. Additionally, the company had a cost of 20% over that amount. (Addendum 1 at 7).

11. Marilyn Mackey was paid both an hourly rate and a piece rate. The hourly rate was \$10.50 or \$11.00. (Addendum 1 at 7-8).

12. Brooke Larson, the maintenance supervisor, was paid in the "magnitude" of \$15.00 per hour. (Addendum 1 at 8).

13. Mr. Slutten, the President, was paid a salary of probably \$120,000.00. (Addendum 1 at 8).

14. The witness clarified that housekeeping was not done on a piece work basis at \$25.00 per room. (Addendum 1 at 8-9). Rather, they were paid different rates for each condo size. It was the witness's statement that the employees would make in excess of

\$25.00 per hour if one looked at the gross piece rate at the end of a given pay period.

(Addendum 1 at 9).

15. For the size of the condominiums which were broken into, the charge for a full clean was \$75 per hour if the owners were charged. However, in this case, the owners were not charged. (Addendum 1 at 9).

16. On this occasion, Ms. Mackey was paid an hourly rate of \$10.50 to \$11.00 an hour. (Addendum 1 at 9-10).

17. In referring to Addendum 2-Exhibit 1, the installation of televisions on June 20 was accomplished by an unknown individual in "the area of \$12.50 per hour each."

18. Upon cross examination by Mr. VanCampen, Mr. Sheldon was unable to state where the replacements for the stolen televisions were purchased, but was able to identify that it had occurred in Salt Lake City. (Addendum 1 at 11-12).

19. Upon redirect examination by the prosecution, Mr. Shelton indicated that the \$25.00 per hour included items such as FICA, insurance, and other expenses.

(Addendum 1 at 13).

20. However, upon re-cross by Defendant Clark, Mr. Shelton again indicated that the additional amounts were approximately 20% of the salary. (Addendum 1 at 14).

21. In argument, Defendant objected to a claim of \$25.00 per hour for cleaning, as the manager stated some of the cleaners were paid less than \$25.00 per hour, including taxes and insurance. Additionally, Defendant argued that the sums for cleaning were not

authorized by statute as there was no loss of earnings due to bodily injury. Further, because the employees were already on the management company's payroll, Defendant argued that there was no loss of income to the management company. Additionally, the management company was not in Defendant's view a victim under the statute. Further, it was argued that the management company had not provided sufficient evidence as to the time it took to accomplish the activities and had not proven the loss. (Addendum 1 at 15-18).

22. The Court made oral findings (below) and then issued a written order on February 6, 2003. (R. 43-44). In its oral findings, the court stated:

[W]hat we have here is indeed loss to the actual owners of the condo units, but someone making the repairs so that they didn't have to do it. If they had to pay someone else, then there would be the loss to them. So it seems to me that it's really no different that these people do it and without billing them, the loss indeed really is to the homeowners because if they didn't do it, or the condo owners, the condo owners would have to do it themselves. So, while some of these do seem a little hard to understand, Mr. Sheldon obviously isn't the one who did all of them himself. It seems to me that -- again placing them in the place of the condo owners. The owners had to do these things themselves and either hire someone else to do it or take the time to do it themselves. These things do seem reasonable to me. So I'm going to find in accordance with the

exhibit those hours are, expended are reasonable in terms of the hourly wage of the people involved.

I'm crediting Mr. Sheldon with the notion that he believes these are all very conservative in terms of both the time and the other associated issues that go along with the wage. I find that exhibit 1 is a reasonable calculation of wage and accordingly, I am going to order and I think that is the proper subject of restitution. I think it is indeed a loss passed on from the condo owners to this entity. So I'm going to order restitution, I think that's unchallenged in the amount of \$488.00 for the return of the various items that were taken, or the cost of the items, and \$512.00 for wages so that's a total of \$1,000.00 restitution. So with respect to each of the defendants, the probation order signed by Judge Hilder on August 29, 2002 will reflect that total restitution is \$1,000.00 to be joint and several for each of them. Addendum 1.

SUMMARY OF THE ARGUMENT

Any loss did not equal \$25.00 an hour. The sums for cleaning were not authorized by statute. The management company was not a victim under the statute. There was no loss of earnings due to bodily injury. Because the employees were already on the management company's payroll, there was no loss of income to the management company. The management company did not provide sufficient evidence as to the time it took to accomplish the activities, who performed them, and did not prove the loss.

ARGUMENT

1. **The clear weight of the evidence is against the trial court finding that there was a cost of \$25.00 per hour for cleaning.**

This case is distinguishable from *State v. Twitchell*, 832 P.2d 866 (Ct. App. 1992). Clark does not maintain, as Twitchell did, that no restitution is owing. Rather, he maintains that the damages were improperly determined. Further, the trial court in this matter gave no indication that the restitution was based on rehabilitative aspects. See Utah Code Ann. 76-3-201(8)(c)(iii), Addendum at 19-21.

The property company manager indicated that the salaries for cleaners were \$17.50, \$15.00 and \$11.00-10.50 per hour plus 20% for taxes and insurance. (Addendum 1 at 7-8).

This is simply not \$25.00 per hour. \$17.50 per hour plus 20% equals \$21.00. \$11.00 per hour plus 20% equals \$13.20 an hour. It does not equal \$25.00 per hour. Yet \$25.00 per hour is the amount the Court awarded. Addendum 1 at 29.

While it is clear that the trial court has discretion in sentencing, that discretion may not be abused, *State v. Schweitzer*, 943 P.2d 649, 653. The evidence demonstrates an abuse of discretion.

2. **Restitution for the cleaning sums is not authorized by statute as the property management company was not a victim within the meaning of the statute.**

It is correct that 76-3-201(1)(e)(i) defines a victim as any person who the court determines has suffered pecuniary damages as the result of the defendant's criminal activities.

76-3-201(1)(c) defines pecuniary damages as all special damages, but not general damages, which a person could recover against the defendant in a civil action rising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

The \$25.00 per hour did not constitute an award for property taken or damaged. Even assuming that the amount of \$25.00 per hour was correct, these losses do not constitute "earnings."

First, the use of the term "earnings" in this section would appear to constitute what is most commonly known as wage or salary loss. See also 77-38a-203(1)(b)(i). There is no evidence that anyone suffered lost wages or salaries in this matter. All the employees were paid. Even the company president was paid. (Addendum B).

77-38a-302(5)(b)(iv) uses a different term: "income." However, in using the term "income", the statute requires that there be a bodily injury to the victim.

There is no evidence that the management company took time off work and did not receive earnings from an employer during this period. There is no evidence that because of an injury, the management company was unable to work during this period.

3. Even if the property management company had losses of \$25.00 and even if those losses constituted earnings or income, there is no evidence that such loss has occurred.

Mr. Shelton testified at the restitution hearing that the employees were paid at an hourly rate. (Addendum 1 at 9-10). The employees were not paid their piece rate. *Id.* However, there is no indication that the amounts the management company was required to pay them over that pay period changed in any manner. There is no evidence of the management company sustaining a loss.

4. The trial court decision is not based upon reasonably reliable information.

As argued above, \$25.00 per hour was not the amount paid. Further, Mr. Sheldon was unable to show the time it took to accomplish the activities, when these activities purportedly occurred, or in some cases, even who it was that performed the duties. (See Addendum 2/Exhibit 1). Further, the witness was unable to state exactly how much people earned, only “in the magnitude of...”. (See e.g., Addendum 1 at 8, line 8). In speaking of replacing the T.V.’s, the witness stated “I believe there were two individuals involved...I believe [they were paid] in the area of \$12.50 per hour each.” (Addendum 1 at 10). There was no documentation presented as to what was actually paid to the persons involved. (Addendum 1 at 11).

Under both the United States and the Utah Constitutions, due process requires reasonably reliable information. See *State v. Gomez*, 887 P.2d 853, 854, (Utah 1994). At \$25.00 per hour, some \$50,000.00 a year is being paid for a single housekeeper. It is suggested that this is not a reasonably, reliable wage for that occupation.

CONCLUSION

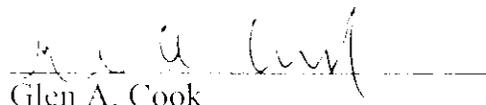
The evidence did not demonstrate that \$25.00 per hour was paid for cleaning. The evidence demonstrated that less than that amount was paid for cleaning.

Even if that was the correct hourly wage, there is no evidence that the property management company sustained a loss; paid any greater salaries or wages than they would have otherwise. These individuals were already on the payroll.

Further, there was no loss of "earnings" or "income" as those terms are used in the statute. There was no indication that by engaging in the activities purportedly required because of the crimes, less income or earnings were derived by the management company.

Even if there was a loss, no reliable information was provided as to that loss amounting to \$25.00 per hour.

Respectfully submitted this 4 day of June, 2003.


Glen A. Cook
Cook, Skeen & Robinson, L.L.C.
Counsel for Defendant/Appellant
Matthew Clark

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the "BRIEF OF APPELLANT" was mailed via first-class U.S. Postal Service mail, postage pre-paid, on June 5, 2003, to:

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J. Frederic Voros, Jr.

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

STATE OF UTAH, : Case No. 021500145

Plaintiff, :

v :

MATTHEW CLARK, :

Defendant. :

RESTITUTION HEARING FEBRUARY 4, 2003

BEFORE

THE HONORABLE BRUCE C. LUBECK

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

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SUMMIT COUNTY, UTAH - FEBRUARY 4, 2003

HONORABLE BRUCE LUBECK, JUDGE PRESIDING

(Transcriber's note: Speaker identification
may not be accurate with audio recordings)

P R O C E E D I N G S

THE COURT: All right. Well, if there's nothing we
can handle summarily, so go ahead with that? Any other cases
we can deal with?

MR. COOK: [inaudible] on behalf of Mr. Clark we're
prepared to proceed, your Honor. Mr. Clark is in the
courtroom.

THE COURT: So, I'll call those if we're ready. Is
everyone ready to go on those - on Clark and Croston matters?

MR. VANCAMPEN: Mr. Croston hasn't appeared yet, your
Honor. I don't know if we just go ahead and do it without him
or -

THE ?: I suspect that's up to counsel if he'd like
to proceed without that I'll -

MR. BRICKEY: I have my witness. Mr. Sheldon is
present, your Honor.

THE COURT: Well.

MR. COOK: I think his presence or lack of presence
isn't going to change anything I don't think, so why don't we
just go ahead.

MR. VANCAMPEN: And, your Honor, I - our client's

1 testimony isn't really the issue. The issue are the
2 [inaudible] claims, in my view.

3 THE COURT: Okay, well, State vs. Matthew Clark,
4 021500145, Mr. Clark is here with his attorney Glen Cook, and
5 State vs. Aaron Croston, 021500146. Mr. Croston is not here,
6 but his attorney Mr. VanCampen is here. These are each
7 scheduled for an evidentiary hearing, and while they are - on
8 the issue of restitution, and while they are separate cases,
9 they appear to me to be related. And so for purposes of this
10 hearing only, we'll hear them together.

11 Mr. Brickey, call your first witness.

12 MR. BRICKEY: Yes, your Honor, the State would call
13 Larry Sheldon.

14 THE COURT: Mr. Sheldon, step up here to the clerk,
15 if you would, and take an oath.

16 LARRY SHELDON

17 having first been duly sworn, testified
18 upon his oath as follows:

19 THE COURT: Have a seat over here on the witness
20 stand if you would. And as soon as you get there, tell us your
21 name and spell it please.

22 THE WITNESS: My name is Larry Sheldon, L-A-R-R-Y,
23 S-H-E-L-D-O-N.

24 THE COURT: Thank you.

25 Go ahead, Mr. Brickey.

1 MR. BRICKEY: Your Honor, may I just show counsel
2 what's marked as Exhibit No. 1 and ask for permission to
3 approach the witness?

4 THE COURT: You may.

5 DIRECT EXAMINATION

6 BY MR. BRICKEY:

7 Q I'm handing you, Mr. Sheldon, a message. Does that
8 look familiar to you? If so, could you indicate if you
9 prepared that email message?

10 A Yes, I did.

11 Q Does that accurately reflect the amount of time
12 employee personnel had spent cleaning and collecting
13 information related to the thefts that occurred at the two
14 condominium units at Identity Property?

15 A I feel it's a fair representation. If anything, it's
16 conservative.

17 Q All right. With regard why you think it's
18 conservative, you've indicated that you're billing at \$25 an
19 hour, for instance, for some of the cleaning costs. Why do you
20 believe that's a fair estimate or a fair amount?

21 A Typically our housekeepers work on an piece rate and
22 make in excess of \$25 at the end of any pay period.
23 Additionally, we charge for - we have a set fee for most
24 housekeeping. Whenever we do housekeeping that's outside of
25 that set fee, we charge our owners or our guests a \$25 an hour,

1 you know, \$25 per hour rate.

2 Q All right. And in the matter of this particular
3 claim, how much time is it calculated, and you can indicate to
4 the Court whether that's a conservative amount or how firm you
5 believe your employees have spent cleaning the two units, I
6 believe on two separate occasions; is that correct?

7 A Yes. There were two - two separate weekends that
8 both units were entered and we cleaned them.

9 Q And you believe the amount of time you set for there,
10 I believe it's approximately six hours; is that correct?

11 A I'd have to go through and add it, but yes.

12 MR. BRICKEY: Well, I suppose at this point it would
13 make sense, your Honor, to move to admit Exhibit No. 1.

14 MR. COOK: Objection on behalf of Mr. Clark, your
15 Honor.

16 MR. VANCAMPEN: No objection, your Honor.

17 THE COURT: One is received.

18 (Plaintiff's Exhibit 1 received)

19 Q (BY MR. BRICKEY) With regard to the amount of time
20 other personnel had spent in collecting information such as
21 apprehending or the search of the complex for missing items, do
22 you believe that is a fair and accurate representation? I
23 believe it's approximately 14½ hours?

24 A Yes, I do.

25 Q How much, you again have indicated \$25 an hour for

1 that time, do you believe that to be a fair amount?

2 A Yes, I do.

3 Q What do you base that on?

4 A Most of our rates for things that we do in
5 associations and in housekeeping and in other areas of the
6 company we bill \$25 an hour or even more than that.

7 Q But for the fact that these break-ins and these
8 convictions, would your staff have spend that time looking for
9 these items or doing the things you've set forth in Exhibit 1?

10 A No, they would not.

11 Q And specifically I think you previously have
12 indicated that you had to replace two TVs; is that correct?

13 A Yes.

14 Q What was that amount that you had to pay out to
15 replace those two TVs, can you recall today?

16 A I believe it's in the magnitude of \$488. I submitted
17 that in another letter, but it's a little less than \$500.

18 Q Right. You've indicated \$488. Can you indicate to
19 the Court is that purchasing new TVs or replacement TVs? What
20 was that specifically for?

21 A It was new TVs to replace the ones that were not
22 recovered.

23 Q They were not recovered?

24 A Yes.

25 Q All right. As of this amount, it's my understanding

1 that you're asking for restitution of the two TVs that were not
2 recovered in the amount of \$488; is that correct?

3 A Yes.

4 Q As well as the total time of 20.5 at an hourly rate
5 of \$25 an hour for a total expense of \$512.50; is that
6 accurate?'

7 A Yes, it is.

8 Q And if I were to combine those two amounts, \$488 and
9 roughly \$512, that would be the total amount that you're
10 currently seeking; is that correct?

11 A Yes.

12 Q I may ask just a - one more quick question. Was
13 there an additional expense occurred that your staff had to
14 incorporate into this claim for re-keying the units to have
15 them secured from further break-ins?

16 A We did re-key them, but I do not have a cost. We did
17 it in house, so not - not asking for that.

18 Q But you're not asking for that?

19 A No.

20 MR. BRICKEY: All right. No further questions, your
21 Honor. Thank you.

22 THE COURT: Thank you.

23 Cross-examination, Mr. Cook?

24 MR. COOK: Your Honor, counsel has not published the
25 exhibit to the Court. It might be of assistance to the Court

1 to have that.

2 THE COURT: That's fine. The defendant - excuse me,
3 the witness has that.

4 Mr. Sheldon, can I take a look at that for a minute?
5 Thank you.

6 I have exhibit one.

7 MR. COOK: Thank you, your Honor. For the Court's
8 information, I'll be proceeding through the items and I thought
9 it might be helpful to the Court to understand what I'm talking
10 about.

11 CROSS-EXAMINATION

12 BY MR. COOK:

13 Q Mr. Sheldon, you list here a Kathy Winterer as a site
14 manager. How much is - is Ms. Winterer paid an hourly or a
15 salary wage?

16 A She's paid an hourly rate.

17 Q What is her hourly rate?

18 A I do not know that. I believe it's in the magnitude
19 of \$17.50 per hour. Our cost to that is about 20 percent over
20 that amount.

21 Q Okay. And you list a Marilyn Macki, housekeeping
22 supervisor. Is Ms. Macki hourly as well?

23 A On occasion. She has an hourly rate as well as a
24 piece rate.

25 Q All right. What is her hourly rate?

1 A I believe it's around \$10.50 or \$11.00.

2 Q Brook Larsen, maintenance supervisor. Is that a
3 female or a male Brook?

4 A It's a male.

5 Q Okay. And how is Mr. Larsen paid, hourly or salary?

6 A Hourly.

7 Q What is his hourly rate?

8 A It's in the magnitude of \$15.00 per hour.

9 Q And Mr. Slutten. Is Mr. Slutten, I'm guessing, a
10 salary? He's listed as a president.

11 A He is salary.

12 Q Okay. And what is his salary?

13 A I'd have to do the math, but I expect it's around \$90
14 per hour.

15 Q Okay. Salary usually isn't hourly. What is his
16 yearly salary?

17 A I - an estimate?

18 Q Okay. Who pays him?

19 A It goes through payroll department. It's probably
20 \$120,000.

21 Q And he's the president of the company?

22 A Yes.

23 Q And is his salary or is it based on profits?

24 A It's a salary.

25 Q You indicated that typically housekeeping is done on

1 a piece work basis at \$25 a room; is that correct?

2 A No.

3 Q Okay. What is correct?

4 A The rates are - are different for each condo size.
5 And what I indicated was that they make in excess of \$25 an
6 hour if you look at their gross piece rate at the end of any
7 given pay period.

8 Q Okay. What is the basis on which you pay for piece
9 work?

10 A By the size of the condo.

11 Q Okay. And for the size of these two condos, what do
12 you usually pay?

13 A Around \$75 is what we charge.

14 Q \$75 for what?

15 A For a full clean. That's charged to the owner. In
16 this case, we incurred the charge, the owners, you know, we
17 didn't charge the owners.

18 Q Okay, which was my next question. You indicated you
19 usually bill the owners for these cleans. But you not bill the
20 owners these times?

21 A That's correct.

22 Q How did you compute Ms. Macki's payment for doing
23 these cleans?

24 A How do you (inaudible)?

25 Q How do you figure out what to pay her to do it?

1 A These were on an hourly rate.

2 Q Okay. You say these were on an hourly rate? And you
3 told us that Ms. Macki earns \$10.50 to \$11.00 an hour; is that
4 correct? You need to answer out loud.

5 A Yes.

6 Q Now, Mr. Larsen is your maintenance supervisor. On
7 June 20th at the bottom you indicate maintenance department
8 installed new appliances with appropriate connections. Was
9 that Mr. Larsen or some other individual?

10 A Another individual.

11 Q Okay. Do you know who the other individual was?

12 A I believe there were two individuals involved.

13 Q And how much were they paid?

14 A I believe in the area of \$12.50 per hour each.

15 Q So are you saying it took four man hours to install
16 the new TVs?

17 A I believe - are the two hours indicated on that?

18 MR. COOK: May I approach, your Honor?

19 THE COURT: I've got, Mr. Sheldon, I'll hand back
20 Exhibit 1 to Mr. Sheldon.

21 THE WITNESS: Any hours listed on there are just the
22 total. It's not on a per man basis. So that two hours, it's
23 an hour to do the -

24 MR. COOK: Thank you.

25 I have no further questions, your Honor.

1 THE COURT: Thank you.

2 Mr. VanCampen, any cross-examination?

3 MR. VANCAMPEN: Just briefly.

4 CROSS-EXAMINATION

5 BY MR. VANCAMPEN:

6 Q Just briefly, sir. You state on the itemization here
7 that the complex was searched for the missing items. Can you
8 explain to me where the search took place? Was it just common
9 areas or where did this search take place?

10 A This was in all of the units after the two units were
11 entered and it wasn't forced, so we assumed they had a key and
12 we searched the complex to see if there were any other missing
13 items or any other condominiums had been entered.

14 Q Okay. Do you have any documentation as to what was
15 actually paid to each of these persons involved?

16 A We can go back to payroll records. I have - I don't
17 have that with me.

18 Q You don't have that with you today. Okay. Can you
19 tell me where the replacements of the stolen goods were
20 purchased?

21 A Not off the top of my head. I do have some
22 information with a receipt in a folder just outside of the
23 courtroom.

24 Q Okay, I just was trying to nail down why it took four
25 hours to buy a couple of televisions. I think, wasn't it was

1 two TVs or two VCRs.

2 A It was two TVs, two VCRs, went to Salt Lake, shopped
3 and got them, drove them back up.

4 MR. VANCAMPEN: Okay, that was the only other notes
5 that I had. Thank you.

6 THE COURT: All right. Any redirect, Mr. Brickey?

7 MR. BRICKEY: Just briefly. I'm going to tell both
8 counsel one question. One moment, your Honor, may I?

9 THE COURT: Yes.

10 (Off the record discussion)

11 REDIRECT EXAMINATION

12 BY MR. BRICKEY:

13 Q Were you aware that two Motorola radio walkie-talkies
14 were removed from one of the units?

15 A I saw that on the report, but I wasn't aware of that.

16 Q Has any owner stepped forward to make a claim for
17 those Motorola radios?

18 A They have not.

19 MR. BRICKEY: No further questions.

20 MR. COOK: No re-cross based on that, your Honor.

21 THE COURT: Mr. VanCampen?

22 MR. VANCAMPEN: Nothing, your Honor.

23 THE COURT: All right. Thank you. You may step
24 down, Mr. Sheldon.

25 THE WITNESS: May I make one comment?

1 MR. COOK: Objection.

2 MR. BRICKEY: May I approach and just find out what
3 it is before I -

4 THE COURT: Sure.

5 (Off the record discussion)

6 MR. BRICKEY: I think I understand Mr. Sheldon's
7 concerns. May I just clarify one question and ask one
8 question, your Honor?

9 THE COURT: Sure.

10 REDIRECT EXAMINATION

11 BY MR. BRICKEY:

12 Q When you're calculating these costs that you've got
13 calculated out per hour, does it take into consideration FICA,
14 insurance, and other expenses associated to the company paying
15 that person an hourly rate?

16 A As I represented before, that amount does not include
17 that - that expense to the company.

18 Q So have you built that into what has been marked as
19 Exhibit 1 in requesting the \$25 an hour?

20 A That's inherently where that \$25 came from.

21 MR. COOK: Re-cross, please.

22 MR. BRICKEY: And I was just going to say that may
23 elicit more re-cross.

24 THE COURT: Mr. Cook.

25 MR. COOK: Thank you, your Honor.

1 RECROSS-EXAMINATION

2 BY MR COOK:

3 Q You, previously, during my cross-examination
4 indicated that the additional amounts were approximately 20
5 percent of the salary; is that correct?

6 A Yes.

7 MR. COOK: Nothing further, your Honor.

8 THE COURT: Any other questions?

9 MR. VANCAMPEN: No, sir.

10 THE COURT: All right, Mr. Sheldon, can you hand me
11 Exhibit 1 please, and you can step down.

12 Can Mr. Sheldon be excused?

13 MR. BRICKEY: That would be fine.

14 MR. COOK: No objection.

15 THE COURT: All right. You're free to leave, Mr.
16 Sheldon. Thank you for coming.

17 Any other evidence?

18 MR. BRICKEY: No, your Honor, the State would submit
19 it.

20 THE COURT: Okay. Brief argument from the State and
21 Counsel.

22 MR. BRICKEY: Your Honor, the victim has indicated
23 the costs associated with recovering and returning these two
24 units that were used on four separate occasions, both units
25 twice, has incurred significant costs to both the company and

1 not been passed on to the homeowners that actually own those
2 particular units. I believe Mr. Sheldon has indicated that in
3 one instance, or in the instance of the cleaning costs that
4 those were not passed onto the homeowners because they had to
5 take responsibility for returning the units to the capacity and
6 ability to be used from that date after the defendants were
7 caught. So I think the \$150 requested and set forth by Mr.
8 Sheldon is a fair amount and should be awarded as well as the
9 cost to replace two TVs that were not recovered. They had to
10 replace those. The amount indicated was \$488. That amount
11 brings the total to \$1,000.50. The additional costs again I
12 think are fair in this matter in that the defendants occurred
13 costs to Identity Properties that would not have occurred but
14 for the fact that they broke in and used these facilities -
15 used these rental units without authorization. Based on that,
16 I would ask for the remaining amount of the difference of \$150.
17 I believe, if I am to calculate the total expenses sought
18 \$512.50 plus \$488 is again \$1,000.50. I'd ask for that entire
19 amount to be jointly and severely shared between Matthew Clark
20 and Aaron Croston.

21 THE COURT: Thank you.

22 Mr. Cook.

23 MR. COOK: Thank you, your Honor. Your Honor, when
24 we first reviewed this matter we were surprised as a yearly
25 salary or wage of \$50,000 a year for housekeeping. Having been

1 in the hotel industry and having owned apartments and having
2 owned a second home, \$50,000 a year is an excellent salary for
3 housecleaning. As the testimony turns out, it isn't \$50,000 a
4 year or \$25 an hour. Even adding the purported 20 percent, Mr.
5 - Ms. Winterer is \$21, Macki is \$13, Larsen is \$18, we're
6 no where near \$25 an hour, your Honor, that's just not a candid
7 assessment.

8 Secondly, your Honor, we question the amounts. On
9 May 6th there's a charge for one hour to tell a condo owner of
10 a break in. Now it's appropriate to tell a condo owner of a
11 break in, that's fine. It's surprising it would take an hour
12 to do so. If I submitted a telephone billing for one hour to a
13 court to approve an attorney's fee for that, I'd have to have a
14 whole lot there for the court to approve an attorney's fee for
15 one hour telephone call. Further, on May 13th, there's another
16 two hours which includes telling the condo owner of the break
17 in. Now there are other things there as well, but it again
18 includes the same item. I don't think the court would allow my
19 attorney fee for that either. Four hours to purchase a TV and
20 VCR.

21 THE COURT: Let me stop you there. There were two
22 different break-ins though, right? I mean -

23 MR. COOK: Yes, and this indicates both of the people
24 were informed.

25 THE COURT: Well, one on May 12 and one on - I'm

1 sorry, one on the May 6 break in and one on the May 12 break
2 in, right? Okay, go ahead.

3 MR. COOK: Okay. Two telephone calls that should
4 have taken perhaps 10 minutes to inform the individuals of the
5 telephone calls. And that would even include a long distance
6 call, your Honor.

7 Additionally, your Honor, except for May 12th on Ms.
8 Larsen, no time of day is given for any of these activities.
9 Pardon me, that's Mr. Larsen, I apologize. No time of day is
10 given for any of these activities, and this is, if you will, a
11 guesstimate, your Honor. But that's attacking the factual
12 basis, judge. More importantly is that I don't believe these
13 are authorized by statute. First of all, the management
14 company isn't the victim in this case. The victim is the
15 owner. You've received testimony that the owners weren't
16 billed for these matters. Secondly, in regard to the statute,
17 the statute authorizes loss of income if an individual is a
18 victim of bodily injury. There's absolutely no indication of
19 that whatsoever. Further, your Honor, there was no wage loss.
20 I should have been clear, your Honor, we're addressing the wage
21 loss issue. There wasn't any. These were employees who were
22 already on the payroll. Contrary to the initial indication of
23 the witness, this was not piece rate that was contracted out.
24 These were employees who were already on the payroll. There
25 was no additional expenditure, there was no independent

1 contractor, that, even if this person were a victim, even if
2 were authorized by statute, somebody had to pay. Consequently,
3 judge, there are no out-of-pocket expenses.

4 In sum, it's not authorized by statute and even if it
5 were, there's no out-of-pocket loss, and even if there were,
6 there's no proof of a losses as claimed. Indeed the proof is
7 to their contrary. The witness wasn't fully candid until
8 cross-examination about the amounts that were lost. Thank
9 you, Your Honor. And again, we're addressing only the wage
10 loss issue, Judge.

11 THE COURT: Mr. VanCampen, any argument?

12 MR. VANCAMPEN: No, Mr. Cook has done a great job. I
13 won't take any more of the Court's time.

14 THE COURT: Okay, Mr. Brickey, you want to respond to
15 some of those specific things that - mentioned to what you
16 think the statute says with respect to this kind of loss.

17 MR. BRICKEY: I would indicate to the Court that the
18 statute can be construed to allow a victim advocacy group to
19 step in in the case of individuals who incur the costs
20 associated with bringing a victim - making a victim whole prior
21 to the actual final restitution and sentencing date. And in
22 fact, Identity Properties has stepped into that role and
23 provided victims, in this case, the owner of properties, with
24 an opportunity that the units are clean and available for later
25 use in a rental pool, that the - well, I guess the TVs are not

1 at issue, it's whether or not the wages incurred by Identity
2 Properties and their employees is at issue. And I would submit
3 that the Court can, in fact, find that this in fact is a result
4 of a victimization of Identity Properties, but for the fact
5 that these young men hadn't used those units without
6 authorization, those employees' times would have been spent
7 elsewhere doing other things. I'd ask again for those amounts
8 previously asked by Mr. Sheldon.

9 THE COURT: Okay, anything else from either party?

10 MR. COOK: Judge, I'll take the chance if you're
11 really giving it to me.

12 THE COURT: Yes.

13 MR. COOK: Your Honor, I don't see how this group
14 would fit into a victim advocate position. I just don't think
15 that's particularly well taken. The appropriate code,
16 Section 76-3-201 paragraph 8 is what indicates the court shall
17 include in terms of restitution.

18 THE COURT: All right. Well, I have looked at the
19 restitution statute on several occasions and I respectfully
20 disagree, Mr. Cook. I think it does cover this, not as a
21 victim advocate, but it seems to me what we have here is indeed
22 loss to the actual owners of the condo units, but someone
23 making the repairs so that they didn't have to do it. If they
24 had to pay someone else, then there would be the loss to them.
25 So it seems to me that it's really no different that these

1 people do it and without billing them, the loss indeed really
2 is to the homeowners because if they didn't do it, or the condo
3 owners, the condo owners would have to do it themselves. So,
4 and while some of these do seem a little bit hard to
5 understand, Mr. Sheldon obviously isn't the one that did all of
6 them himself. It seems to me that - again placing them in the
7 place of the condo owners. The owners had to do these things
8 themselves and either hire someone else to do it or take the
9 time to do it themselves. These things do seem reasonable to
10 me. So I'm going to find in accordance with the exhibit those
11 hours are, expended are reasonable in terms of the hourly rate
12 or wage of the people involved.

13 I'm crediting Mr. Sheldon with the notion that he
14 believes these are all very conservative in terms of both the
15 time and the other associated issues that go along with wage.
16 I find that Exhibit 1 is a reasonable calculation of wage and
17 accordingly, I am going to order and I think that is the proper
18 subject of restitution. I think it is indeed a loss passed on
19 from the condo owners to this entity. So I'm going to order
20 restitution, I think that's unchallenged in the amount of \$488
21 for the return of the various items that were taken, or the
22 cost of the items, and \$512 for wages, so that's a total of
23 \$1,000 restitution. So with respect to each of the defendants,
24 the probation order signed by Judge Hilder on August 29, 2002
25 will reflect that total restitution is \$1,000 to be joint and

1 several for each of them.

2 So, Mr. Brickey, if you can prepare those amended
3 judgments.

4 MR. BRICKEY: Is that to be collected by Adult
5 Probation and Parole?

6 THE COURT: Yes, that'll be through Adult Probation
7 and Parole.

8 MR. BRICKEY: And I'll identify Identity Properties'
9 address in those orders, your Honor.

10 THE COURT: Yes. All right. Thank you very much.
11 Thank you, counsel.

12 MR. COOK: Thank you, your Honor. I have no further
13 matters. May I be excused?

14 THE COURT: You may. Thank you.

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CERTIFICATE

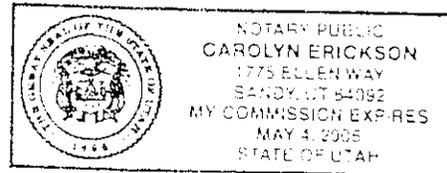
I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Bruce Lubeck was transcribed by me from an CD recording is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 24th day of March, 2003 in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006



David Brickey

From: Larry Sheldon [larry@pclodge.com]
Sent: Monday, February 03, 2003 4:49 PM
To: David R. Brickey
Subject: Identity Properties

Dear Mr. Brickey,

The letter dated August 16, 2002 was a reasonable estimate of our time involvement generated on short notice in order to make our claim in this case. The cleaning and labor expense was estimated at \$600.00 (\$150.00 cleaning and \$450.00 misc labor)

Following is the detail substantiating the cleaning and miscellaneous labor expense submitted for restitution in association with case No. 02-04953.

05/06/02

- (1)Patty Winterer (Site manager): Met with PC Police to review unlawful entry and stolen goods relative to Resort Plaza condo #5052T and #5040T. Searched complex for missing items. 2 hours
- (2)Marilyn Mackey (Housekeeping supervisor): Cleaning in #5052T after unlawful use. 1.5 hours
- (3)Patty Winterer: Administrative time related to condominium owner notification of burglary and unlawful use of condo. 1 hour

05/12/02

- (1)Brook Larson (Maintenance supervisor): Apprehended suspects in conjunction with Park City Police, filled out forms, filed same. Involved from noon to 3:00pm. 3 hours
- (2)Rob Sletton (President): Reported to Police department to collect stolen property. 2 hours

05/13/02

- (1)Marilyn Mackey: Cleaned 5052T after second unlawful use (party). 2.5 hours
- (2)Marilyn Mackey: Cleaned 5040T after second unlawful use. 0.5 hours
- (3)Patty Winterer: Administrative time related to police reports and notification of owners of 5052T and 5040T. 2 hours

06/19/02

- (1)Patty Winterer: Administrative and travel time to purchase replacements of stolen goods. 4 hours

06/20/02

- (1)Maintenance department: Install new appliances with appropriate connections. 2 hours

Total hours = 20.5

Hourly rate = \$25.00

Total expense = \$512.50

Respectfully,

Addendum 2

Larry Sheldon
General Manager

76-3-201. Definitions- Sentences or Combination of sentences allowed- Civil Penalties- Restitution- Hearing

- (1) As used in this section:
 - (a) "Conviction" includes a:
 - (i) judgment of guilt; and
 - (ii) plea of guilty
 - (b) "Criminal activities" means any offense of which the defendant is convicted or any criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
 - (c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
 - (d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a government entity for extradition or transportation and as further defined in Subsection (4)(c)
 - (e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
- (2) Within the limits prescribed in this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
 - (a) to pay a fine;
 - (b) to removal or disqualification from public or private office;
 - (c) to probation unless otherwise specifically provided by law;
 - (d) to imprisonment
 - (e) to life imprisonment
 - (f) on or after April 27, 1992, to life in prison without parole; or
 - (g) to death
- (3) (a) This chapter does not deprive a court authority conferred by law to:
 - (i) forfeit property;
 - (ii) dissolve a corporation;
 - (iii) suspend or cancel a license;
 - (iv) permit removal of a person from office;
 - (v) cite for contempt; or
 - (vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.
- (4) (a) When a person is convicted of a criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in the Subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea

agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).

(e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of the sentencing allow the defendant a full hearing on the issue.

(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, psychiatric, and psychological care, including non medical care and treatment rendered in accordance with the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in the death of a victim.