THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2009-0822

IN THE MATTER OF

STATE OF NEW HAMPSHIRE

V.

DALE BROWN

APPEAL FROM THE TRIAL COURT DECISION ON THE MERITS

CARROLL COUNTY SUPERIOR COURT

DOCKET NUMBER 212-2008-CR-00175, 00176

BRIEF OF DALE BROWN

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BRIEF OF DALE BROWN

I. STATEMENT OF THE CASE

This is an appeal of the restitution ordered in the State of New Hampshire vs. Dale Brown as heard by the Carroll County Superior Court, Docket Number 212-2008-CR-00175, 00176.

Mr. Brown was originally charged with two (2) crimes, a felony of criminal mischief over $1,000 # 212-2008-CR-00175 and a misdemeanor of reckless conduct #212-2008-CR-00176. Both cases were tried together ending on 07/24/09. The defense requested and the court granted a jury instruction on a lesser included misdemeanor on the felony charge.

The jury returned a verdict of Not Guilty on the misdemeanor charge of reckless conduct[1], a verdict of Not Guilty on the original felony of criminal mischief[2] and a verdict of Guilty on the lesser misdemeanor under $1,000[3]. The sentencing was held on October 20, 2009 at which time the defense submitted Finding of Fact and Rulings of Law & Memo [4] and a Proposed Sentence [5] . The state successfully argued for restitution of $28,000, $25,000 and change for the Allstate Insurance Company and $250.00 for Tammy Brown. Mr. Brown was also sentenced to six (6) months house of corrections, stand and committed and the defendant shall successfully complete a Domestic Violence counseling program equivalent to the 36 week program offered in New Hampshire. Probation may be terminated once Domestic Violence counseling program is successfully completed. The defendant shall have no contact with Tammy (Brown) Brooks.[6]

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[1] Appendix: Sentencing Order – Reckless Conduct, page 1
[2] Appendix: Sentencing Order – Criminal Mischief – Felony, page 2
[3] Appendix Sentencing Order – Criminal Mischief – Misdemeanor, page 3
[4] Appendix: Finding of Fact & Ruling of Law & Memo, page 6
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There are five separate issues surrounding the restitution:

II. WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR AND / OR AN ABUSE OF DISCRETION WHEN THE COURT ORDERED RESTITUTION OF $25,261.63 ON A MISDEMEANOR WHEN THE STATUTE LIMITS THE DAMAGES TO $1,000.

III. DID THE COURT ERR WHEN IT RULED THAT ALLSTATE INSURANCE COMPANY WAS A "VICTIM" UNDER NEW HAMPSHIRE RSA 651:62VI[7]?

IV. DID THE COURT ERR WHEN IT RULED THAT ALLSTATE INSURANCE COMPANY WAS A "COLLATERAL SOURCE" UNDER NEW HAMPSHIRE RSA 651:62V[8]?

V. DID THE COURT ERR WHEN IT RULED THAT ALLSTATE INSURANCE COMPANY HAS BEEN "SUBROGATED TO THE RIGHTS OF THE VICTIMS" UNDER NEW HAMPSHIRE RSA 651:62V[9]?

VI. DID THE COURT ERR WHEN IT RULED THAT THE MONEY PAID TO TAMMY BROWN BY ALLSTATE INSURANCE COMPANY IN THE

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[7] Appendix: New Hampshire RSA 651:62VI, page 21
[8] Appendix: New Hampshire RSA 651:62V, page 21
[9] Appendix: New Hampshire RSA 651:62V, page 21

APPROXIMATE AMOUNT OF $28,000 WAS FOR DAMAGES TO ITEMS THAT BELONGED TO BOTH DALE AND TAMMY BROWN, WHEN RESTITUTION CAN NOT BE ORDERED BECAUSE THE DAMAGED PROPERTY WAS JOINT PROPERTY?

VII. ISSUE 1.

The trial court erred when it ordered Dale Brown to pay restitution of an amount of $28,000 on a conviction of a class A misdemeanor.

The crime for which Mr. Brown was convicted by a Jury is New Hampshire RSA 634:2 II-a. which says "Criminal mischief is a class A misdemeanor if the actor purposely causes or attempts to cause pecuniary loss in excess of $100 and not more than $1,000. Obviously the jury found that the damage Mr. Brown did was $1,000 or less. "Pecuniary loss" is not defined in 634:2 II-a, 651:2[10], 651:62V[11] or 651:63[12]. In addition New Hampshire RSA 651:2[13] which speaks to sentencing does not refer to restitution.

[10] Appendix: New Hampshire RSA 651:2, page 17
[11] Appendix: New Hampshire RSA 651:62V, page 21
[12] Appendix: New Hampshire RSA 651:63, page 22
[13] Appendix: New Hampshire RSA 651:2, page 17

New Hampshire RSA 651:62[14], the definition statute does not define "pecuniary loss" but does define "economic loss". It is unclear whether pecuniary loss under New Hampshire RSA 634:2[15] is the same as economic loss under New Hampshire RSA 651:62 III-c which states ""Economic loss" means out of pocket losses or other expenses incurred as a direct result of a criminal offense, including: (c) the value of damaged, destroyed or lost property."

This issue rests on three (3) main themes:

A. Legislative Intent

B. Plain wording of the statute

C. Common sense

A. Legislative Intent

The legislature has decided that the more the money damages or loss (pecuniary, economic or otherwise) the more serious the offense. If a defendant has committed damages of $1,000 or less then he has committed a misdemeanor. The intent is to punish him less than a person who committed damages over $1,000. To "punish" Mr. Brown by making him pay $28,000 for a misdemeanor was not the intent of the legislature.

[14] Appendix: New Hampshire RSA 651:62, page 21
[15] Appendix: New Hampshire RSA 634:2, page 15

B. Plain wording of the statute

The wording is $1,000 or less – the victim – should be paid $1,000.

C. Common sense

If you do the crime of $1,000 then you should pay $1,000.

Neither the Superior Court nor the Supreme Court should substitute their judgments of the jury which said Mr. Brown did $1,000 (or less) damages.

We would refer the court to the case of State vs. Hudson 151 NH 688 (2005). The Hudson case, citing other cases, stands for the proposition that an unambiguous statute's language should be construed "according to the fair **import** of their term and to promote justice."

In the case at Bar it would be unfair to penalize Mr. Brown $28,000 on a misdemeanor when the jury found that the maximum damages committed by Mr. Brown was $1,000.

It should be noted that there is nothing to prevent either Mrs. Brown or Allstate from suing Mr. Brown civilly should they choose New Hampshire RSA 651.63 IV[16].

ISSUE 2.

The trial court erred when it ruled that Allstate Insurance Company was a "victim" under New Hampshire RSA 651:62VI which says, ""Victim" means a person or claimant who suffers economic loss as a result of an offender's criminal conduct or the good faith effort of any person attempting to prevent or preventing the criminal conduct.".

At the sentencing, Tammy Brown provided input and Allstate Insurance Company was allowed to present evidence of their "claim". As both Tammy and Dale had paid premiums to Allstate, Allstate should not have been permitted to be reimbursed. They are an insurance company. People pay premiums, they pay out on losses. That is a risk they take in their business. They did not suffer "economic loss" as New Hampshire RSA 651:62 VI requires.

ISSUE 3.

[16] Appendix: New Hampshire RSA 651:63 IV, page 22

The trial court erred when it ruled that Allstate Insurance Company was a "collateral source" under New Hampshire RSA 651:62V[17].

In order to qualify as a "collateral source" an entity, Allstate in this case, has to be "subrogated" to the rights of the victim. It is unclear in this case who is the victim. Both Tammy Brown and Allstate were considered by the trial court to be victims.

As State vs. Burr 147 N.H. 102 (2001) points out, the victim can not receive double restitution see also: New Hampshire RSA 651:63 I[18].

In this case Allstate received premiums for house insurance and now will receive restitution. At the very least the amount of restitution Allstate received should be reduced by the premiums paid by Dale and Tammy Brown.

ISSUE 4

The trial court erred when it ruled that Allstate Insurance Company has been "subrogated to the rights of the victims" under New Hampshire RSA 651:62V[19].

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[17] Appendix: New Hampshire RSA 651:62V, page 21
[18] Appendix: New Hampshire RSA 651:63 I, page 22

There was no evidence present at trial or sentencing to justify that Allstate stepped into either Dale or Tammy Brown's position. The house was in both names, jointly. Dale never authorized the Insurance Company to act for him and no evidence was presented that Tammy did either.

ISSUE 5

The trial court erred when it ordered restitution to Allstate for the money it paid Tammy Brown alone when the house and the insurance policy was in both names and Dale had not been found guilty of anything.

1. The insurance company paid Tammy Brown before there was a finding of guilty and before any court order that Dale Brown did anything.

2. The house title and the insurance policy were in both Dale and Tammy's name, jointly. As such the insurance company should have made the checks out to both Dale and Tammy as joint insured. This is especially so as he had not

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[19] Appendix: New Hampshire RSA 651:62V, page 21

been found guilty and was still innocent when the checks were issued.

3. The insurance company paid out money for a claim of damage done by its insured that was intentional, as a crime requires an intentional act.

We refer the court also to the case of the State vs Burr 147 N.H. 102 (2001) for the issues of legal intent, plain language and restitution. That case awarded $43,158.84 restitution but involved twenty (20) charges, not one misdemeanor as is here. It also did not involve an Insurance Company that was paid premiums (partly by the defendant).

CONCLUSION

The insurance company can always bring an action against Dale Brown. At a hearing on that issue, the company can explain why they paid one but not both of their insured all the money of a claim of intentional damage done by the other one of their insured before a guilty finding.

This brief is unusually short because of the lack of law on this subject and the seemingly simple issue: If a defendant has done damage of less then $1,000, he is guilty of a misdemeanor and the jury so found here. It only makes sense that the restitution should be equal to the damages done.

For the reasons set forth, Dale Brown respectfully requests this Court hear his oral argument.

Respectfully submitted,

Dale Brown
By his attorney,

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CERTIFICATE OF SERVICE

I certify that on January 15, 2010, two (2) copies of this Brief of Dale Brown were mailed to Assistant Carroll County Attorney Tom Misco P.O. Box 218, Ossipee, NH 03864.

_____

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APPENDIX

Sentencing Order – Reckless Conduct
Dated July 24, 2009 **Appendix Page 1**

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Dated July 24, 2009 **Appendix Page 2**

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