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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff,

v.

DANIEL ALGEO,
Defendant.

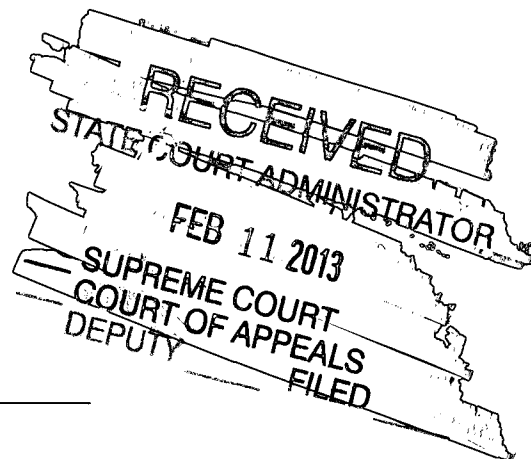
Yamhill County Circuit
Court No. CR100607

SC No. S060830

J. W. P.,
Petitioner on Review,

v.

STATE OF OREGON and DANIEL ALGEO,
Respondents on Review.



BRIEF OF *AMICUS CURIAE*
THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF
PETITIONER J.W.P.'S OPENING BRIEF ON THE MERITS

On review of the order of Yamhill County Circuit Court,
Honorable Ronald W. Stone, Judge
Order signed: October 29, 2012

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STATEMENT OF THE *AMICUS CURIAE*'S INTEREST

Amicus curiae the National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing.

NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims by providing information on crime victim law and litigating as *amicus curiae* issues of national importance regarding crime victims' rights in cases nationwide. NCVLI also provides information to crime victims and crime victims' attorneys through its website, www.ncvli.org.

This case involves issues that are fundamental to the rights and interests of all crime victims in Oregon, including crime victims' constitutional and statutory rights to receive prompt and full restitution as well as their constitutional rights to be accorded due dignity and respect and to fair treatment in the criminal justice system. NCVLI submits this brief in aid of the Court's task of analyzing and determining the correct rule of law in this matter.

INTRODUCTION

As the United States Supreme Court once observed:

The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here.

S. Dakota v. Neville, 459 US 553, 558 (1983). What does need to be detailed is the fact that the tragedy in this case involves not only the pedestrian-crime victims' serious injuries and losses at the hands of a drunk driver but also the trial court's refusal to honor the legislative mandate of awarding full restitution to those victims. Instead, the trial court abandoned this state's carefully crafted mandatory restitution scheme, and in its place substituted its own policy about the applicability of civil comparative fault. As part of its policy, the court crafted an arbitrary 90 percent/10 percent split of responsibility, even after defendant has admitted to recklessly causing the crime victims' injuries, and ordered the crime victims to shoulder almost the entire burden of the expenses that defendant's unlawful alcohol-impaired conduct inflicted upon them.

In so doing, the trial court rendered meaningless Oregon's constitutional and statutory guarantees of justice, fair treatment, and prompt restitution in the full amount of the crime victims' economic damages. This Court should correct the injustice by rejecting the theory that comparative fault applies in criminal restitution and reversing the trial court's ruling.

ARGUMENT

I. INJECTING COMPARATIVE FAULT INTO CRIMINAL RESTITUTION FRUSTRATES OREGON'S CAREFULLY CRAFTED POLICIES AND VIOLATES THE CRIME VICTIMS' STATUTORY AND CONSTITUTIONAL RIGHTS.

A. The Trial Court Impermissibly Exercised A Power That Is Entrusted To The Legislature.

As this Court once cautioned:

When a court acts beyond the bounds of its sentencing authority, it infringes upon the power of the legislature to determine the manner of punishment. A sentence must be in conformity with the governing statute; any non-conforming sentence is void for lack of authority and thus totally without legal effect.

State v. Leathers, 271 Or 236, 240 (1975); *accord* Or Const, Art III, § 1

(addressing the separation of powers). The trial court exceeded its authority when it ignored the plain language of the relevant statutes and substituted its opinion about how restitution awards should be calculated.

In the 1980s, lawmakers across the country began to recognize that the criminal justice system had become “appallingly out of balance” and it “has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it.” President’s Task Force on Victims of Crime Final Report, at vi (1982), *available at* <http://www.ojp.gov/ovc/publications/presdntstskforcprpt/87299.pdf>. In response to this imbalance, the Oregon legislature enacted a number of statutory protections for crime victims, and the people of this state adopted constitutional victims’

rights amendments that “preserve and protect,” *inter alia*, crime victims’ rights to justice and to prompt restitution; and “ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal * * * proceedings.” Or Const, Art I, § 42; *see also* Or Const, Art I, § 43; ORS 147.410 - 147.438. The lawmakers declared that Oregon “victims’ rights shall be protected at each stage of the criminal justice system and sought “to secure balanced justice by eliminating unbalanced rules.” ORS 147.410.¹

One area of imbalance that existed before the 2003 amendments was this state’s criminal restitution scheme. The then-existing Attorney General’s Restitution Reform Task Force observed an immense gap between the crime victims’ rights on the books—such as the constitutional guarantees of restitution, justice, and fairness—and the reality of what was happening in criminal cases statewide—little to no award of restitution to crime victims. As former Attorney General Hardy Myers explained:

While article 1 § 42 of the Oregon constitution provides a right to prompt restitution, our criminal justice system instead sends a very ambiguous message to victims about offender accountability for pecuniary damages suffered by victims. * * * Under

¹ Around this same period, the legislature made efforts to “improve public safety by getting tougher on DUII offenders” and “keep[ing] dangerous drivers off the road.” *State v. Miller*, 309 Or 362, 369 (1990) (holding that the DUII statute, ORS 813.010, is a strict liability offense that does not require any culpable mental state).

current law, when a person is convicted of a crime or violation * * * that has resulted in pecuniary damages, the court * * * may order that the offender make restitution for the victim. * * * The effect of this statutory statement of policy [of giving courts discretion to award any, full or partial restitution] * * * is that a significant number of victims are left without any restitution judgment whatsoever.

Audio Recording: Hearing on SB 617, House Committee on Judiciary, 72nd Leg. (May 20, 2003), *available at* <http://www.leg.state.or.us/listn/> (statement of Attorney General Hardy Myers). Attorney General Myers made clear that the bill to amend the restitution statutes to provide for mandatory full restitution “in effect seeks to fulfill the constitutional commitment that Oregon has made to crime victims.” *Id.*

The legislature’s intent to improve offender accountability and fulfill the constitutional guarantees of justice, fairness, and prompt restitution were effectuated by amending the restitution statutes to:

- (1) Require restitution in all cases where “a person is convicted of a crime * * * that has resulted in economic damages,” ORS 137.106(1);
- (2) Require restitution in the “full amount of the victim’s economic damages” unless the victim consents to partial restitution, ORS 137.106(1)(a), (c); and
- (3) Remove the “civil action” limitation for restitution awards, ORS 137.103(2).

See Or Laws 2003, ch 670, § 1 (amending ORS 137.106); Or Laws 2005, ch 564, § 1 (amending ORS 137.106).

The Court's interpretation of the causation requirement for criminal restitution must be consistent with the legislative intent to carry out the constitutional commitment that this state has made to crime victims. *See State, on Inf. Hayden v. Hill*, 181 Or 585, 602 (1947) (stating that this Court's "function is confined to the duty of interpreting what the lawmaker wrote" and "put[ting] into effect the legislative will"); *Fox v. Galloway*, 174 Or 339, 347 (1944) (concluding that "[i]f the language [of the statute] is plain and unambiguous * * * and that meaning does not lead to an impossibility or an absurdity such as the legislature could not be supposed to have intended, the court must give effect to that meaning if constitutional, even though the result may be, in the court's opinion, harsh, unjust or mistaken in policy"); *see also Dolan v. United States*, — US —, 130 S Ct 2533, 2539-40 (2010) (interpreting the Mandatory Victims Restitution Act's 90-day deadline in a way that takes into account the fact that "the statute seeks primarily to assure that victims of a crime receive full restitution").

By allowing trial courts to inject comparative fault into the restitution calculation after criminal liability has been established, this Court would be condoning the practice of subjecting crime victims to quasi-civil trials that focus on their alleged conduct at the time of their victimization rather than the

offender's adjudicated unlawful conduct. Such a practice would turn this state's crime victims' criminal justice policies on their head, defeating the legislative intent that convicted offenders shoulder the burden of the financial consequences of their unlawful activities, and in so doing inflict secondary victimization on the victims.²

B. The Civil Tort Principle of Comparative Fault Has No Role In Oregon's Criminal Restitution Scheme.

As Professor La Fave explained:

The broad aim of the criminal law is * * * to prevent harm to society—more specifically, to prevent injury to the health, safety, morals and welfare of the public. This it accomplishes by punishing those who have done harm, and by threatening with punishment those who would do harm, to others.

Wayne R. LaFave, *Criminal Law* § 1.2(e) (3d ed 2000). Oregon's restitution scheme is a penological sanction that serves the principles of criminal law.

State v. Hart, 299 Or 128, 138-39 (1985); *State v. N.R.L.*, 249 Or App 321, 332 (2012) (concluding that mandatory restitution for the full amount of the victim's

² Social scientists have long recognized that victims can experience re-victimization at the hands of the criminal justice process, often referred to as secondary victimization. See, e.g., Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L Rev 7, 25 (1987) (describing victims' further victimization by the criminal justice system); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world").

economic losses “arguably reemphasized the role of restitution in ‘correcting * * * behavior’ and impressing upon the offender ‘the seriousness and cost of his offense’”); *cf.* Or Const, Art I, § 15 (providing that “[l]aws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one’s actions and reformation”). If courts are permitted to ignore the complete consequences of convicted criminals’ unlawful activities and disregard the legislative mandate to award full restitution by transforming restitution proceedings into quasi-civil proceedings that put the victims’ conduct on trial, these penological aims are frustrated.

One Wisconsin appellate court articulated the rationale for rejecting an offender’s argument that comparative fault should apply to reduce restitution:

One of [restitution’s] primary purposes is to rehabilitate a defendant. * * * Rehabilitation is furthered by requiring those convicted of crimes to take responsibility for the consequences of their actions. * * * To allow a defendant who has already been convicted of a crime to focus on the action of a victim to avoid restitution defeats this purpose because it permits him to evade responsibility for his own actions.

State v. Knoll, 237 Wis 2d 384, 393, 614 NW2d 20, 24 (Wis Ct App 2000). This Court should similarly conclude that comparative fault has no place in criminal restitution calculations.

II. THE STATE HAS ESTABLISHED THAT DEFENDANT'S CRIMINAL CONDUCT IS THE LEGAL CAUSE OF THE VICTIMS' INJURIES.

In this case, the crime victims' injuries were clearly caused by defendant's unlawful act of driving a pickup truck while drunk. To conclude otherwise defies both the law and the facts. It is axiomatic that an offender who pleads guilty to fourth degree assault for having "recklessly caused physical injury to the victims" (P-ER 45) must be deemed the legal cause of the victims' injuries. *See* ORS 163.160 (defining the elements of the offense). *Cf. Barnett v. Gladden*, 237 Or 76, 82 (1964) (concluding that by pleading guilty, "defendant admits every fact alleged in the indictment [or information]").

In *State v. Murray*, 343 Or 48 (2007), this Court rejected a criminal defendant's argument that the victim's conduct should have a bearing on defendant's criminal liability for third degree assault. In that case, defendant stipulated to the following facts: the victim-passenger was injured when defendant crashed his car; defendant was reckless in his operation of the car at the time; and defendant's recklessness "led to" the victim's injuries. 343 Or at 51. Defendant nevertheless argued that he was not the legal cause of the victim's injuries because the victim had been a willing participant in the night-time high speed driving venture. *Id.* The Court disagreed and concluded that defendant's stipulated facts established that he was the legal cause of the victim's injuries for purposes of criminal liability. *Id.* at 56.

In reaching its conclusion, the Court applied the common meaning of “cause”— *i.e.*, to “bring[] about, make[], or effect[] by force”— and found that the stipulated facts demonstrated that defendant’s reckless conduct was obviously the cause of the victim’s injuries. *See id.* at 56. The Court found that neither the statutory language nor case law supported an interpretation of “cause” that would make the victim’s actions relevant in determining defendant’s criminal liability. *See id.* at 52-56. The Court explained that “[n]othing in the * * * text (or the context) of ORS 163.165 suggests that the legislature intended to carve out an exception for harm done to willing participants in the conduct.” *Id.* at 52.

Similarly, neither the law nor the facts support the causation analysis that the trial court adopted. First, nothing in the plain language of the relevant criminal statutes indicates that “the legislature intended to carve out an exception” to the full-amount-of-economic-damages requirement in cases where the crime victims might have placed themselves in a position to be injured by defendants’ reckless actions. *Id.* at 52. On the contrary, as petitioner-crime victim demonstrates in her brief, both the statutory language and legislative history support a contrary conclusion— that a crime victim’s conduct is irrelevant in the criminal restitution calculation. Second, it is undisputed that defendant’s reckless conduct of driving while drunk brought about, made, or effected by force the crime victims’ serious physical injuries.

Indeed, the rationale that underlies the *Murray* Court's conclusion should apply with greater force to the causation determination in this case because, unlike *Murray*, the crime victims here were not willing participants in defendant's reckless activity. If the presence of willing participants does not reduce an offender's criminal liability, the presence of unwilling pedestrians hit by a drunk driver who pled guilty to recklessly causing their injury should certainly not reduce the extent of the driver's criminal liability. The Court should conclude that the issue of legal causation has been established, and the victims' alleged actions should not, as a matter of law, reduce defendant's criminal restitution responsibilities. *See id.* ; *see also State v. Baker*, 87 Or App 285, 289-90 (1987) (concluding that even where the evidence shows that the victim stopped breathing because the nursing home staff may have negligently removed her tracheostomy tube, "[t]he chain of events ultimately causing death was set in motion by defendant[]" and "[a]s a matter of law, the claimed intervening negligence could not reduce his criminal responsibility").

CONCLUSION

This should have been a straightforward restitution claim for the crime victims. Defendant pled guilty not only to driving under the influence but also to recklessly causing injury to the victims. Yet the trial court decided, without supporting authority, to ignore the legislative mandate of awarding full restitution and to instead adopt its own comparative fault policy. As a result, in

the two years since defendant pled guilty to recklessly causing their injuries (PER 9), the crime victims have been forced to bear the burden of the serious financial consequences that resulted from his drunk driving. This simply does not comport with this state's penological policies or its constitutional and statutory guarantees of justice, fair treatment, and prompt restitution in the full amount of the victims' economic damages.

Although Oregon has made steady progress towards striking the proper balance of crime victims' rights, defendants' rights, and state interests, the criminal justice process remains a complicated legal system designed primarily to fairly adjudicate defendant's conduct, determine defendant's guilt and innocence, and protect defendant's rights. Crime victims are unwilling participants, typically lay persons with little understanding of how to navigate the judicial system to fully exercise their rights. Adding tort law's comparative fault analysis into this already challenging reality and putting crime victims' conduct on trial during sentencing is inimical to the practice of "ensur[ing] that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal * * * proceedings." Or Const, Art I, § 42(1).

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For the foregoing reasons and the reasons set forth in petitioner-crime victim J.W.P.'s brief on the merits, *amicus curiae* requests that the Court reverse the trial court's ruling.

Date: February 8, 2013

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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2993 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Margaret Garvin^v

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I hereby certify that on February 8, 2013, I sent the original plus 15 copies of the foregoing BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONER J.W.P.'S OPENING BRIEF ON THE MERITS via FedEx 2-day delivery to:

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