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 Circuit Court
 Appellate Court
 CR 19-0001
 ADMINISTRATOR
 MAR 29 2013
 SUPREME COURT
 COURT OF APPEALS

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APPELLATE COURT
ADMINISTRATOR

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— SUPREME COURT
— COURT OF APPEALS

SC NO. S060830

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), and the β parameter is the inverse of the variance of the error term. The β parameter is estimated by the following equation:

1) *Staphylococcus aureus* (10⁷ CFU/ml);

New From the Final Order of Yamhill County Circuit Court,
 Honorable Ronald W. Stone, Judge
 Order Signed: October 29, 2012

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**RESPONSE BRIEF ON THE MERITS
OF RESPONDENT ON REVIEW, DANIEL ALGEO**

Introduction

J.W.P. asserts that the restitution Order of the Honorable Ronald Stone, Yamhill County Circuit Court Judge, in Yamhill County Case No. CR10-0607, is unlawful. Respondent on Review, Daniel Algeo [ALGEO], disagrees and respectfully requests that this Court affirm the trial court's restitution Order, because Judge Stone in reaching his decision followed the applicable law and his decision is supported by evidence in the record.

Specifically, Judge Stone did not err when he found defendant did not "cause" the victims' injuries for which restitution is sought, and so ordered defendant to pay only a nominal amount of restitution as a result of his guilty pleas to one count of Driving Under the Influence of Intoxicants and two counts of Assault in the Fourth Degree because:

- (1) The trial court judge determined the amount of restitution in this case in a manner that is consistent with Oregon constitutional, statutory, and decisional law, all of which clearly provide for a

“causation” analysis as a prerequisite to any finding that a victim suffered “economic damages *as a result of the offense*.”

- (2) It is well-settled that restitution awards are limited to damages resulting from crimes of conviction or other criminal activities to which the defendant has pleaded guilty or admitted. Here, ALGEO entered guilty pleas to two counts of Assault in the Fourth Degree, which is an admission to causing “physical injury” only. The state dismissed two counts of Assault in the Third Degree, which charges include the element of “serious physical injury,” and the record reflects no stipulation or agreement that ALGEO admit to the element of “serious physical injury” or economic damages underlying those charges for purposes of restitution.

Questions Presented

- (1) Whether the statutory language requiring that a defendant pay the victim the *full amount* of the victim's economic damages as determined by the court precludes a trial court judge from employing a causation analysis of the economic damages sought?
- (2) Whether the record supports the trial court's findings of fact and legal conclusion that the evidence presented to the court by the prosecutor consisting of ALGEO's pleas to one count of Driving Under the Influence of Intoxicants and two counts of Assault in the Fourth degree was insufficient to support a finding that the victims suffered more than nominal economic damages as a result of the crimes of conviction?

Brief Statement of Facts

On March 14, 2011, ALGEO entered pleas of guilty in Yamhill County Case No. CR10-0607 to one count of misdemeanor Driving Under the Influence of Intoxicants and two counts of Assault in the Fourth Degree. P-SER 1. Petitioner J.W.P. was the named-victim in one of the Assault in the Fourth Degree pleas, Count 4. P-SER 4.¹ The state dismissed the five remaining counts, including two counts of Assault in the Third Degree. P-SER 14. J.W.P. was the named-victim in one of the dismissed Assault in the Third Degree counts, Count 2. P-SER 4.

The vehicle-pedestrian accident underlying the charges in this case is detailed in McMinnville Police Department Officer Steve Macartney's Accident Reconstruction Report. R-ER 1. In brief, the report chronicles witness interviews and analyzes the physical evidence relevant to fault. R-ER 1-15. In his report, Officer Macartney concludes that the two involved pedestrians, which includes J.W.P., "****is at fault for this collision" and was in violation of ORS 814.070 (Improper position on or improperly proceeding along highway). R-ER 14. Equally as important, Officer Macartney concluded that despite defendant having

¹ ALGEO will reference the record in the same manner as set forth in Petitioner's Amended Brief on the Merits, p. 2, fn. 1. "P-ER" for Petitioner's original Excerpt of Record (filed 11/05/12), "R-ER" for Respondent ALGEO's original Excerpt of Record (filed 11/21/12), "P-SER" for Petitioner's Supplemental Excerpt of Record (filed 2/08/13), and "R-SER" for Respondent ALGEO's Supplemental Excerpt of Record filed with this brief.

violated ORS 813.010 (Driving under the influence of intoxicants) “[t]here is no factual basis that vehicular condition***, speed, or inappropriate operation****was causal of the involved serious injury collision.*” R-ER 14 [emphasis added].

Citing Officer Macartney’s report in his letter opinion, the trial court judge “agree[d]” that “the ‘cause’ of the victim’s injuries were their violation of ORS 810.040 and not vehicular, conditions, speed, or inappropriate operation.” P-ER 71. Observing that the state had the duty to present evidence that the victims suffered economic damages, the trial court judge found the state proved only that ALGEO admitted to “recklessly causing some physical injury” to the victims, and that “[i]t is clear from the evidence that almost all of the economic damages suffered by the victims, were caused by their violation of the law (ORS 810.040).” P-ER 73.

Standard of Review

When reviewing a restitution order, Oregon appellate courts will review the trial court's legal conclusion with respect to its authority to award restitution for errors of law, and are bound by the trial court's findings of fact if there is evidence in the record to support them. *State v. Carson*, 238 Or App 188, 191 (2010); *State v. Jordan*, 249 Or App 93, 96 (2012); *see also* ORS 138.220.

Argument

1. Statutory Construction

(A) Statutes

The trial court judge determined the amount of restitution in this case in a manner that is consistent with Oregon statutory and decisional law, both of which unambiguously provide for a “causation” analysis as a prerequisite to a finding that a victim suffered “economic damages” as will be explained below. Specifically, in imposing punishment for a criminal offense, Oregon courts are “limited strictly to the provisions of the applicable statute.” *State v. Cotton*, 240 Or 252, 254 (1965); *State v. Duncan*, 15 Or App 101, 103 (1973).

When analyzing a statute, the role of a court is simply to interpret the statutes at issue, but not rewrite the statutes—and that is the case even if the court thinks the legislature made a clear error and could not have intended a particular result. ORS 174.010; *State v. Vasquez-Rubio*, 323 Or 275, 282-283 (1996).²

The order of analysis, as this Court announced in *State v. Gaines*, 346 Or 160, 171-72 (2009), modifying *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), is to “first examine the text and context of

²If the legislature has chosen language that creates unexpected and unintended results, the legislature can amend the statute to express its actual intent. *Cole v. Farmers Ins Co*, 108 Or App 277, 280 (1991).

the statute and then proceed to any relevant legislative history that the parties have offered, giving that history such weight, if any, as it appears to merit.” *State v. Bailey*, 346 Or 551, 556 (2009).

The text of a statute is the “best evidence of the legislature’s intent.” *PGE*, 317 Or at 617. ORS 174.010 provides that, in construing a statute, the court is not “to insert what has been omitted, or to omit what has been inserted.” Also, “when interpreting a statute, we “give effect to all relevant provisions” and assume that “the legislature did not intend any portion of its enactments * * * to be meaningless surplusage.” *State v. Mayes*, 220 Or App 385, 389 (2008).

If the legislature has chosen language that creates unexpected and unintended results, the legislature can amend the statute to express its actual intent. It is not the function of a court to insert language that should have been added and ignore language that should have been omitted.

Cole v. Farmers Ins Co, 108 Or App 277, 280 (1991).

ORS 137.103 *et seq* outlines the process for a trial court judge to determine the amount of restitution. ORS 137.106(1) provides:

*When a person is convicted of a crime *** that has resulted in economic damages*, the district attorney shall investigate and present to the court, prior to the time of sentencing, evidence of the nature and amount of the damages. **If the court finds from the evidence presented that a victim suffered economic damages**, in addition to any other sanction it may impose, the court shall include one of the following in the judgment:

(a) A requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim's economic damages **as determined by the court**.

(b) A requirement that the defendant pay the victim restitution, and that *the specific amount of restitution will be established by a supplemental judgment based upon a **determination made by the court*** within 90 days of entry of the judgment. In the supplemental judgment, the court shall establish a specific amount of restitution that equals the full amount of the victim's economic damages as determined by the court. The court may extend the time within which the determination and supplemental judgment may be completed for good cause. The lien, priority of the lien and ability to enforce the specific amount of restitution established under this paragraph by a supplemental judgment relates back to the date of the original judgment that is supplemented.

(c)(A) A requirement that the defendant pay the victim restitution in a specific amount that is less than the full amount of the victim's economic damages, with the consent of the victim.

[Emphasis added]. As emphasized in the statute's language underlined, *italicized*, and in **bold** above, the amount of restitution—if any—is unquestionably a “determination” to be made by the trial judge. See, e.g., *State v. Yocum*, 247 Or App 507, 514 (2011) (Affirming trial court's decision related to the value of a stolen pair of diamond earrings: “The trial court, as factfinder, was entitled to weigh the evidence presented and to reach that conclusion.”). To adopt a statutory interpretation that ignores the “if the court finds/as determined by the court/determination

made by the court” plain language in the statute would be to render that language “superfluous” and “meaningless” and “fail to give effect to all relevant provisions”. *Mayes*, 220 Or App at 389.

A statutory analysis is informed by, among other things, prior versions of a statute. *State v. Blair*, 348 Or 72, 76 (2010). For example, in 2005 the term “pecuniary” was changed to “economic” damages in ORS 137.106 bringing the language of the statute in line with the common tort terminology and definition for such damages. That change, however, did not affect the language of the statute as it relates to a judge’s determination of the damage amount. In fact, in each new iteration of the statute since it was amended in 2003 to remove from consideration a criminal defendant’s “ability to pay” the restitution amount, the legislature has not deleted the judicial “determination” language. R-ER16 (2004, 2006, 2008 versions of ORS 137.103 and 137.106). Further, the “full amount” language has likewise remained in each iteration and continues to be modified by the “as determined by the court” language. Finally, the definition of a “victim” in ORS 137.103(4) (a) continues to include the language “if the court determines that the person has suffered economic damages as a result of the offense.” Therefore, the fact that the legislature over the years never modified or deleted the language of ORS 137.103 and 137.106 to remove “as

determined by the court” and “as a result of the offense” evidences the legislature’s intention that the amount of the damages is a factual finding to be “determined by the court.”

In addition, it should be instructive to this Court that another set of Victim’s Rights statutes, ORS 147.005 *et seq*, incorporates as a consideration whether a victim “contributed”³ to their injury. PGE, 317 Or at 611 (An analysis of the text of a statute must also include its context, “which includes other provisions of the same statute and other related statutes.”). Specifically, ORS 147.125(1)(c), which relates to the compensation of Crime Victims through a fund administered by the State of Oregon, states in part concerning eligibility for compensation that the Department of Justice “shall determine the degree or extent to which the victim’s acts or conduct contributed to the injuries*****and may reduce or deny the award accordingly.**” [Emphasis added]. Accordingly, to apply civil law concepts of causation and fault to a restitution order is consistent with how the State of Oregon makes a similar award calculation.

³ It is Respondent ALGEO’s position that any reference in the trial court record to “contributory negligence” is a distraction and should not affect the result in this case, insofar as the trial court made a very specific factual finding that ALGEO did not **cause** the victims’ injuries. Therefore, any application of “contributory negligence” under Oregon statute, ORS 31.600, to this case is of no moment. However, to the extent that the concept of “contributory negligence” is a causation-type analysis and to the extent that restitution is related to some but not all of the damages a crime victim could possibly recover in a civil suit against a criminal defendant, then consideration of fault to determine that a criminal defendant should not have to pay restitution for damages s/he did not cause is at the very least not inconsistent with ORS 137.103 and 137.106.

J.W.P. asserts that the text of the statute, "full amount," supports her position that a trial judge cannot deny or reduce a victim's asserted economic damages based upon a victim's conduct, and connotes a legislative intent to eliminate any judicial analysis or factfinding on the issue of causation. However, to take the position that causation is not an issue in a restitution determination is to deny the very words and definitions assigned to and modifying the words "full amount" chosen by the legislature. Specifically, ORS 137.103(3) reads, in part, that "[r]estitution' means full, partial or nominal payment of economic damages to a victim," and ORS 137.103(2) provides that "[e]conomic damages' ** * [h]as the meaning given that term in ORS 31.710[.]" ORS 31.710(2) (a), in turn, defines economic damages as monetary losses that are "objectively verifiable." In addition, and most importantly, ORS 137.103 defines a "victim" in part as follows:

(4) "Victim" means:

(a) The person against whom the defendant committed the criminal offense, *if the court determines that the person has suffered economic damages as a result of the offense.*

(b) Any person not described in paragraph (a) of this subsection *whom the court determines has suffered economic damages as a result of the defendant's criminal activities.* ***

[Emphasis added]. “[A]s a result of” unambiguously connotes a requirement of a finding of causation as a prerequisite to a restitution order.

The requirement that there be a judicial determination of causation as a prerequisite to a restitution order is also supported by Oregon decisional law. In *State v. Edson*, 329 Or 127, 132 (1999), this Court explained that “there are three prerequisites for an order of restitution under ORS 137.106(1): (1) criminal activities, (2) pecuniary damages, and (3) **a causal relationship** between the two” [emphasis added]. ORS 137.106 was amended in 2005 and the term “pecuniary damage” replaced with “economic damage,” but that change in language appears not to have changed how Oregon appellate courts to date have defined and continue to define restitution as being similar to those damages recoverable in a “civil action”:

*“For purposes of determining ‘the full amount of [a] victim’s economic damages’ under ORS 137.106(1)(b), **the court may consider the ‘damages recoverable in a civil action arising out of the facts or events constituting [the] crime [for which the defendant was convicted].’**”*

State v. White, 249 Or App 166, 167 (2012), *citing State v. Carson*, 238 Or App 188, 192 (2010) [emphasis added]; see also, *State v.*

Onishchenko, 249 Or App 470, 476 (2012) (Discusses language change in relation to the compensatory fine statute, ORS 137.101, while citing a

1997 “pecuniary damage” decision for the same proposition vis-à-vis new “economic damage” wording of statute: “**Economic damages** are damages that would be ‘recoverable against the defendant in a civil action.’ *State v. Barkley*, 315 Or 420, 438, *cert den*, 510 US 837 (1997) (so holding with respect to “pecuniary damages” (now “economic damages”))” [emphasis added; footnote omitted]; See also, R-SER 2 (Rep. Bob Ackerman, Chair, House Committee on Judiciary Subcommittee on Civil Law: “Explains that the main scope is to tie in the definition of restitution with economic damages which is the statutory definition that is common with tort cases.”).

Given that Oregon appellate decisions since the restitution statute was amended in 2003 continue to compare a crime victim’s economic damages to damages recoverable in a “civil action,” it is reasonable to consider the reasoning of pre-change decisions as authoritative on the issue of whether principles from civil law apply to restitution decisions. For example, Oregon courts have approved the application of civil damage principles such as: (1) mitigation of damages in *State v. Jurado*, 137 Or App 538, 541 (1995), (2) reasonable market value at time of theft in *State v. Wise*, 150 Or App 449, 455-56 (1997), and (3) attorney fees incurred must be reasonable and necessary in *State v. Schwartz*, 173 Or App 301, 318 (2001).

(B) Legislative History

Insofar as this Court may consider legislative history in this matter, Respondent ALGEO proffers the following (*Gaines*, 346 Or at 172):

While “[r]eading the tea leaves of legislative history is always a risky business” (*State v. Walker*, 192 Or App 535, 545 (2004)), the legislative history supports a conclusion that the general legislative intent behind the 2003 changes to the restitution statutes was to eliminate from a trial court’s consideration a defendant’s “ability to pay” all or part of the restitution. *State v. Kelly*, 229 Or App 461, 466 (2009) (“In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment.” [citations omitted]).

This understanding of the general intent is consistent with the text of the statute, and seems to be the reason for the “full amount” language. Specifically, prominent government attorneys testified before the legislature and submitted statements in support of the proposed changes in the restitution laws:

“Most important factor proposed by SB 617A is that the financial condition of the offender is no longer a consideration of restitution to the victim.”

5/2/03 House Committee on Judiciary Minutes, summary of testimony of Hardy Myers, Attorney General, R-SER 24.

"[T]his bill seeks to make a clear statement to victims that offenders will be held accountable for *the full amount of financial harm **that they have caused*** through their criminal acts."

Attorney General Hardy Myers, Letter to the Senate Judiciary Committee, R-SER 7 [emphasis added].

"Restitution should be ordered based upon the victim's loss, not ***the offender's ability to pay***."

... Ordering *full restitution* restores not only the victim, but also restores the credibility of the system. It *cuts down on the guess work in court over how much the defendant or juvenile offender may be able to **pay in the future***."

Michael Shrunk, Multnomah District Attorney, Letter to the Senate Judiciary Committee, R-SER 8 [emphasis added].

It is Respondent ALGEO's position that the legislative history clearly shows that the legislature's general intent in choosing the "full restitution" language in the statute was to make clear that an offender's "ability to pay" the "full amount" was no longer a consideration for a restitution order.

Finally, the proposed amendments considered by the legislature, and ultimately the text of the final statute, all include the judicial "determination" language discussed above—which again should leave no doubt that the general legislative intent when passing the bill was to

give the trial court judge the task of “determining” the amount of restitution to order, if any. R-SER 14-23, 33-38; R-ER 16.

(C) Oregon Constitution

Respondent State of Oregon argues that the trial court judge’s restitution order violated J.W.P.’s state constitutional right to “prompt restitution.” It is true that that Oregon voters approved an amendment to the state constitution in 1999, which included the right to “prompt restitution.” Oregon Constitution, Article 1, section 42 (1) (d). However, it is Respondent ALGEO’s position that the text of now-Article 1, section 42(1) (d), is further support of the analysis above. Specifically, the voter’s intent is clearly expressed through the text of that amendment, which included notice to the voters that the amendment included the concept of “causation.” R-SER 43-44. *Ecumenical Ministries v. Oregon State Lottery Comm’n*, 318 Or 551, 559 (1994) (Constitutional provision adopted by voter initiative is the “best evidence of the voter’s intent”).

In considering the history of a constitutional provision adopted through the initiative process, this court examines, as legislative facts, other sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure. Such information includes the ballot title and arguments for and against the measure included in the voter’s pamphlet, and contemporaneous news reports and editorial comment on the measure.

Ecumenical Ministries, 318 Or at 559, fn 8.

The 1999 Special Election Voter's Pamphlet, Measure 69, included for the voter's consideration the full text of what is now Article 1, section 42, of the Oregon Constitution. R-SER 43. That language approved by the voters is consistent with the language of ORS 137.106, insofar as it incorporates the concept of "causation" into a Crime Victim's rights:

The right to receive prompt restitution from the convicted criminal who **caused** the victim's loss or injury.

R-SER 44; Oregon Constitution, Article 1, section 42 (1) (d)

[emphasis added].

In addition, consistent with ORS 137.103(4), Article 1, section 42 (6) (c) defines a "crime victim" as:

any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm **as a result of a crime**.

Id. [emphasis added].

Consequently, similar to ORS 137.103 and 137.106, Article 1, section 42, incorporates a causation analysis through inclusion of the language "harm **as a result of a crime**." Further, in no way does the information provided the voters in the pamphlet preclude the amount of restitution asserted by a Crime Victim from a judicial or other

determination of causation, including in the arguments in favor and against. R-SER 43-48. In fact, the Measure's "Explanatory Statement" reads:

"The right to receive prompt payment from the criminal or youth offender ***for certain monetary damages caused by the criminal*** or youth offender's actions."

R-SER 44 [emphasis added].

2. Factual Record

The trial judge in this case made findings of fact, supported by evidence in the record (i.e., Officer Macartney's accident reconstruction report, R-ER 1), that Petitioner's "jaywalking" and not the defendant's driving under the influence of intoxicants was the cause of J.W.P.'s injuries, and so concluded that ALGEO was not convicted of a crime that "resulted in economic damages" to the victims. The trial judge did order nominal restitution (10 percent of total requested) based on defendant's guilty plea "to recklessly causing physical injury" to Petitioner—albeit he wrote in his letter opinion that other than the fact of the plea "there is no evidence to apportion blame by a [percentage] more than nominal." P-ER 73.

"[A] defendant cannot be required to pay restitution for pecuniary damages arising out of criminal activity for which he was not convicted

or which he did not admit having committed." *State v. Seggerman*, 167 Or App 140, 145 (2000).

When a person is convicted of a crime, the trial court may impose restitution for damages recoverable in a civil action arising out of the facts or events constituting that crime or any other criminal conduct admitted by the defendant.

Even though the statutory framework generally limits restitution awards to damages resulting from crimes of conviction or other criminal activities to which a defendant has admitted, the parties may alter that framework by agreement or waiver.

State v. Carson, 238 Or App 188, 192-93 (2010), *citing State v. Howett*, 184 Or App 352 (2002) and *State v. Miller*, 116 Or App 432 (1992), *rev den*, 315 Or 443 (1993); *see also, State v. Kappelman*, 162 Or App 170, 175 (1999) (plea agreement does not implicitly admit facts beyond the essential elements of the charge).

An admission to causing "physical injury" for purposes of an Assault 4 plea, as defined in ORS 161.015(7), is an admission to causing "impairment of physical condition or substantial pain" and not an admission to facts beyond the essential elements of that charge. As the Court of Appeals found in *State v. Jones*, 113 Or App 425 (1992), an admission to DUII, without more, is simply an admission to DUII. In *Jones*, the state argued that simply proving that an accident occurred in conjunction with a defendant's conviction of DUII was insufficient to

prove the basis for a restitution order. The Court of Appeals reasoned “that fact — standing alone — is insufficient to prove what caused the damages, [and] it does not support the imposition of restitution in any amount”. *Id.* at 427.

Whether a trial court has the authority to order restitution for crimes that were not admitted to (and the answer is, “No”) has resulted in numerous concessions by the state in the past. See, e.g., *State v. Irizarry*, 207 Or App 99 (2006) (State concedes error where defendant was ordered to pay back Crime Injuries Compensation Account for funds paid out to a victim of charges defendant had not pleaded guilty to); *State v. Renner*, 207 Or App 528 (2006) (State concedes error where trial court ordered restitution for damages that did not result from the crime of conviction); *State v. Denham*, 211 Or App 98 (2007) (State concedes error where court ordered restitution for damage to vehicle where defendant pleaded guilty only to unlawfully entering the vehicle with the intent to commit theft); *State v. Pleasant*, 212 Or App 697 (2007) (State concedes trial court erred in imposing restitution for losses that occurred outside the dates of the crimes defendant pleaded guilty to); *State v. Flores*, 224 Or App 90 (2008) (State concedes trial court erred by ordering restitution for a sexual abuse examination when the

defendant pleaded guilty only to Delivery of a Controlled Substance to a Minor).

Here, the trial court judge correctly observed that the threshold for an Assault 4-type of injury is low, far out of line with the economic damages sought in this case, and concluded that ALGEO by his plea admitted to no more than a criminal act that resulted in only a nominal injury to the victims. It is important to understand the record of this case includes that the state DISMISSED the two charges that addressed the issue of “serious physical injury” which were the two Assault in the Third Degree charges. P-ER 3-4, 14. “Serious Physical Injury” is defined as “physical injury which creates a substantial risk of death or which causes a serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of function of any bodily organ.” ORS 161.015(8). The Assault 3 dismissals speak loudly on the issue of what ALGEO did NOT admit to at the time of his plea—and the trial court judge correctly recognized the limitations of the admitted to conduct underlying the plea in this case:

“****to support restitution, the record must clearly reflect that the defendant admitted to unconvicted conduct that constitutes a criminal offense. ***If a question of whether the defendant committed the criminal conduct remains unresolved, restitution is not proper.*** In other words, the defendant's admission of criminal conduct must be

unequivocal, such that the admission would preclude the defendant from contesting guilt at a later time.

State v. Thorpe, 217 Or App 301, 306 (2007) (citations omitted; emphasis added). *Thorpe* cites approvingly the concurring opinion in *State v. Boswell*, 52 Or App 535 (1981), as to the importance of an “admission” of criminal conduct in the context of restitution:

“For purposes of determining a basis for restitution, the admission of a defendant is essentially the same as a plea of guilty that would support a conviction, but a judgment of conviction is not entered because of a plea bargain. Because such an admission can result in liability for substantial sums of money, defendant's responsibility for the criminal activities ought to be firmly established. The determination of whether defendant admits other criminal activities should be made with essentially the same formalities that surround a plea of guilty to an offense.”

Boswell, 52 Or App at 539-40.

Other than the fact of the pleas, the record of this case is void of any evidence of a causal link to the victim's injuries. Under the restitution statute, it is the prosecutor who is tasked with “investigat[ing] and present[ing] to the court***the nature and amount of the damages.” ORS 137.106. Here, the trial court found that the prosecutor presented nothing more than the fact of the plea with respect to the victims' economic damages suffered “as a result of” (ORS 137.103(4)(a))

ALGEO's crimes and admissions—and that “[i]t is clear from the evidence that almost all of the economic damages suffered by the victims, were caused by their violation of the law (ORS 810.040). I don't believe I have the authority to award more.” P-ER 73.

Given the analysis and conclusion of the state's accident reconstruction report, it is not surprising that the trial court “determined” ALGEO's criminal convictions did not result in ALL of the victims' asserted economic damages, and such a determination is allowed under ORS 137.106(2) (“After the district attorney makes a presentation***if the court is unable to find from the evidence presented that a victim suffered economic damages, the court shall make a finding on the record to that effect.”).

3. Public Policy Considerations

It is an old adage that “bad facts make bad law,” and this case has some unusually bad facts for the victims. So, it is important for all parties to remember that this is a case limited by its very specific facts, *and not a cause*. Indeed, it is an unfortunate truth for the victims that their injuries occurred due to their own jaywalking conduct, and that under the circumstances of this case any driver—whether under the influence or not—would have hit them. Therefore, this is not a case about a trial judge trampling on victims' rights, but rather this is a case of

a trial judge making a tough but right decision. The gravity of a crime victim's injury, or the fact that a victim was injured at all, should not be the "test" for what if any restitution should be ordered. That would be poor policy, because as Aristotle said "the law should be reason free from passion."

In addition, in the event any Crime Victim believes that a prosecutor resolved a case with a plea bargain and/or admissions to crimes that did not result in all of their asserted economic damages, or a trial judge did not order all monies to which the crime victim believes they are civilly entitled, ORS 137.109 retains for a Crime Victim the right to bring suit against a defendant and seek a civil judgment order to supplement the criminal judgment order. Therefore, a Crime Victim is not without recourse for asserted economic damages not covered in the criminal justice system. Under Oregon law, Crime Victims are more that well taken care of in this regard.

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Conclusion

For the reasons stated above, Respondent ALGEO respectfully requests that this Court affirm the trial court.

Respectfully submitted,
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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 5,006 words.

Type Size

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).

DATED this 29th day of March 2013

Paula J. Lawrence, O&B No. 89285

1
2
3 **CERTIFICATE OF FILING AND SERVICE**

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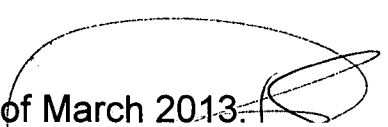
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DATED this 29th day of March 2013. 

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