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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. EMA RAMOS, Defendant-Appellant Petitioner on Review.	Washington County Circuit Court Case No. C092342CR CA A150423 S062942

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable Kirsten E. Thompson, Judge

Opinion Filed: November 26, 2014
Author of Opinion: Sercombe, Presiding Judge
Concurring Judges: Hadlock, Judge, and Tookey, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Legislative Materials

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case presents a statutory interpretation issue concerning the meaning of the clause "crime that has resulted in economic damages" in the restitution statutes and the phrase "economic damages" in the tort statute, which is incorporated into the restitution statute. Specifically, defendant's case asks this court to decide whether funds that the insurance-company victim spent on attorney fees, private investigators, court reporters, expert witness fees, and the like were "economic damages" and therefore compensable as restitution.

A person who is convicted of a crime that results in economic damages must pay full restitution for those damages to the victim. ORS 137.106(1)(a). Defendant was convicted of arson in the second degree for setting her restaurant on fire and of attempted aggravated theft in the first degree for making a false claim to her insurance company for about $16,500 in damage to restaurant equipment inside the building. She agreed to pay restitution to her landlord for the fire damage to the building. But she contended that the costs and fees that her insurance company incurred in investigating her claim and preparing for trial were not properly the subject of a restitution award. Specifically, defendant argued that the company's attorney fees, investigation costs, and expert witness fees for grand jury and trial were not "economic damages" under ORS 137.103

and ORS 31.710. The trial court ruled that all of the claimed expenses were cognizable as restitution and ordered defendant to pay $28,417.98 in restitution to Oregon Mutual Insurance.

The Court of Appeals affirmed the restitution award, holding that so long as a defendant's criminal conduct is a "but for" cause of a victim's expenses, those expenses are economic damages and therefore properly the subject of a restitution award. *State v. Ramos*, 267 Or App 164, 178-80, 340 P3d 703 (2014).

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented. Must the state establish more than a "but for" connection between a defendant's criminal conduct and a victim's expenses before a sentencing court may impose restitution for those expenses as "economic damages"?

First Proposed Rule of Law. Yes. A "but for" causal connection is a necessary predicate to a restitution award, but is not sufficient without more to form the basis of restitution. Once the "but for" connection is established, the trial court must determine whether the claimed expenses were a reasonably foreseeable result of the defendant's criminal conduct and thus "economic damages" subject to restitution.

Second Question Presented. Did the legislature intend for trial courts to use tort damages concepts of liability to determine whether a victim's expenses are the proper subject of a restitution award?

Second Proposed Rule of Law. Yes. By incorporating the tort definition of economic damages into the restitution statute, the legislature analogized the determination of restitution arising from criminal conduct to the determination of damages arising from a civil tort. The legislature thus demonstrated its intent that trial courts continue to rely on civil damages concepts to determine whether claimed expenses are "economic damages" and therefore the proper subject of a restitution award.

Third Question Presented. Are attorney fees, investigation expenses, expert witness fees, court-reporter fees, document storage fees, and the like incurred in the prosecution or defense of an action "economic damages" for purposes of restitution in a criminal case?

Third Proposed Rule of Law. No. Fees and costs are not "economic damages" and therefore are not cognizable as restitution in a criminal case.

STATEMENT OF FACTS

Defendant set fires in a restaurant that she owned and made an insurance claim for damage to the equipment inside the restaurant. Tr 66-84; Trial Ex 65, 66. Her insurance company, Oregon Mutual Insurance, investigated and denied her claim after concluding it was fraudulent. Tr 115-16, 198-206, 243-78. The

state prosecuted defendant for arson and attempted theft. Indictment, TCF. After she was convicted at trial, the trial court ordered defendant to pay restitution to the property owners for the damage to the building and to Oregon Mutual Insurance for expenses it incurred in investigating, processing, and prosecuting defendant's case. Tr 416-17; Restitution Exhibit 1; Trial Court's Letter Opinion, TCF.

SUMMARY OF ARGUMENT

An analysis of the plain and ordinary meanings of the relevant terms in the restitution statute, the context of the statutes, and a review of the legislative history of those statutes demonstrate that more than a but-for connection must exist between criminal conduct and victim expenses to support a restitution award. A mere but-for connection between a defendant's crime and a victim's expenses is necessary but not sufficient to establish that those expenses are economic damages. Instead, civil law principles of the scope of liability apply: the expenses must be the reasonably foreseeable result of the defendant's wrongful conduct to be economic damages. Consequently, costs and expenses that are not damages in the civil context are likewise not damages in the criminal restitution context.

In particular, the legislative history shows that when the legislature amended the restitution statute in 2005 by eliminating the requirement that a victim's expenses be recoverable in a civil claim and replacing the term

"pecuniary damages" with "economic damages," it did not intend to broaden the scope of damages compensable as restitution. Rather, the legislature substituted the phrase "economic damages" and incorporated its definition from the tort statute in an effort to make the restitution statute easier to use and more consistent in application.

Application of the above principles to defendant's case demonstrates that the expenses that the trial court ordered her to pay as restitution were not properly the subject of a restitution award.

ARGUMENT

I. The text, context, and legislative history of the restitution statute show that the legislature intended for courts to rely on civil damages concepts to identify "economic damages" subject to restitution.

Defendant was convicted of attempted theft for making a false claim on an insurance policy after a fire in her restaurant. The trial court ordered her to pay restitution to her insurance company for money that the company spent on legal fees, investigation fees, document storage fees, court-reporter fees, travel and meals for investigators and attorneys, and the like. The restitution award covered expenses incurred before and after the insurance company decided not to pay defendant's claim, and before and after the state began its criminal investigation.

This case asks this court construe the phrase "has resulted in economic damages" in the ORS 137.106 using the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and modified in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The core questions are (1) whether the verb phrase "has resulted in" in the restitution statute refers to a mere but-for connection between crime and expenses, or to a more direct, logically sequential relationship between cause and effect akin to the concept of foreseeability used in tort law, and (2) whether "economic damages" for criminal restitution purposes are the same as "economic damages" in the civil tort context, subject to the statutory exception for loss of future earning capacity.

To settle those questions, this court must discern what the legislature intended with respect to causation and "economic damages" as they apply to restitution. To interpret statutory terms, this court examines the plain and ordinary meaning of the text, the context, the legislative history of the restitution statutes, and if necessary resorts to general maxims of statutory construction. *PGE*, 317 Or at 610-612. As the *Gaines* court explained:

> "The first step remains an examination of text and context. * * * But, contrary to this court's pronouncement in *PGE,* we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step-consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an

> ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. The third, and final step, of the interpretative methodology is unchanged. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."

Gaines, 346 Or at 171-72.

As examination of the text, context, and legislative history of the restitution statutes shows, when the legislature enacted the statutes in 1977 and amended them in 1987, 2003, and 2005, it intended sentencing courts to rely on civil law damages concepts to determine which victim expenses and other "objective monetary losses" are compensable as criminal restitution. Criminal restitution and civil damages claims do not serve exactly the same interests or policy goals—though those interests and goals are coterminous in many instances—but civil damages concepts provide a helpful, fair, and, as limited in the restitution context, constitutionally sound framework for making accurate and consistent restitution determinations. It is therefore unsurprising that the legislature intended sentencing courts to use those familiar legal concepts and did not intend to institute a novel system for determining victims' damages.

II. The plain meaning of the text "has resulted in economic damages" in the restitution statute is that victim expenses must flow directly, immediately, and logically from the defendant's wrongful conduct to be "economic damages."

In Oregon, a person must pay restitution for economic damages that result from her criminal conduct. ORS 137.106(1)(a) provides in part:

> "When a person is convicted of a crime * * * that has resulted in economic damages, the district attorney shall investigate and present to the court, at the time of sentencing or within 90 days after entry of the judgment, 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 enter a judgment or supplemental judgment requiring 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."

ORS 137.103(2)(a) provides that "'economic damages' * * * [h]as the meaning given that term in ORS 31.710, except that 'economic damages' does not include future impairment of earning capacity." ORS 31.710, which appears in the chapter of the Oregon Revised Statues governing civil tort actions, defines economic damages as

> "[o]bjectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less."

This case turns on the meaning of the verb "to result in"—the infinitive form for the present perfect verbal phrase "has resulted in"—and the meaning of the phrase "economic damages." Specifically, the issue is whether "economic damages" encompasses any cost incurred by the victim because of the defendant's crime or whether such damages are limited by the same principles that limit liability for damages in the civil context.

A. "To result in"

Although the legislature did not further define the meaning of the phrase "to result in" in the ORS 137.106(1)(a), "result" is a verb of common usage. *Gaines*, 346 Or at 175 (citing *PGE*, 317 Or at 611, for the proposition that the court "ordinarily presumes that the legislature intended terms to have plain, natural, and ordinary meaning"). "Result," as "result in," commonly means "to proceed, spring, or arise as a consequence, effect, or conclusion." *Webster's Third New Int'l Dictionary* 1937 (unabridged ed 2002). To plumb the meaning of "result" it is necessary to look at the meanings of "consequence," "effect," and "conclusion."

"Consequence" commonly means "something that is produced by a cause or follows from a form of necessary connection or from a set of conditions **:** a natural or necessary result * * *." *Id.* at 482. An alternate meaning, particular to the study of logic, is "the rational process by which effect follows cause **:** logical sequence * * *." *Id.* "Effect" commonly means "something that is

produced by an agent or cause **:** something that follows immediately from an antecedent **:** a resultant condition * * *[.]" *Id.* at 724. "EFFECT is the correlative of the word *cause* and in general use implies something necessarily and directly following upon or occurring by reason of the cause." *Id.* (emphasis in the original). "Conclusion" commonly means "a reasoned judgment" (as in, "I used to wake up at 4 a.m. and start sneezing * * *. I tried to find out what sort of allergy I had but finally came to the conclusion that it must be an allergy to consciousness." James Thurber, *Barbed Shafts of a Veteran Wit*, Life Magazine 108 (Mar 14, 1960)) or, more generally, "the last part of anything." *Id.* at 471.

The ordinary meanings of the terms "result," "consequence," "effect," and "conclusion," indicate that ORS 137.106(1)(a) requires courts to order restitution when a person's crime has "directly," "immediately," and in "logical sequence" given rise to a victim's economic damages. Taken together, those definitions demonstrate that the verb "result" requires a close, logical causal relationship between crime and damages rather than a mere but-for connection. The word "result" connotes the "rational," "necessary" relationship that exists between immediate cause and effect, *e.g.*, studying has resulted in a passing grade (because the student learned the material) versus studying has resulted in a broken nose (because the student tripped and fell because she had her nose in a book on the way to class).

The notion of but-for causation does not capture the more heightened, logically grounded connection between crime and damages that the statutory language suggests is required before restitution is awarded. Indeed, but-for causation may be so attenuated and vague that it connects a cause loosely with any number of remote effects. But-for cause is therefore of limited utility as a principle by which to determine with any precision how closely related a particular cause and effect actually are. A recent California case stated the problem succinctly, citing familiar tort law authorities:

> "In the words of Prosser and Keeton: '[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."' Therefore, the law must impose limitations on liability other than simple causality."

People v. Jones, 187 Cal App 4th 418, 425, 114 Cal Rptr 3d 8 (2010) (internal citation omitted) (applying tort concepts of liability in a criminal case to determine restitution).[1]

B. "Economic damages"

The term "economic damages" is defined in ORS 31.710 as limited in ORS 137.103(2)(a) as

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[1] *See also* Edward Lorenz, *Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?* Paper presented to the American Association for the Advancement of Science, available at http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf (last visited May 28, 2015).

> "[o]bjectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past * * * impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less."

To construe the term "economic damages" requires in turn the examination of key words within the statutory definition that are not themselves defined. First, the word "damages" itself bears consideration. "Damages" is a legal term of art. When construing such terms, this court looks to legal sources to ascertain their meaning. *See, e.g., Comcast Corp v. Department of Revenue*, 356 Or 282, 296, 337 P3d 768 (2014) ("[W]e look to the meaning and usage of [terms of art] in the discipline from which the legislature borrowed them. So, for example, when a term is a legal one, we look to its 'established legal meaning' as revealed by, for starters at least, legal dictionaries."). "Damages" means "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Black's Law Dictionary* 416 (8th ed 2004). *Webster's* defines "damages" as "the estimated reparation in money for detriment or injury sustained **:** compensation or satisfaction imposed by law for a wrong or injury

caused by a violation of a legal right * * *." *Id.* at 571.[2] In essence, then, "damages" means an amount of money, determined through some legal proceeding, paid to compensate someone for injury or loss.

The losses that form the basis for economic damages must be "objectively verifiable." Relying on dictionary definitions, the Court of Appeals interpreted "objectively verifiable" to mean that the loss is "capable of confirmation by reference to empirical facts." *DeVaux v. Presby*, 136 Or App 456, 462, 902 P3d 593 (1995) (citing *Webster's* at 2453). This court too should rely on that definition in construing ORS 137.106.

"Monetary" means "of or relating to money or to the instrumentalities by which money is supplied to the economy **:** PECUNIARY." *Webster's* at 1457-58. "Loss" is "the deprivation of [something]" or "the harm or privation resulting from losing or being separated from something * * *." *Id.* at 1338. "Monetary loss" therefore is either a loss of money itself or some other loss that is expressed in money terms.

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[2] The term "economic damages" is itself a term of art in Oregon law. As a statutory term it was enacted in 1987 along with the term "noneconomic damages" as a change in nomenclature to replace the terms "special damages" and "general damages" in tort cases. Or Laws 1987, ch 774, § 6. "Economic damages" replaced the term "special damages." *See generally Whitman v. McCoy v. Department of Corrections*, 132 Or App 45, 50, 887 P2d 375 (1994) (discussing the change in terms of art used to describe damages).

ORS 31.710(2)(a) contains an illustrative list of what permissible costs that provides further interpretive clues to the bounds of "economic damages." Such damages include "reasonable charges necessarily incurred" for medical care and the like; "reasonable and necessary expenses incurred for substitute domestic services[,]" and "reasonable and necessarily incurred costs due to a loss of property or for replacement of damaged property." The watchwords of this definition are "reasonable" and "necessary." They are words of restraint, of proportion.

"Reasonable" commonly means "being in agreement with right thinking or right judgment **:** not conflicting with reason **:** not absurd **:** not ridiculous * * * being or remaining within the bounds of reason." *Webster's* at 1892. Since "reasonable" is also frequently used as a legal term of art in Oregon law, it is appropriate to consult the legal dictionary as well: "reasonable" means "fair, proper, or moderate under the circumstances[.]" *Black's* at 1293.

"Necessary" has both an ineffable, existential meaning: ("1a **:** that must be by reason of the nature of things **:** that cannot be otherwise by reason of inherent qualities **:** that is or exists or comes to be by reason of the nature of being * * *"), and a more prosaic meaning: "1b **:** of, relating to, or having the character of something that is logically required or logically inevitable or that cannot be denied without involving contradiction 2 **:** that cannot be done without **:** that must done or had **:** absolutely required." *Webster's* at 1510.

Taken together, and relying on the least restrictive meaning of "necessary," those dictionary definitions indicate that "reasonable" charges or costs that are "necessarily" incurred are those outlays of money that are fair and proper, not absurd or ridiculous, and fall within the bounds of what an ordinary person would think were logically required under the circumstances.

Another portion of the statutory text supports this interpretation. ORS 137.106(1)(a) provides that "if the trial court finds from the evidence presented that a victim suffered economic damages * * *, the court shall enter a judgment" requiring the defendant to pay restitution for those damages. This procedure presumes that there will be times when the court evaluates the evidence presented and finds that no economic damages exist. For that to be so, there must be circumstances when a victim has paid out money or sustained loss of some sort, but the court determines that the loss is not compensable as damages. Put another way, the statute assumes the existence of situations in which victim costs, losses, or expenses are not "economic damages."

The manner in which the legislature used the terms discussed above strongly suggests that it used the phrase "economic damages" for two main reasons: first, to ensure that crime victims are compensated fully and appropriately for their injuries by making the measure of damages concrete and readily verifiable; and second, by the same token, to guarantee that the wrongdoer, guilty or liable as she may be, is not held accountable for losses not

directly or reasonably related to her wrongful conduct. As this court has noted, Oregon's general rule in regard to assessing damages is that "a plaintiff should recover only such sums as will compensate the plaintiff for the injury suffered as a result of the defendant's wrong * * *." *Zehr v. Haugen*, 318 Or 647, 657, 871 P2d 1006 (1994) (citing *Yamaha Store of Bend, Inc v. Yamaha Motor Corp*, 310 Or 333, 344, 798 P2d 656 (1990)). The legislature's incorporation of the tort-statute definition of economic damages into the criminal restitution statute indicates that the legislature meant for courts to determine economic damages for restitution in the same common-sense fashion as they determine tort damages.

Applying the plain and ordinary meanings and the legal "term-of-art" meanings of the relevant terms yields the following standard for determining economic damages in the criminal restitution setting: a criminal defendant is liable to the victim for those damages that are reasonably and foreseeably within the scope of the risk of harm created by the defendant's criminal conduct. The legislature incorporated that tort standard into the restitution context. Although this incorporation of tort damages principles into the restitution statute is clear from the meanings of the terms themselves, it is made even clearer by the fact that the legislature *literally* integrated the tort damages statute—ORS 31.710—into the restitution statute.

III. The context and legislative history of the restitution statute confirm that the legislature intended that civil damages concepts be used to determine criminal restitution.

"The context for interpreting a statute's text includes the preexisting common law and the statutory framework within which the law was enacted." *State v. Ofodrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) (internal citation and quotation marks omitted).

A. ORS 137.540(10) (1973), the statute that governed restitution before 1977, contained no guidance for trial courts in determining whether and how to order restitution in criminal cases.

Until 1977, ORS 137.540, the probation-conditions statute, governed criminal restitution in Oregon. ORS 137.540(10) (1973 authorized a sentencing court to require that the defendant "make reparation or restitution to the aggrieved party for the damage or loss caused by the offense, in an amount to be determined by the court" as a condition of probation. That provision was the sole statute that empowered criminal courts to order restitution. Because the restitution order was not a term of the sentence as it is today, but rather a condition of probation, restitution was difficult to enforce and collect. Likewise, the probation statute did not authorize a court to order an offender receiving a prison sentence to pay restitution. The unsatisfactory generality of the provision prompted this court to address the issue in 1976.

B. In *State v. Stalheim*, this court interpreted ORS 137.540(10) (1973) to require the application of civil damages concepts to determine restitution.

In 1976, this court decided *State v. Stalheim*¸ 275 Or 683, 552 P2d 829 (1976), interpreting the statute that then governed the imposition of restitution. The question in *Stalheim* was who was an "aggrieved party" for purposes of receiving restitution under ORS 137.540(10) (1973). *Id.* at 685-86. The direct victims in that case, a mother and daughter, had been killed in the car crash that gave rise to the criminal charges, and the trial court ordered the defendant to pay restitution to the surviving husband, who had not been involved in the accident. *Id.* at 685.

The court construed ORS 137.540(10) (1973) to determine whether the surviving husband was an "aggrieved party" under the statute. The court began by observing that ORS 137.540(10) (1973) was "drawn in general terms" and was therefore equally susceptible to both broad and narrow interpretations as to "the persons entitled to receive benefits under [the statute] and as to the character of the reparation or restitution which is to be made." *Id.* at 686. A broad interpretation, the court noted, led to potentially thorny legal problems:

> "* * * If the [ORS 137.540(10) (1973)] is interpreted broadly so as to permit the imposition of unliquidated damages, thus including such losses as pain and suffering, decreased earning capacity, loss of consortium and the like, the trial judge will be forced to make evaluations of losses usually reserved to civil juries. In the usual case, the trial judge will not have the benefit of pleadings which frame the issues nor the testimony of witnesses to develop

> evidence relevant to the loss resulting from the defendant's wrongdoing. Thus, the trial judge is left in the difficult if not impossible position of having to assign a value to a loss he knows little about. While we customarily rely upon the collective intuition of the civil jury to calculate the amount which should be awarded for pain and suffering and other uncertain losses, and although in some civil cases this function is left to the trial judge sitting without a jury, we find it highly inappropriate to assign this task to a judge presiding over a criminal trial.
>
> "There are other reasons for removing the adjudication of uncertain losses from the sentencing proceedings. There is a real danger that the defendant may be prejudiced by the introduction of civil damages issues into his criminal trial. At the sentencing proceeding the defendant does not have the benefit of defenses such as contributory negligence or assumption of risk, nor does he receive a jury determination of damages which would be available to him in a civil trial. Further, when faced with the alternative of paying what he might regard as an exorbitant measure of damages or of going to prison, the defendant might hesitate to argue with an award of restitution or reparation no matter how speculative or unfair it might be or however summary the procedure under which it was imposed."

Id. at 686-87 (footnotes omitted). *See also State v. Sullivan*, 24 Or App 99, 104-06, 544 P2d 616 (1976) (Schwab, C.J., dissenting) (footnote omitted) ("The serious legal problems raised [by the current method of imposing restitution] are legion. The defendant is being deprived of property without an opportunity to be heard. Both the defendant and the victim are being deprived of their right to have a jury trial on the civil liability question.").

The difficulties that the court identified prompted it to interpret ORS 137.540(10) (1973) narrowly, restricting damages recoverable as restitution to the return or replacement of lost money or objects and the reimbursement of

"the victim's liquidated or easily measurable damages" resulting from the offense, including such things as medical expenses, actual lost wages, and easily measureable property damage. *Stalheim*, 275 Or at 688. The court further held that only the direct victim of the crime at issue was the "aggrieved party" for purposes of receiving restitution. *Id.* Finally, the court held that if there was "some question as to the amount of the victim's loss, the defendant [was] entitled to a hearing on that issue." *Id.* All of this, the court wrote, was consistent with the basic rehabilitative purpose of restitution. *Id.* at 689. The court ended its opinion with an invitation to the legislature to address the issue:

> "Because there are a number of policy considerations which are presented by a broad treatment of the statute, we think that it is advisable to leave these for legislative scrutiny. We hold, therefore, that ORS 137.540(10) permits restitution or reparation to the victim only and limits recovery to amounts which are readily measurable."

Id. at 689-90.

C. The legislature enacted ORS 137.103 and 137.106 in 1977, in part to codify and in part to change this court's holdings in *Stalheim*, and expressly incorporated civil damages concepts into criminal restitution.

The legislature accepted this court's invitation and enacted the new restitution statutes in 1977. The Legislative Interim Committee on the Judiciary had been working on a number of corrections issues, including restitution, since 1975. *See, e.g.*, HB 2012 (1977) Restitution—Summary, (February 13, 1976) (summary of proposed legislation describing the principle and intended impact

of the bill).[3] That committee developed draft legislation intended in part to codify and in part to change the *Stalheim* restitution scheme. *See* Report of the Subcommittee on Corrections, Legislative Interim Committee on the Judiciary at 17-20 (September 9, 1976) (containing draft legislation and commentary, noting that the proposed statutory provisions reflected this court's decision in *Stalheim*, and the Court of Appeals' decision in *Sullivan*).

In the fall of 1976, the Governor's Task Force on Corrections, charged with developing community-based corrections programs and chaired by Edward Sullivan, legal counsel to Governor Robert Straub, recommended that, "[f]ollowing the [*Stalheim*] decision * * *, further studies of restitution sentencing options should be conducted." Report of the Governor's Task Force on Corrections 69 (1976). The task force's report to the legislature included draft restitution legislation and recommended that the legislature (1) amend ORS 137.540(10) (1973) to provide that, contrary to the holding in *Stalheim*, "any party" who was "affected by the offender's criminal actions" could receive restitution; and (2) consider legislation that would "empower the [trial] court" to order restitution as a term of the sentence, and therefore an enforceable part

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[3] *See* Oregon State Archives Legislative Tracing for House Bill (HB) 2012 (1977) at 2, describing Archives' holdings of the interim judiciary committee's records.

of the judgment, rather than as a condition of probation. *Id.*, Position Papers 49-50, Draft Legislation, 1-2.

The House Judiciary Committee took up restitution in the 1977 regular legislative session. Minutes, House Committee on Judiciary, Jan 18, 1977, 3; Feb 21, 1977, 1-4. After considering a number of different bills, the legislature settled on House Bill (HB) 2012 (1977), one of the draft bills proposed by the governor's corrections task force. The bill, like the bill developed by the interim committee in 1976, was meant to implement certain parts of the *Stalheim* decision and to "fix" others. Minutes, House Committee on the Judiciary, Jan 18, 1977, 3.

HB 2012 (1977) created restitution as a term of the criminal sentence rather than a condition of probation, allowing but not requiring the court to sentence the defendant to pay it. In direct response to *Stalheim*'s holding that only the direct victim was an "aggrieved party," the legislature broadened the class of who could recover to include "any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities." Minutes, House Committee on the Judiciary, Feb 21, 1977, 1. As to damages, the bill provided that restitution would compensate victims for "pecuniary damages," defined as "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" at issue. *Id.*, 2. Damages were limited to special damages

because, like the *Stalheim* court, some legislators feared that allowing for broader recovery or general damages would force trial judges into constitutionally problematic territory with respect to the determination of damages. *Stalheim*, 275 at 687-89; Tape Recording, House Committee on the Judiciary, Jan 18, 1977, Tape 1, Side 2(discussion between committee counsel Dennis Bromka and Representatives Kulongoski, Gardner, and unidentified speaker); Minutes, House Committee on the Judiciary, Feb 21, 1977, 2, 3-4, 9. The bill gave the trial court discretion (1) whether to order restitution in the first instance, and (2) whether to order complete, partial, or nominal restitution based on the defendant's circumstances and the likely rehabilitative effect of the restitution order. Or Laws 1977, ch 371, § 1. Additionally, the bill provided that the defendant had the right to a hearing if he or she objected to the restitution order, and required an offset against damages in any civil case that might follow the criminal case. *Id.*

The principal policy goals behind HB 2012 (1977) were to reinforce restitution's rehabilitative and deterrent effect on defendants, to remedy "some of the damage done to victims of crimes[,]" and to show justice-system concern for the plight of victims. Gov Task Force on Corrections Memorandum, House Committee on the Judiciary, HB 2012, Feb 21, 1977, Ex B, 1, 6 (task force counsel Sullivan's summary and comparison of various restitution bills). At one of the first hearings on the issue, committee legislative counsel Bromka, put

forth the idea that an offender who must both suffer loss himself and repair the loss that he has caused is less likely to reoffend. Tape Recording, House Committee on the Judiciary, Tape 1, Side 2, Jan 18, 1977. It might be just a "gut feeling[,]" he said, but it seemed that restitution could have a significant rehabilitative effect. *Id*. The legislature sought also to demonstrate that the state was responsive to victims' needs by making restitution both more enforceable and more widely available. Gov Task Force on Corrections Memorandum, House Committee on the Judiciary, HB 2012, Feb 21, 1977, Ex B.

Lawmakers apparently felt that the discretionary, limited nature of restitution as set forth in the bill saved it from implicating the civil jury trial right as to the determination of damages, and that the provision for a hearing protected defendants' right to due process and allayed the concerns regarding the determination of damages that this court had raised in *Stalheim*. Minutes, House Committee on the Judiciary, April 5, 1977, 2-4; April 12, 1977, 2, 4, 9; April 29, 1977, 12, 20. HB 2012 (1977) was codified as ORS 137.103, 137.106, and 137.109, and signed into law in July 1977. Or Laws 1977 ch 371, § 1.

D. *State v. Dillon,* this court's lead case interpreting the restitution statutes, announced the basic rule regarding causation that still governs restitution today.

In *State v. Dillon*, 292 Or 172, 179, 637 P2d 602 (1981), this court first interpreted the new statute, characterizing the statutory scheme as a "peculiar blend of both civil and criminal law concepts." The court noted that the statute

borrowed from civil law "in that it limits the type and amount of restitution to that which could be recovered as special damages in a civil suit[,]" and required the defendant to pay the victim directly rather than making payments to the state as with a criminal fine. *Id.* For all that, the court said, restitution was not intended to be the equivalent of a civil award. *Id.* Restitution did not necessarily compensate the victim fully because general and punitive damages were excluded, and the trial court could tailor the restitution order how it saw fit to accomplish restitution's purposes as a sentencing tool. *Id.* at 179-80.

In *Dillon*, the court announced the rule that became and should remain the *sine qua non* of Oregon's restitution law: the three prerequisites to a restitution order are (1) criminal conduct, (2) pecuniary damages (economic damages under the current statute), and (3) a causal relationship between the two. *Id.* at 181. The question remains what degree of causal relationship must exist between the defendant's conduct and the victim's expenses for those expenses to be economic damages and thus cognizable as restitution. As the legislature's actions in the decades since enactment of the restitution statutes suggest, the law requires a robust connection—tort-style foreseeability—between criminal conduct and damages.

E. The 1983 amendment to ORS 137.106 ensured that trial courts would have the evidence necessary to determine accurately whether victim expenses were compensable as damages for restitution purposes.

In SB 520 (1983), the legislature amended ORS 137.106 to require that the district attorney investigate and present evidence of the nature and amount of damages to the trial court before the time of sentencing. Or Laws 1983 ch 724, § 1. That change was intended to give sentencing courts the information they needed to determine accurately the damages at issue so that they could make informed decisions regarding whether and how to order restitution. *See, e.g.*, SB 520 (1983) Exhibit P (Letter from Circuit Court Judge Alan Bonebrake proposing the text at issue and explaining its potential utility). Judge Bonebrake explained in his written testimony that the requirement would help victims accomplish the legitimate goal of obtaining compensation for damages while safeguarding "the rights guaranteed to criminal defendants." *Id.*

F. By guaranteeing full recovery of damages to victims as restitution, the 2003 amendment to ORS 137.106 made restitution even more like a civil damages award than it had been before, thus demonstrating the continuing utility of civil damages concepts in determining restitution.

In 2003, the legislature passed Senate Bill (SB) 617, amending ORS 137.106 to make restitution mandatory rather than discretionary. Or Laws 2003 ch 670 § 1. The concern underlying the bill was that the existing discretionary scheme allowed defendants to dodge responsibility for the damages they caused, with the result that victims were not receiving restitution, either because

the defendant did not pay and no effective mechanism existed to make him pay, or because the court simply did not order restitution in the first instance. SB 617 (2003), Public Hearing, Senate Judiciary Committee, Mar 25, 2003, audio recording at 01:38:25.[4]

SB 617 altered the landscape. No longer could the trial court decide whether and how much restitution to award based on its evaluation of the individual defendant's circumstances and its conclusions concerning rehabilitation or deterrence of future crime. Now, the court was required to order restitution in the full amount of the victim's pecuniary damages regardless of the defendant's circumstances at the time of sentencing. *Id.*, recording at 01:43:20; Or Laws 2003 ch 670 § 1. Some discretion remained to the court: if the defendant had no money or other resources at the time of sentencing, the court could allow him or her to make restitution on a court-administered payment plan rather than all at once at the time of the judgment. Recording,

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[4] A recording of this hearing and recordings of the other House and Senate Judiciary Committee hearings referred to in this brief are available on the Oregon Legislative Information System website at https://www.oregonlegislature.gov/citizen_engagement/Pages/Legislative-Video.aspx. Recordings are organized by session year, then by committee or subcommittee, and then by date.

Public Hearing, House Judiciary Committee, May 20, 2003, audio recording at 00:44:00.[5]

As Attorney General Hardy Myers, chair of the Attorney General's Task Force on Restitution Reform, testified at a May 2003 hearing, SB 617 illustrated a fundamental shift in Oregon policy to "full accountability" so that offenders would be under a "strict legal obligation" to recompense victims fully. Recording, Public Hearing, House Judiciary Committee, May 20, 2003, recording at 00:22:00. The focus of the statute had shifted from offender-specific considerations such as the defendant's resources and the rehabilitative impact of restitution, to making the victim economically whole. *See, e.g.*, Recording, Work Session, House Judiciary Committee, June 26, 2003,

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[5] Those changes flowed from the growing societal concern in the 1990s with crime victims' rights and with "just deserts" punishment of offenders. In 1996, for example, pursuant to Senate Joint Resolution 32 referred to the voters as Ballot Measure 26, the voters amended Article I, section 15, of the Oregon Constitution to remove the mandate that Oregon's criminal laws must be based on principles of "reformation and not of vindictive justice." Oregon Voters' Pamphlet (1996) 4-8; Public Hearing, House Judiciary Committee, May 20, 2003, audio recording at 00:32:40. The new text stated that the foundational principles of criminal punishment under Oregon law must be "protection of society, personal responsibility, accountability for one's actions and reformation." Or Const Art I, § 15. In 1999, the voters enacted Article I, section 42, of the Oregon Constitution which, *inter alia*, ensconced crime victims' right to prompt restitution in the state constitution. Groups like Crime Victims United and Crime Victims for Justice advocated with great success for increased attention to be paid to the needs of victims. *See, e.g.*, Recording, Public Hearing, Senate Judiciary Committee, Mar 25, 2003, recording at 01:46:15 (testimony of Arwen Bird, executive director of Crime Victims for Justice)

recording at 00:54:17 (comments of Representative Barker concerning philosophy behind restitution).

By making full recovery of economic damages a central purpose of restitution, the legislature demonstrated ever more clearly restitution's kinship with civil damages awards, highlighting the central goal of restitution as a recovery device meant to make victims whole. *Id.* At a work session on SB 617, then-Representative Floyd Prozanski highlighted the increasingly hybrid civil/criminal nature of restitution: he approved of allowing the victim to ask the criminal court to award the damages they would be able to get in a civil judgment because it allowed the victim to recover what they had a right to without having to go through the additional arduousness of a civil case. *Id.* At 01:01:33. Similarly, Representative Lane Shetterly noted the fundamental policy change in restitution, observing that it personalized the restitution judgment and made it more like a civil judgment between two people than a criminal judgment imposed on the defendant by the state. *Id.*

G. The 2005 amendments to ORS 137.103 and 137.106 were housekeeping amendments meant to simplify and streamline the restitution process, not to broaden the scope of restitution; the legislature once again expressly incorporated civil damages concepts into restitution, demonstrating the continuing viability of the civil damages model in determining restitution.

In House Bill (HB) 2230 (2005), the legislature made the change to ORS 137.103 and 137.106 that is most relevant here. Or Laws 2005 ch 564 § 1. The

bill removed the phrase "pecuniary damages" and its entire definition from the statute. Most significantly for this case, that definition contained the "recoverable in a civil proceeding" predicate that required a sentencing court to identify a civil action arising out of the facts or events of the criminal conduct under which the victim could recover damages. HB 2230 (2005) replaced the term "pecuniary damages" with the term "economic damages," defined by reference to ORS 31.710,[6] a section of Oregon Revised Statutes chapter 31, the chapter on tort actions. Or Laws 2005 ch 564 § 2. The import of that change is key to the resolution of defendant's case.

As the legislative history below shows, that shift was a housekeeping change rather than a tectonic shift in statutory meaning. The legislature intended to streamline and simplify the operation of the statute, not to remove existing limitations on restitution damages. The legislation was meant to make it easier for sentencing courts to determine and award restitution consistently.

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[6] Originally codified as ORS 18.560, ORS 31.710 was part of SB 323 (1987), the Oregon Tort Reform Act, a capacious tort-reform bill that the legislature passed based on the recommendations of a Joint Interim Task Force on Liability Insurance. *See generally* Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 Willamette L. Rev. 283 (1988). A centerpiece of that bill was its cap on noneconomic damages. ORS 37.710(1). In the section that contained the cap, the legislature defined the terms "economic damages" and "noneconomic damages." ORS 31.710(2)(a), (b). Those terms were meant to replace the terms "special damages" and "general damages." *See Clarke v. OHSU,* 343 Or at 608 n 17.

Fred Boss, then chief counsel of the Civil Enforcement Division of the Attorney General's office, shepherded HB 2230 through numerous committee hearings and work sessions. According to Boss, the change in the definition of damages was meant to clarify the statute and make it easier for trial courts to use. Recording, Public Hearing, House Judiciary Committee, Subcommittee on Civil Law, Jan 24, 2005, recording at 00: 34:36. Boss explained to the committee that the reason for substituting the term "economic damages" for "pecuniary damages" was to get rid of the "vague" term "pecuniary damages," and its confusing definition. *Id.* He said that courts and litigants struggled with the definition, and read the portion of the restitution statute referring to "special damages but not general damages" recoverable in a civil action. *Id.*

The confusion that Boss referred to likely arose from the fact that those statutorily undefined terms of art—"general damages," "special damages," and "pecuniary damages."[7]—were no longer in common parlance in Oregon law, and even when they were, were the subject of debate as to their contours.[8] The

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[7] As far as defendant can determine, the phrase "pecuniary damages" was *never* in common parlance in Oregon law except in the restitution context as a result of ORS 137.103(2) (1977). Nearly all of the Oregon cases that use the phrase are Court of Appeals cases interpreting ORS 137.103 and ORS 137.106 before the 2005 removal of that phrase.

[8] *See, e.g.*, *Wheeler v. Huston*, 288 Or 467, 471, 605 P2d 1339 (1980) (noting years-long "confusion" among the bench and bar with respect to how "special damages" and "general damages" interact with each other, and how jury is to apportion damages).

Oregon Revised Statutes contained no definition of those terms. The intent was for the new restitution statute to reflect the statutory terms currently in use defining tort damages. *See, e.g.*, *Clarke v. Oregon Health Sciences University*, 343 Or 581, 608 n 17, 175 P3d 418 (2007) ("General damages * * * now are described as noneconomic damages and encompass nonmonetary losses, including damages for pain and suffering, emotional distress, injury to reputation, and loss of companionship. * * * Special damages now are described as economic damages and refer to the verifiable out-of-pocket losses, including medical expenses, loss of income and future impairment of earning capacity, and costs to repair damaged property.") The "economic damages" definition was simpler, Boss said. *Id.* What is more, the definition contained an illustrative list of things that constituted economic damages so that courts could easily determine what they were and consistently order restitution accurately and fairly. *Id.*

Committee Chair Ackerman noted that the definition of economic damages from ORS 31.710 was the definition commonly used in tort cases and that it referred only to objectively verifiable losses such as medical bills. Recording, Public Hearing, House Judiciary Committee, Subcommittee on Civil Law, Jan 24, 2005, recording at 00:40:48. Boss affirmed Ackerman's impression that the new definition did not change the law to allow for recovery for pain and suffering, but rather kept the current limitations on damages. *Id*

Connie Gallagher, Administrator of the Crime Victim's Assistance Section of the Department of Justice's Criminal Justice Division, testified in favor of HB 2230 at the May 16, 2005, hearing. Recording, Public Hearing, Senate Judiciary Committee, May 16, 2005, recording at 00:17:13. She spoke about the losses that crime victims suffered and the desirability of placing the burden of the losses on those who caused them, not those who suffered them. *Id.* In her view, changing the definition of damages from "pecuniary damages" to "economic damages" would promote consistency in restitution orders; she stated that the term "pecuniary damages" had led to inconsistency in restitution orders because the term was not "well-defined in statute[,]" whereas "economic damages" was clearly defined in ORS 31.710 in a way that was familiar to courts. *Id. See also* Senate Judiciary Committee, May 16, 2005, Ex E (Connie Gallagher's written testimony in support of HB 2230).

Fred Boss reiterated the testimony he offered during prior hearings in support of the bill. May 16, 2005, Recording, Public Hearing, Senate Judiciary Committee, recording at 00:21:30.

Kelly Skye of the Oregon Criminal Defense Lawyer's Association (OCDLA) testified against the bill. May 16, 2005, Recording, Public Hearing, Senate Judiciary Committee, recording at 00:28:33. She stated that OCDLA was concerned that the definitional fix, which appeared merely "technical" on its face, would broaden restitution by allowing restitution for damages that were

general damages, which had not been the subject of a restitution award under the old scheme. *Id.* She pointed out that the illustrative list in the "economic damages" definition in ORS 31.710 included one item—future impairment of earning capacity—that had been considered "general damages" under the pre-tort reform model, and therefore would not have been available as restitution under the "pecuniary damages" definition. *Id.* Skye said that OCDLA believed that the changes of the last two legislative sessions[9] could expand restitution to the point where the civil jury trial right would be implicated and she urged the committee to keep that in mind when enacting the new legislation. *Id. See also*, Senate Judiciary Committee, May 16, 2005, Ex H (Kelly Skye written testimony explaining OCDLA objection to HB 2230). As a result of the issues that Skye identified, the enacted version of the bill stated expressly that economic damages did *not* include future impairment of earning capacity. Recording, Work Session, Senate Judiciary Committee, June 16, 2005, recording at 01:20:12 (Fred Boss testimony summarizing current state of HB 2330); Or Laws 2005 ch 564 § 1.

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[9] *I.e.*, the removal of judicial discretion regarding whether to order restitution, ORS 137.106(1)(a); the requirement that the defendant pay the entire amount of the victim's economic damages, *Id.*; the addition of subrogation "victims" such as insurance companies and the Crime Victim's Compensation Fund, ORS 137.103(4)(c), (d); and the possible inclusion of types of damages that had previously been considered "general damages." HB 2230 (2005).

At a final work session in the Senate Judiciary Committee, Fred Boss again explained the intent behind HB 2230. Work Session, Senate Judiciary Committee, June 16, 2005. After outlining the bill's provisions, including the amendment that excluded loss of future earning capacity from the definition of economic damages, he stated outright that the goal of the change in the definition was to maintain the status quo with respect to what damages were, but to clarify the definition. *Id.*, recording at 01:20:12. Committee Chair Senator Burdick noted that the HB 2230 was meant to clean up the restitution statute at the attorney general's behest, and *not* to expand the scope of damages. *Id.*

As the legislative history shows, no one who worked on the definitional change contemplated that its purpose was to expand the concept of restitution damages beyond what it had been under the "pecuniary damages" formulation, or to unmoor restitution damages from the civil-damages model. The problem with the old definition was not that it directly linked restitution to what a person could recover in a civil case—that rule required only that the sentencing court make the same determinations made in civil actions. Rather, the problem was that the old definition used imprecise, outdated damages terms of art that were not statutorily defined, and it seemed that trial courts were applying them inconsistently.

From the time of the enactment of the restitution statute, the legislature has expressly linked restitution damages to civil damages. This court did the same thing in *State v. Stalheim*, 275 Or 683. There is no good reason now to read a housekeeping amendment like the definitional change in 2005 to dismantle a useful framework that is fair and familiar, accords with the text of the restitution statute overall, and serves the policy purposes that the legislature identified in enacting those statutes.

IV. For restitution purposes, "economic damages" are those damages that the victim could recover under civil tort damages principles.

As discussed above, the legislature expressly incorporated the tort definition of damages into the restitution statute, indicating that it intended for courts to continue to rely on civil concepts in determining economic damages in criminal cases, as they had from the time the restitution statute was enacted. From its inception, the restitution statute has referred sentencing courts to civil damages law to determine restitution. Nothing has changed save that in 2005 the legislature removed the requirement that the state identify a particular theory of civil liability under which the victim could recover damages if the case were civil rather than criminal. Regardless of the theory of liability, the assessment of economic damages is still guided by the civil damages model. In tort, a person who has suffered harm can recover damages to compensate for loss or harm that was a reasonably foreseeable result of the defendant's

wrongful conduct. *Fazzolari v. Portland School Dist No 1J*, 303 Or 1, 734 P2d 1326 (1987); *see also Towe v. Sacagawea*, 357 Or 74, 86-87, 347 P3d 766 (2015) (examining the interaction of duty of care and foreseeability of risk in light of *Fazzolari* and its progeny).

Oregon law does not use the familiar law-school parlance that "cause in fact" plus "proximate" or "legal cause" equals liability. As this court discussed in *Fazzolari*, "proximate cause" in that traditional formation is actually a "value judgment" determining as a policy matter where to draw the line with respect to the scope of the defendant's liability. The phrase is not a literal requirement that a defendant's conduct be a "proximate cause" of the harm or loss. *Id.*, 303 Or at 8.

Oregon courts moved away from the "proximate cause" model in the 1960s, and in 1970 this court set forth the Oregon standard for determining the scope of tort liability in *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 469 P2d 783 (1970):

> "[L]iability is confined to harms actually resulting that are of the general kind to be anticipated from the conduct and, for the same reason, liability is confined to situations in which the person harmed is one of the general class threatened.
>
> "This idea of limiting liability to that which can be anticipated is formulated into the foreseeability test for negligence, which states that one is negligent only if he, as an ordinary reasonable person, ought reasonably to foresee that he will expose another to an unreasonable risk of harm. Foreseeability is an element of fault; the community deems a person to be at fault only

> when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen."

Id. at 608-09 (internal citation and quotation marks omitted).

As they have for years, these general tenets continue to provide a useful framework within which to determine economic damages for restitution purposes. In most instances the initial question of factual causation is not disputed in criminal restitution cases—it is often patent that the defendant's criminal conduct was a "but-for" cause of a host of victim expenses. The second inquiry, whether the harm that resulted was of "the general kind to be anticipated from the conduct," and is thus compensable as "economic damages," is a helpful and necessary guiding principle for cases where the scope of liability is disputed.

By the same token, costs and expenses that are not considered "economic damages" in civil tort proceedings are not properly compensable as restitution in a criminal case. The legislature made clear that only "economic damages" are cognizable as restitution.

V. Oregon Mutual's decision to pay $28,417.98 to hire lawyers and a private investigator to help it decide whether to pay defendant's $16,500 claim was not a reasonably foreseeable result of defendant's attempted theft.

The concept of foreseeability refers to generalized risks of the type of things that could happen rather than the predictability of the actual sequence of events in a particular case. *Fazzolari,* 303 Or at 13 (citing *Stewart v. Jefferson*

Plywood, 255 Or at 610-11). The question here, then, is whether as a general matter insurance companies contract to pay outside entities substantial sums of money to aid in investigation and resolution of claims.

It is generally reasonably foreseeable that when an insured makes a claim on an insurance policy, the insurance company will investigate the circumstances to determine whether the claim is legitimate and must be paid. It does not follow, however, that *any* investigation, no matter how wide-ranging or costly, is reasonably foreseeable. For example, nothing in this record demonstrates that insurance companies generally will pay private contractors significantly more than a claim against a policy to investigate that claim. Such an outlay would be akin to a store that had been the victim of shoplifting $500 in goods hiring a $200/day private investigator to spend a week investigating the theft. The store might well have a sincere desire to get to the bottom of the theft, but without additional evidence to the contrary its decision to spend significantly more than the amount stolen cannot be described as a reasonably foreseeable consequence of the initial wrongful conduct.

VI. Alternatively, the expenses at issue in this case are not "economic damages" and are therefore not the proper subject of a restitution award.

A. Oregon Mutual incurred the expenses at issue as part of the conduct of its everyday business and thus those expenses were not economic damages.

Oregon Mutual Insurance is, obviously, in the insurance business. One problem with this record, however, is the dearth of evidence regarding how insurance companies reasonably and foreseeably operate. A core part of an insurance company's work would appear to be claim adjustment, that is, the evaluation each claim that its insureds make on their policies to determine whether the company will pay the claim or much it will pay. It is commonly known that insurance companies frequently engage in negotiation and litigation as part of their day-to-day claims-adjustment operations. It may be common knowledge that most insurance policies require the insured to submit to questioning in an examination under oath, which is typically conducted and recorded as if it were a deposition or court hearing. And it is unsurprising that in carrying out those business functions, insurance companies routinely rely on the services of in-house or contracted attorneys, paralegals, investigators, court reporters, and the like. But even assuming that the sentencing court (and this court) could rely on that questionably "common" knowledge, the expenses at issue do not constitute "economic damages."

An insured who makes a claim on a policy—whether the claim is fraudulent or legitimate—does not create extra work for the insurance company. Nor does that claimant impede the company's ability to carry out its normal business functions. The insured's claim does not harm the company's infrastructure, necessitating repair. The claim does not constitute tampering or interference with the company's property or personnel. The claim does not destroy the insurance company's property or hurt its employees. The claim does not cause the company to lose income. The claim does not cause the company to do anything that it does not already do in the normal course of business. Rather, dealing with the insured's claim is the insurance company's *raison d'être*. And ferreting out fraudulent claims is just one aspect of dealing with those claims.

In defendant's case, the money Oregon Mutual spent in hiring Smith Freed Eberhard and in paying for the various expenses of the fire investigation was money it would have spent in any fire claim in the ordinary course of adjusting the claim. Defendant's criminal conduct did not cause Oregon Mutual to do anything it did not already do as standard operating procedure, likely in every such case, regardless of whether the claim was fraudulent or not. The expenses incurred were therefore not "economic damages."

B. Oregon Mutual's attorney fees, investigation fees, and trial costs were not economic damages because those types of expenses are not damages in civil tort cases.

More fundamentally, however, economic damages recoverable as restitution are determined by reference to the damages recoverable in civil tort actions. Attorney fees and court costs are not economic damages in any type of civil case, tort or otherwise. *See, e.g., Griffin By and Through Stanley v. Tri-County Metropolitan Transp Dist of Oregon*, 318 Or 500, 528-29, 870 P2d 808 (1994) (Unis, J. dissenting) ("Costs and disbursements and attorney fees are 'add-ons' rather than part of the claim for relief. Damages, on the other hand, are the sum of money that may be awarded as a consequence of the injury or loss suffered by the party seeking redress."). Chapter 20 of the Oregon Revised Statutes details generally how courts are to apportion fees and costs in civil proceedings.[10] Certain other statutes govern attorney fees in specific types of

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[10] ORS 20.080(1), for example, provides that

> "In any action for damages for an injury or wrong to the person or property, or both, of another where the amount pleaded is $10,000 or less, and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, at trial and on appeal, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant, and on the defendant's insurer, if known to the plaintiff, not less than 30 days before the commencement of the action or the filing of a formal complaint under ORS 46.465, or not more than 30 days after the transfer of the action under ORS 46.461. However, no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of

proceedings. *See, e.g., Strawn v. Farmers Ins Co of Oregon*, 353 Or 210, 297 P3d 439 (2013) (discussing the prevailing methodologies for determining attorney fee awards in case involving a fee-shifting statute and a common-fund award). The Oregon Rules of Civil Procedure define attorney fees as "the reasonable value of legal services related to the prosecution or defense of an action. ORCP 68 A(1). ORCP 68 B details whether and how costs and disbursements are to be allowed.

Here, Oregon Mutual's attorney fees were not damages. Nor were the fees Oregon Mutual spent paying expert witnesses to testify at grand jury and at trial. Those expenses were "add-ons," part of the cost of taking a case through the litigation process, distinct from economic damages.

C. Oregon Mutual stepped into the shoes of the state when, in effect, the company took on a state investigation and its expenses were therefore prosecution costs and not economic damages.

Oregon Mutual's pivotal role in defendant's prosecution presents another reason that at least some of the claimed expenses are not "economic damages." From the beginning, the investigation in this case was carried out by private

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> the action or the filing of a formal complaint under ORS 46.465, or not more than 30 days after the transfer of the action under ORS 46.461, an amount not less than the damages awarded to the plaintiff."

ORS 20.107 governs unlawful discrimination claims and provides that the court "shall award" attorney fees and expert witness fees to the prevailing plaintiff or defendant under certain circumstances.

investigators at the expense of Oregon Mutual. Smith Freed Eberhard, Oregon Mutual's lawyers, coordinated the investigative efforts, including communicating frequently with the private investigators, with the police, and with the prosecution. By statute, it is the state police's duty to carry out such investigations: ORS 476.110 mandates that "the Department of State Police shall employ a sufficient number of state police who shall perform the duties of enforcement of criminal laws and other statutes of Oregon with reference to the suppression and punishment of arson and fraudulent claims and practices in connection with fire laws." Given the scarcity of resources in lean budgetary times, the state police no doubt appreciate the help when insurance companies hire private actors to perform those duties. But a defendant should not be made to bear the cost of an investigation when a private entity steps into the shoes of the state and does the work that would otherwise be done by the police and prosecutors.

Oregon law has never dictated that a defendant must pay the state to prosecute her. While ORS 166.665[11] does allow the recovery of certain costs under limited circumstances, in general, the state must carry the financial

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[11] ORS 161.665(1) provides that a court "may include in its sentence * * * a money award for all costs specially incurred by the state in prosecuting the defendant. Costs include a reasonable attorney fee for counsel appointed * * * and a reasonable amount for fees and expenses incurred pursuant to preauthorization under ORS 135.055 [the statute that provides for, *inter alia*, defense investigative expenses.]."

burden of prosecuting a defendant. *See, e.g.*, *State v. Fuller*, 12 Or App 152, 157, 504 P2d 1393, *aff'd by Fuller v. Oregon*, 417 US 40 (1974) ("[M]ost of the costs of the prosecution side of the case are excluded from consideration as costs. The 'costs of prosecution' specifically do not include district attorneys' salaries, sheriffs' salaries, jurors' fees, police investigations, etc. *See*, Minutes, Criminal Law Revision Commission Meeting, May 14, 1970, pp. 27-30.").

To make a defendant pay a private entity for the expenses that entity incurred in fulfilling the state's statutorily-mandated prosecution duties is like making the defendant pay for state agencies to carry out those duties. It is unfair to shift the costs of investigation and prosecution to private actors and then require the defendant to pay those costs as "economic damages."

D. Even if Oregon Mutual's expenses were "harm" or "loss" that could be recompensed through economic damages, the expenses were not reasonably or necessarily incurred.

Even if this court determines that the costs and expenses that Oregon Mutual Insurance sought to recoup as economic damages through a restitution award in defendant's case were, generally, the type of cost that *could* constitute economic damages according to the analysis set forth above, this court should not permit recovery of the costs and expenses incurred after Oregon Mutual decided not to pay defendant's claim. ORS 31.710(2)(a) provides that "economic damages" are only those charges, expenses, or costs that are

reasonable and necessary. The costs and expenses incurred after Oregon Mutual decided not to pay the claim were neither reasonable nor necessary.

Oregon Mutual decided not to pay defendant's claim within a few weeks of the fire incident. Tr 202. At that point, Oregon Mutual had no need to carry on its investigation and no need to keep Smith Freed on its payroll (assuming that it did not have Smith Freed on general retainer).[12] It chose to continue incurring expenses but was certainly not required to do so by anything that defendant did. Those expenditures may have had some other internal business purpose for Oregon Mutual, but they were no longer necessary for purposes of dealing with defendant's claim. The point of restitution is to make the victim whole for unavoidable harm or loss caused by the defendant. Every dollar that Oregon Mutual spent after it decided not to pay defendant's claim was

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[12] This is so notwithstanding ORS 476.270 and ORS 731.592. ORS 476.270, a section of the chapter that describes and defines the state fire marshal's duties, requires an insurance company to report suspected arson to the state fire marshal. ORS 731.592, part of the insurance code, requires an insurer to "cooperate" with any law enforcement or other government agency that is investigating suspected criminal conduct involving insurance, and provides that an insurer that does not cooperate as the statute requires is "not eligible for any compensation to which the insurer* * * might otherwise be entitled to from any award under [the restitution statute]." ORS 731.592(5). Neither statute mandates that an insurance company engage in its own private investigation of arson or insurance-related wrongdoing. Both statutes are most likely meant to ensure that insurance companies cooperate with law enforcement and that they are protected when compelled to divulge otherwise confidential information regarding their insureds.

avoidable expenditure. It would be unfair and unlawful to make defendant pay for unnecessary expenses that Oregon Mutual could easily have avoided.

CONCLUSION

For the above reasons, defendant respectfully asks this court to reverse the trial court's order that she pay restitution to Oregon Mutual Insurance. That requires reversing the decisions of the trial court and the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (1) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 11,502 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on June 8, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Doug Petrina, #963943, Assistant Attorney General, attorney for Respondent on Review.

Respectfully submitted,

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