

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff,

v.

DANIEL ALGEO,

Defendant.

J. W. P.,

Petitioner on Review,

v.

STATE OF OREGON and DANIEL ALGEO,

Respondents on Review.

Yamhill County Circuit

Court No. CR100607

FILED
APPELLATE COURT ADMINISTRATOR

NOV 13 2012

SC No. S060830

SUPREME COURT
COURT OF APPEALS

S060830

BRIEF OF *AMICUS CURIAE*

THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF
CRIME VICTIM J.W.P.'s PETITION FOR REVIEW UNDER ORS 147.539

Petition for review of the order of Yamhill County Circuit Court,

Honorable Ronald W. Stone, Judge

Order signed: October 29, 2012

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STATEMENT OF THE *AMICUS CURIAE*'S INTEREST

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

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

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

INTRODUCTION

During the past three decades, Oregon has made steady progress toward reshaping the criminal justice system to one that recognizes crime victims' rights, including the rights to justice; to receive prompt restitution; and to be treated with due dignity, respect and fairness. *See, e.g.*, Or Const, Art. I, § 42(1), (1)(d); ORS 137.106(1)(a). To that end, the Oregon legislature has repeatedly amended the criminal restitution statutes to conform to the constitutional mandate to accommodate the rights and interests of crime victims, increase offender accountability, and ensure that crime victims receive the financial compensation that they need to begin to address the impact that defendants' crimes have had on their lives.¹ As a result of those efforts, Oregon restitution law now requires that courts award restitution in an "amount that equals the full amount of the victim's economic damages," ORS 137.106(1)(a), without any limitation that such damages be recoverable in a civil action, *see* ORS 137.103(2).

¹ *See, e.g.*, Or. Laws 2003, ch. 670, § 1 (amending ORS 137.106 to provide, *inter alia*, that (1) the trial court "shall enter" a restitution judgment if there is evidence that the victim suffered "pecuniary damages" and (2) the restitution award must "equal[] the full amount of the victim's pecuniary damages"); Or. Laws 2005, ch. 564, § 1 (amending ORS 137.106 to replace "pecuniary" damages with "economic" damages and amending ORS 137.103(2) to replace the former definition for "pecuniary damages" — which included a clause that limited recovery to what the victim "could recover against the defendant in a civil action" — with a definition for "economic damages" that removed the "civil action" clause).

Notwithstanding the clear mandate to award crime victims the full amount of their economic damages, the trial court incorporated civil comparative fault principles and awarded the crime victims — pedestrians who were struck down and seriously injured by defendant drunk driver — only 10 percent of the full amount of their economic damages. Not only does the trial court's interpretation of Oregon's criminal restitution law violate well-settled principles of statutory construction, it is also contrary to the policy and purposes behind Oregon's crime victims' rights and restitution laws. Allowing the trial court's decision to stand would result in a serious and irreversible injustice for the crime victims.

STATEMENT OF THE CASE

Defendant-respondent Daniel Algeo pled guilty to driving under the influence of intoxicants and assault in the fourth degree for recklessly causing physical injury to two pedestrian-victims on the night of October 16, 2010. (ER45.)² The initial reporting officer witnessed the following: defendant's "eyelids were drooping and his speech was slurred"; he "sway[ed] from side to side and back and forth as he was talking" to the officer; he "had difficulty balancing" during the field sobriety tests; and "[t]he smell of alcoholic beverage was overwhelming inside [the] patrol car while [defendant] was in the back

² All references to excerpts of record herein refer to the Excerpt of Record in Support of Petition for Review filed by the crime victim-petitioner J.W.P.

seat.” (ER28-ER30.) Defendant’s blood alcohol content (BAC), tested an hour after the collision, registered at .19 percent — more than twice the legal limit.³ (ER30.) One of the crime victims, petitioner J.W.P., suffered serious physical injuries as a result of the collision and had to be transported to a Portland hospital via Life Flight. (ER8.)⁴ It is undisputed that the total sum of petitioner-crime victim J.W.P.’s “economic damages,” as defined by ORS 137.103(2), is \$61,367.68. (See ER45 [stating that the parties stipulated that the total amount of economic damages suffered by both crime victims is \$77,621.53]; ER26-ER27 [stating that J.W.P.’s portion of the combined total economic damages is \$61,367.68].)

The trial court, citing *State v. Carson*, 238 Or App 188 (2010), determined that the amount of restitution a crime victim may recover “are those that are recoverable in a civil action.” (ER46.) As a result, the trial court concluded “as a matter of law” that a modified version of ORS 31.600 — the civil comparative fault statute — applies to limit the amount recoverable as restitution. (*Id.*)

The trial court then determined that “almost all of the economic damages suffered by the victims[] were caused by their [jaywalking]” at the time of the

³ A person who drives a vehicle while he or she has a BAC of “0.08 percent or more” violates the DUII statute. ORS 813.010(1)(a).

⁴ The other crime victim was transported via ambulance to the local medical center. (ER8.)

collision rather than defendant's drunk driving and criminal assault. (ER47.)

Applying contributory fault principles, the trial court concluded that the crime victims "are only eligible" to receive 10 percent of their total economic damages as criminal restitution. (*Id.*)

REASONS FOR GRANTING REVIEW

This Court considers a number of grounds for allowing a petition for review. *See* ORAP 9.07, 12.09(4). In addition to the grounds set forth in crime victim J.W.P.'s Petition for Review, the Court should grant review because this case also satisfies ORAP 9.07(1) – it presents questions of first impression about significant issues of law:

- (1) The scope of a trial court's authority to award restitution in an amount that is less than the unambiguous statutory mandate; and
- (2) Whether the application of civil comparative fault principles to criminal restitution in this case is consistent with the policies and purposes behind Oregon's constitutional and statutory crime victims' rights and restitution laws.

Resolution of these questions will have far-reaching impact on all Oregon crime victims.

To date, few appellate cases address the current version of Oregon's restitution statutes. And at least one recent appellate decision, *State v. Carson*, contains dictum suggesting a pre-2005 statutory amendment limitation to

restitution — that the award is limited by certain damages recoverable in a civil tort action — may continue to apply. *See Carson*, 238 Or App at 192. The complexity of criminal restitution and the lack of proper guidance from the appellate courts led the trial court below to erroneously conclude that it has the authority to incorporate civil comparative fault principles into criminal restitution calculations.

The Oregon legislature has carefully promulgated and fine-tuned the criminal restitution statutes over the years, and it has on occasion adopted certain concepts from Oregon's civil tort laws. *See, e.g.*, ORS 137.103(2) (providing, with one exception, that "[e]conomic damages" for restitution purposes has the meaning given in ORS 31.710, a tort statute); ORS 137.103(2) (pre-2005 amendment version) (providing that "[p]ecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities"). The legislature is presumed to have been aware of Oregon's civil comparative fault statute at all relevant times, and the 2005 amendment of ORS 137.103 — whereby the "civil action" limitation clause was deleted — indicates that comparative fault has no place in today's restitution law. *Cf. Cabell v. City of Cottage Grove*, 170 Or 256, 281-82 (1942) (finding that when it adopted the state highway code, "the legislature must be presumed to have been aware of provisions elsewhere found in the

statutes granting to the [State Highway] [C]ommission a measure of authority to control traffic”; and therefore it is reasonable to assume that if the legislature had intended to bestow “any further authority of that kind,” it “would have manifested that intention in express language and not have left it to be inferred or implied” from the new provisions).

Oregon law now clearly requires that courts award criminal restitution in an amount that represents the “full amount” of the crime victims’ “economic damages” without regard to the amount that the crime victims may be able to recover in a civil tort case. ORS 137.103(2); ORS 137.106(1)(a). Therefore, the trial court exceeded its authority — and thereby violated the crime victims’ rights to receive prompt and full restitution and to be treated with due dignity, respect and fairness — when it ignored the plain language of the restitution statutes and substituted its opinion about how restitution awards ought to be calculated. *See Fox v. Galloway*, 174 Or 339, 347 (1944) (“If the language is plain and unambiguous, if it can be given but one meaning, and that meaning does not lead to an impossibility or an absurdity such as the legislature could not be supposed to have intended, the court must give effect to that meaning if constitutional, even though the result may be, in the court’s opinion, harsh, unjust or mistaken in policy.”).

Restitution aims to make Oregon crime victims financially whole, which is crucial to their recovery and sometimes their survival. The trial court’s

misconstruction of current restitution law is significant to crime victims statewide. This Court's guidance on these important issues of law is necessary to redress the harm to these crime victims.

For the foregoing reasons and the reasons set forth in petitioner-crime victim J.W.P.'s Petition for Review, *amicus curiae* requests that the Court grant review.

Date: November 12, 2012 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1840 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).

Margaret Garvin

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 12, 2012, I sent the original plus 15 copies of the foregoing BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF CRIME VICTIM J.W.P.'s PETITION FOR REVIEW UNDER ORS 147.539 via FedEx 2-day delivery to:

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I further certify that on November 12, 2012, I served the foregoing Brief by sending two true copies thereof via FedEx 2-day delivery to each of the following persons:

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