IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. KADE WILLIAM KIRSCHNER, Defendant-Appellant, Petitioner on Review.	Union County Circuit Court No. F19697 CA A154602 SC S063069

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Union County
Honorable BRIAN DRETKE, Judge

Opinion Filed: January 28, 2015
Per Curiam
Before: Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge

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INTRODUCTION

The concept of restitution is straightforward: criminal defendants should pay victims for the economic losses caused by their crimes. That is precisely what Oregon's restitution statute, ORS 137.106, mandates. It provides that, "[w]hen a person is convicted of a crime * * * that has resulted in economic damages," the trial court must impose restitution in the "full amount" of those damages. Over the years, the legislature repeatedly has amended the restitution statutes to protect and enhance crime victims' ability to obtain restitution from defendants. This case presents issues about the causation requirement for restitution, and the scope of recoverable damages.

Defendant committed several crimes during an incident in which he unlawfully attempted to enter the victim's home. To attend court proceedings in defendant's criminal prosecution, the victim missed work, thereby losing wages. On review, defendant challenges the trial court's order that he pay restitution to the victim for those lost wages.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

ORS 137.106(1) authorizes restitution when a crime "has resulted in economic damages."

> **First question presented**: What causal connection is required between the crime and the damages?

First proposed rule of law: Restitution requires factual causation but does not require foreseeability. A crime is a factual cause of the damages for restitution purposes if the victim would not have incurred the losses but for the crime. The factual-causation test also includes a narrow exclusion for losses that are too remote.

Second question presented: What does the term "economic damages" mean?

Second proposed rule of law: The term "economic damages" means objectively verifiable monetary losses. Although ORS 137.102(2) (2003) used to limit restitution to losses that the victim could have recovered as damages in a civil action arising out of the facts constituting the criminal activities, the legislature eliminated that requirement in 2005.

STATEMENT OF FACTS

In February 2013, defendant and his co-defendant attempted to unlawfully enter the victim's home in the early morning hours while they were under the influence of drugs and alcohol. (4/3/13 Tr 10-12). During the attempted entry, they damaged the front door and floor of the victim's home. (6/13/13 Tr 5). Defendant had drugs and brass knuckles in his possession when he was arrested. (4/3/13 Tr 9-10).

The victim of the crime was Rust, who owned the house. Because of defendant's crimes, Rust missed work the day of the incident. (6/13/13 Tr 5). Rust works for Union Pacific Railroad and, as part of that job, he travels to another location one day and makes the return trip the next day. (*Id*.).

Consequently, when Rust misses one day of work, he is forced to miss two days, which costs him roughly $460—$221.85 for the "away" trip, and $237.85 for the "return" trip. (6/13/13 Tr 5-8).

A grand jury indicted defendant for several crimes and trial was scheduled for April 23, 2013. The state apparently subpoenaed the victim to appear for the trial date. (6/13/13 Tr 8). Defendant subsequently reached a plea agreement with the state. On April 3, 2013, defendant pleaded guilty to two drug-possession offenses and a weapons offense, and the trial court dismissed the remaining charges pursuant to the agreement. (4/13/13 Tr 4). The trial court placed defendant on probation and ordered restitution to be determined within 90 days.

Even though the trial was canceled, the victim missed work because of the scheduled trial date. The record does not clearly establish whether the prosecutor notified the victim that the trial had been canceled or whether the victim would have been able to get his shift back after earlier informing his employer that he would miss work. But the record strongly suggests that the prosecutor notified the victim that trial was canceled but that the victim already had lost his shift by that point. (*See* 6/13/13 Tr 6, containing prosecutor's explanation that the victim originally "had to call in and cancel [work]" for the scheduled trial date and that, even though the trial was canceled, the victim

"had lost that trip and wasn't able to then go on that trip at that time"). Neither defendant nor his co-defendant contended that the victim's lost wages for the scheduled trial date was avoidable, so the record was not developed on that issue.

The trial court held a restitution hearing on June 13, 2013. The prosecutor told the victim to appear for the hearing, because the defense was disputing restitution. (6/13/13 Tr 8, 13). At the hearing, the victim explained that, to appear for the hearing, he had to "lay off" the previous night, thereby missing two days of wages and that he also would "get a mark against [him at work] for attendance for being there." (6/13/13 Tr 8-9). The state sought restitution for the cost of repairs to the victim's home and for the victim's lost wages for missing work on three occasions: (1) the day of the crimes; (2) the scheduled trial date; and (3) the restitution hearing.

Defendant and his co-defendant stipulated to paying restitution for the repairs and for the victim's lost wages for the day the incident occurred. (6/13/13 Tr 5). But they disputed the restitution for lost wages for the court proceedings, asserting that the victim could obtain witness fees but not restitution. (6/13/13 Tr 12-13). They also argued that restitution would be inappropriate for the restitution hearing because, had the prosecution provided the defense with documentation in advance, that could have facilitated a

settlement and obviated the need for the hearing. (6/13/13 Tr 10-13). The trial court imposed restitution jointly and severally against both defendants in the amount of $2,265, which included restitution for the lost wages for the court proceedings. (TCF, Amended Judgment).

Defendant appealed and challenged the restitution for lost wages for the court proceedings, asserting that the victim could not have recovered those losses as damages in a civil action. (App Br 8-10). The Court of Appeals affirmed in a *per curiam* opinion, citing its decision in *State v. Ramos*, 267 Or App 164, 340 P3d 703 (2014). *State v. Kirschner*, 268 Or App 716, 342 P3d 1026 (2015). In *Ramos*, the Court of Appeals held that restitution no longer is limited to losses that the victim could have recovered as damages in a civil action. 267 Or App at 175-76.

SUMMARY OF ARGUMENT

ORS 137.106(1) authorizes restitution when a crime "has resulted in" economic damages. That requires factual causation between the crime and the victim's losses. The applicable test is the "but for" test, which is satisfied if the victim would not have incurred the losses but for the defendant's criminal activities. Although the factual-causation test also includes a narrow exclusion for losses that are too remote or attenuated, the restitution statute does not require that the losses were foreseeable.

The requirement of factual causation poses no obstacle here. Defendant committed crimes, which resulted in the scheduled trial date and the restitution hearing, which resulted in the victim missing work and losing the wages. Nor was this a rare instance in which restitution is not authorized, because the losses were too remote. The causal connection is clear. Defendant's crimes "resulted in" the damages. Moreover, defendant's claim would fail even if foreseeability was required. It was foreseeable that defendant's crimes would result in the victim's lost wages.

Defendant also disputes that the victim suffered "economic damages." He asserts that restitution is limited to those losses that the victim could have recovered as damages in a civil action. Yet the legislature deleted the requirement in 2005. Under ORS 137.103(2) (2003), a victim could recover restitution for "pecuniary damages," which was defined as "all special *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." (Emphasis added.) In 2005, the legislature replaced the term "pecuniary damages" with the term "economic damages," which is defined simply as "objectively verifiable monetary losses." The statutory text and context demonstrate that the legislature intentionally omitted the "recover[able]

* * * in a civil action" requirement, and the legislative history, although ambiguous, provides additional support for that conclusion.

Recoverable damages are, however, still limited to monetary losses. ORS 137.106(1) authorizes restitution for economic damages which are defined as "objectively verifiable monetary losses" that the victim reasonably incurred, because of the crime. Economic damages include losses that a victim incurs to address the consequences of the defendant's criminal activity. That was what was involved here. The victim's lost wages to attend court proceedings in defendant's criminal prosecution were economic damages.

Restitution was proper even if restitution is limited to losses that would be recoverable as damages in a civil action. The victim's lost wages were not analogous to a party's costs incurred in bringing a civil action against a defendant but instead resemble third-party litigation losses that are civilly recoverable as damages.

ARGUMENT

ORS 137.106(1) imposes three requirements for restitution: (1) criminal conduct; (2) economic damages; and (3) a causal relationship between the two. *State v. Dillon*, 292 Or 172, 181, 637 P2d 602 (1981) (interpreting prior substantially similar version of the statute that referenced pecuniary damages). Because defendant's crimes caused the victim's lost wages, and because those

losses qualified as economic damages, the trial court properly imposed the restitution.

A. The victim incurred the lost wages as a result of defendant's crimes.

1. The phrase "has resulted in" in ORS 137.106(1) means that the crime was a factual cause of the damages.

ORS 137.106(1)(a) authorizes restitution when a crime "has resulted in" economic damages. The parties agree that that statute requires factual causation, which means that the crime actually must have been a cause of the damages. But defendant argues that the statute also imposes a foreseeability requirement. The meaning of the causation requirement in ORS 137.106(1) presents a question of legislative intent to be resolved by applying this court's usual methodology for construing statutes. *See State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). A review of the statutory text and context demonstrates that restitution requires only factual causation. The factual-causation test consists of the familiar "but for" test along with a narrow exclusion for losses that are too remote and attenuated to be deemed the "result" of the crime.

a. The statutory text and context establishes that restitution requires only factual causation

ORS 137.106(1)(a) 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 * * * evidence of the nature and amount of the damages. * * * If the court finds from the evidence presented that a victim suffered economic damages, * * *

> 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. * * *

(Emphasis added.) As a matter of plain, ordinary meaning, the phrase "has resulted in" means that the crime factually was a cause of the damages. *See Webster's Third New Int'l Dictionary* 1937 (unabridged ed 1993) (defining "result" to mean "to proceed, spring, or arise as a consequence, effect, or conclusion"). ORS 137.106 thus requires a factual causal connection—that is, actual causation—between the criminal activities and the damages.

Defendant asserts that restitution also includes a foreseeability requirement that resembles proximate causation. He notes that in civil cases, this court has abolished the concept of proximate causation and, instead, defined the elements of torts in terms of foreseeability. *See e.g.*, *Fazzolari v. Portland School District No. 1J*, 303 Or 1, 12-14, 734 P3d 1326 (1987) (discussing change). He argues that restitution similarly is limited to damages that are "a reasonably foreseeable result of the defendant's criminal conduct." (Pet Br 2-3).

Yet the statutory text says nothing about foreseeability. As a matter of plain meaning, even unforeseeable damages are the "result" of a crime if the damages would not have been incurred but for the crime. ORS 137.106(1) is phrased in terms of what retrospectively did happen ("has resulted in"), which

is factual causation. Foreseeability, in contrast, is prospective in nature and analyzes whether the harm that came to pass was foreseeable at the time of the tort. *See Towe v. Sacagawea, Inc*., 357 Or 74, 87, 347 P3d 766 (2015) (discussing difference between factual causation and foreseeability).

Had the legislature intended to impose a foreseeability or proximate-cause-like requirement, it would have done so expressly. But it did not do so and to read such a requirement into ORS 137.106(1) would violate the interpretative rule against inserting what has been omitted. ORS 174.010. *See also State v. Enstone*, 137 Wash 2d 675, 974 P2d 828, 829-31 (1999) (refusing to read a foreseeability requirement into a Washington restitution provision, because the text did not support it).

Statutory context points in the same direction. Nothing in the related restitution provisions imposes—or even suggests—a foreseeability requirement as a precondition for restitution. Nor does a foreseeability requirement appear in the text of the definition of "economic damages" in ORS 31.710(2)(a), which the restitution statutes incorporate and which is set out in its entirely below (Resp Br 23). ORS 31.710(2) is not the source of the foreseeability requirement in civil cases, nor the source of any other similar limitations on liability. Instead, that provision plays the limited role of distinguishing economic damages from non-economic damages for purposes of the statutory cap on

damages in ORS 31.710(1). *See White v. Jubitz Corp.*, 347 Or 212, 231-43, 219 P3d 566 (2009) (explaining as much and rejecting argument that provision embodies a collateral-source-rule limitation).

The backdrop of the criminal code further confirms the absence of a foreseeability requirement for restitution. The legislature adopted the revised criminal code in 1971. By then, this court already had discarded the concept of proximate cause for negligence cases. *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 606, 469 P2d 783 (1970). The legislature based a substantial portion of the criminal code revision on the Model Penal Code, which contained a proximate-cause provision. *See* Model Penal Code, § 2.03 (1962) (imposing a proximate-cause requirement in addition to factual-causation requirement). The legislature nonetheless chose to omit a proximate-cause or foreseeability requirement from the criminal code, and it is presumed that that omission was intentional. The criminal law in Oregon does not include an overarching foreseeability requirement. *See also State v. Murray*, 343 Or 48, 56, 162 P3d 255 (2007) (rejecting argument that assault provisions incorporated a proximate-cause-like requirement and instead interpreting "cause" consistent with its plain, ordinary meaning). That further confirms the absence of that requirement for restitution.

Nor can a foreseeability requirement be imported from civil law. This court has flatly rejected the view that restitution is a "form of civil liability and recovery." *Dillon*, 292 Or at 179. Whereas civil law is compensatory in nature, "[r]estitution is not * * * intended to serve a primarily compensatory function or to compensate victims fully for their losses." *State v. N.R.L.*, 354 Or 222, 227, 311 P3d 510 (2013). Restitution is based on principles of rehabilitation and accountability, is part of the criminal sentence, and ultimately rests on a "penological" theory. *Dillon*, 292 Or at 178-80. In addition, unlike a civil suit for damages in which the victim is a plaintiff, a criminal case is not brought by the victim or on its behalf, and the victim is not a party to the proceeding. *Cf.* Or Const, Art I, § 42 (granting crime victims rights); ORS 147.500 *et seq*. (delineating process for crime victims to assert rights). Finally, restitution limits recovery to economic damages, and even then not all economic damages, because loss of future earning capacity is excluded. The victim may not recover restitution for non-economic damages, such as pain and suffering and emotional distress, and punitive damages are not available.

Given those differences, there is no reason to believe that the civil-law foreseeability requirement applies to the restitution determination. Requiring a defendant to pay the full amount of the victim's objectively verifiable monetary losses that resulted from the crime serves the rehabilitative and penal purposes

of restitution regardless of whether the losses were foreseeable. Defendant's attempt to import civil-law principles misses the mark, particularly given the absence of textual or contextual support for his position. That is especially so given that the factual-causation requirement reflected in the text of ORS 137.106(1) already imposes a narrow remoteness limitation, which is discussed in the next section. The phrase "has resulted in" means factual causation but does not require foreseeability.

b. The factual-causation test in ORS 137.106 includes a narrow remoteness limitation.

At its core, defendant's foreseeability argument is rooted not in the text of the restitution provisions but is based on a policy concern that a test that requires only factual causation would be limitless and unfair. Such policy concerns are for the legislature to decide. If the legislature wanted a foreseeability requirement, it could have adopted one and it can still do so.

But defendant's premise that the factual-causation standard in ORS 137.106(1) is limitless is mistaken. The Court of Appeals' caselaw suggests that restitution is subject to a narrow remoteness limitation. *See Ramos*, 267 Or App at 180 (holding that the losses "were not so remote" as to vitiate causation); *State v. Bullock*, 135 Or App 303, 307, 899 P2d 709 (1995) (concluding that contested expenses "were not too remote to be considered the results of defendant's crime"). That suggestion appears to be correct.

At some point, a causal connection will become so attenuated that it is no longer accurate to say that the crime "has resulted" in the damages. In *Paroline v. United States*, 571 US ___, 134 S Ct 1710, 188 L Ed 2d 714 (2014), the United States Supreme Court provides the following example:

> suppose the traumatized victim of a[n offense] * * * needed therapy and had a car accident on the way to her therapist's office. The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs.

134 S Ct at 1721. The victim in that hypothetical could not recover restitution for those losses under ORS 137.106(1)(a), because the medical costs were too remote and attenuated from the crime to support a conclusion that the crime "has resulted in" those losses. A sensible limitation on restitution thus can be gleaned from the statutory text. *See also State v. Brownback*, 356 Mont 190, 232 P3d 385, 388 n 1 (2010) (explaining that "[w]e have recognized that some pecuniary losses may be so attenuated as to no longer be considered 'a result of the offense'"). The limit is narrow but nonetheless excludes restitution in the rare circumstances in which the causal link is extremely remote and attenuated.[1]

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[1] As the hypothetical in *Paroline* suggests, the presence of an intervening cause could be a pertinent consideration in applying the narrow remoteness limitation in ORS 137.106(1). But an intervening cause does not break a "but for" chain of factual causation and usually will not break the chain of causation under the narrow remoteness limitation in ORS 137.106(1)(a). For example, losses caused by others but made possible by a defendant's crime

Footnote continued…

2. Defendant's crimes were a factual cause of the victim's lost wages.

The factual-causation requirement was easily satisfied in this case. The applicable test is the "but for" test: under that test, a defendant's criminal conduct is a factual cause of the losses if the victim would not have incurred the losses but for the criminal activities. *See Bullock*, 135 Or App at 307 ("[f]or purposes of restitution, causation is met by applying a 'but for' standard"). For example, in *Dillon*, this court held that the requisite causal connection existed between the defendant's assault of a police officer and the damage to a police car hit by gunfire. 292 Or at 181. The damage occurred when a police officer fired in the defendant's direction as a response to his criminal conduct. *Id*.

(…continued)
normally will be the "result" of that crime. *See State v. Stephens*, 183 Or App 392, 395-99, 52 P3d 1086 (2002) (the defendant was a factual cause of damage done by others but made possible by the defendant's criminal act).

It bears emphasis that "[t]he damages need not * * * be the *direct* result of the defendant's criminal activities," *Ramos*, 267 Or App at 164 (emphasis added), but only a "result." The plain meaning of the verb "result" is "to proceed, spring or arise as a consequence, effect or conclusion," which is broad and open-ended in nature. *See Webster's Third New Int'l Dictionary* at 1937 (providing following example of "result": "<this measure will ~ in good"); *id*. at 724 (comparing the relative breadth of the nouns "effect," result," and "consequence" and explaining how the term "consequence" "may suggest a direct but looser or more remote connection" and "often suggest[s] a chain of intermediate causes or a complexity of effect"). Losses that indirectly result from a crime are still a result of the crime. *See also Dillon*, 292 Or App at 178 (restitution statute, in part, was reaction to earlier decision limiting restitution to "direct" victims).

Defendant's crimes were a factual cause of the victim's lost wages. Defendant committed crimes that resulted in the prosecution with the scheduled trial date and the restitution hearing, and the victim lost wages because of the need to attend. But for defendant's crimes, there would not have been the scheduled court proceedings, and the victim would not have had to miss work and lose income. Nor is this a rare instance in which restitution is not authorized, because the losses were too remote or attenuated. The causal connection was obvious. *See e.g., State v. Lindsley*, 191 Ariz 195, 953 P2d 1248, 1251-52 (Ariz App 1997), *rev den* (1998) (explaining that a victim's attendance at court proceedings in the criminal case and the resulting lost wages are the direct result of the defendant's crime). Defendant's crimes "resulted in" the lost wages.

3. Any foreseeability requirement would have been met.

The restitution was authorized even if foreseeability is required. This court has rejected a demanding view of the civil-law foreseeability requirement. "[T]he concept of foreseeability refers to generalized risks of the type of incidents and injuries that occurred rather than predictability of the actual sequence of events." *Fazzolari*, 303 Or at 21. The legal-causation requirement is even less demanding for intentional conduct than it is for reckless or negligent conduct. *See* Wayne R. LaFave, *Substantive Criminal Law*, § 6.4(c),

473 (2d ed 2003). "[W]hen an intentional tort is involved, the range of legal causation can be quite broad." *Knepper v. Brown*, 345 Or 320, 330, 195 P3d 383 (2008). That makes sense, because someone who acts with intent is more culpable than someone who acts recklessly or negligently.

The victim's lost wages were foreseeable. Defendant committed several crimes during an incident in which he unlawfully attempted to enter the victim's home. It was foreseeable that the victim would be a witness to the incident and damages. Moreover, a crime victim in Oregon has the right to appear at all significant court proceedings in which the defendant is present and the right to receive restitution. Or Const, Art I, § 42(1)(a) & (1)(d). It was foreseeable that defendant would be charged and prosecuted for his crimes, that the victim would miss work because of court proceedings, and that the victim would lose wages as a result.

Defendant argues that it was not foreseeable that the victim would lose wages due to the scheduled trial date. He posits that the prosecutor failed to notify the victim that the trial had been canceled, and he further apparently assumes that, had the prosecutor done so, the victim would have been given his shift back. (Pet Br 4, 40-41). This court should not consider that argument, because defendant failed to preserve it below. *See* ORAP 5.45(1) (requiring preservation). Had defendant done so, the state or the victim could have

presented evidence that the prosecutor notified the victim that the trial had been canceled but that the victim was not able to get his shift back at that point. Indeed, as noted above, the record strongly suggests that that was the case. Hence, defendant's claim appears to hinge on an inaccurate view of what actually transpired. Consideration of defendant's unpreserved argument thus would undermine the very purposes of the preservation requirement, which include ensuring that the record is fully developed factually. *See Peeples v. Lambert*, 345 Or 209, 221, 191 P3d 637 (2008) (preservation rule fosters the full development of the record).[2]

Regardless, defendant's argument fails, because it is foreseeable that others will be negligent or less than diligent. Trial dates frequently are rescheduled or otherwise canceled, and it is foreseeable that a failure to communicate sometimes will result in witnesses appearing for court proceedings that have been canceled. Consequently, even if the lost wages

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[2] Defendant apparently asserts that the prosecutor "neglected to lift the subpoena" or to otherwise notify the victim that the trial had been canceled, and that that was the reason that the victim missed work. (Pet Br 4, 40-41). For support, defendant cites to the victim's restitution request (which appears in defendant's excerpt of record in his Court of Appeals' brief) and to page 8 of the transcript of the restitution hearing. (Pet Br 4). Yet neither source supports defendant's assertions, and the restitution request was not made part of the record.

could have been avoidable had the prosecutor been more diligent, defendant remains responsible for that portion of the restitution.

Defendant also argues that the restitution hearing was unforeseeable. The victim provided the prosecutor with an initial estimate of the cost to repair the damage to the house, which the prosecutor apparently forwarded to the defense, and the victim provided the prosecutor with additional documentation shortly before the hearing. (6/13/13 Tr 11). At the hearing, the victim and the defendants stipulated to a restitution figure for the damage that was less than the victim's initial estimate (the victim saved money by doing work himself and by finding the materials at a lower cost). (6/13/13 Tr 11). Defendant apparently argues that the prosecutor could have obviated the need for the restitution hearing by obtaining, and providing to the defense, complete documentation in advance of the hearing, thereby facilitating a settlement.

Defendant's attempt to blame the prosecutor for the restitution hearing is misguided. ORS 137.106(1)(a) requires a prosecutor "to investigate and present to the court * * * evidence of the nature and amount of damages" "within 90 days after entry of the judgment," and that is what the prosecutor did. Nothing in the restitution statute requires the prosecutor to facilitate a stipulation to restitution that will obviate the need for a hearing. Furthermore, defendant's argument that the prosecutor would have obviated the need for the

hearing by obtaining and providing complete documentation in advance is refuted by the record. The defense objected and never agreed to the restitution for the lost wages for the scheduled trial date. At a minimum, the hearing was necessary to resolve that dispute.

More generally, it is foreseeable that there will be a restitution hearing in criminal cases. A victim has a constitutional and statutory right to restitution. Or Const., Art I, § 42(1)(d); ORS 137.106(1). And a defendant has a right to a restitution hearing. ORS 137.106(5). The trial court has 90 days after the entry of the judgment to impose restitution, and even longer when "good cause" exists for an extension. ORS 137.106(1)(a). Crime victims often will not have gathered all of the necessary information and documentation until the restitution hearing, and nothing requires them to do so before that point. Moreover, in many cases criminal defendants and their victims will never agree on the amount of restitution and, even when they do, those agreements often will not occur until the restitution hearing (when both the defendant and the victim have prepared for, and appeared at, the hearing). In short, as with any criminal case involving a victim, it was foreseeable in this case that a restitution hearing would be necessary. Any foreseeability requirement would have been met.

B. The victim's lost wages were "economic damages."

The victim's lost wages satisfied the definition of "economic damages" as well. Economic damages are objectively verifiable monetary losses incurred because of a crime and include lost income. Restitution no longer is limited to damages that would have been recoverable in a civil action arising out of the facts constituting the crime but, regardless, the restitution was proper.

1. Restitution no longer requires proof that the losses would have been recoverable as damages in a civil action.

Defendant argues that lost wages to attend court proceedings could not constitute economic damages, because those losses would not be recoverable as damages in a civil action. (Pet Br 41-42). The premise underlying defendant's argument is that restitution is limited to those damages that the victim could recover against the defendant in a civil action arising out of the facts constituting the criminal activities. (Pet Br 37-42).

That was the rule under the prior version of the restitution statute. The "recoverable in a civil action" requirement precluded restitution when there would not have been a cognizable civil theory of liability or when the expenses would not have been considered damages in a hypothetical civil suit. *See Dillon*, 292 Or at 182-83 (invalidating restitution to government agency because no theory of civil liability); *State v. O'Brien*, 96 Or App 498, 504-05, 774 P2d 1109 (1989) (invalidating restitution for attorney fees that would not have been

recoverable as damages in civil action); *State v. Barkley*, 315 Or 420, 438, 846 P2d 390 (1993) (applying a civil-theory liability requirement to invalidate compensatory fine to the victim's mother for lost wages incurred in accompanying the victim to trial).

Defendant argues that restitution still requires proof that the losses would have been recoverable as damages in a civil action. (Pet Br 37-40). Defendant is mistaken, however, because the legislature deleted that requirement in 2005.

a. Text and context establish that restitution no longer is limited to damages recoverable in a civil action.

The most compelling indicators of legislative intent are the statutory text and the context, which includes prior versions of the statute. *See Gaines*, 346 Or at 171, 175 (stressing primacy of text and plain meaning); *Jones v. General Motors Corp*, 325 Or 404, 411, 939 P2d 608 (1997) (statutory context includes prior version of statutes). The text and context is dispositive here. The "recover[able] * * * in a civil action" requirement was express in the prior definition of recoverable restitution, and the legislature deleted the requirement. The only reasonable inference is that the legislature did so intentionally.

Until 2005, the statute governing restitution required proof that the victim had suffered "pecuniary damages" as a result of the defendant's crime. *See* ORS 137.106(1) (2003) (authorizing restitution for "pecuniary damages"). "Pecuniary damages" were 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 constituting the defendant's criminal activities* and shall include, but not be limited to, the money equivalent of property taken, destroyed, broken or otherwise harmed, and losses such as medical expenses and costs of psychological treatment or counseling.

ORS 137.103(2) (2003) (emphasis added). That version of the restitution statute thus expressly limited restitution to special damages that "a person could recover against the defendant in a civil action" arising out of the criminal activities.

In 2005, however, the legislature amended ORS 137.106(1) to replace the references to the term "pecuniary damages" with the term "economic damages." ORS 137.103(2), in turn, was amended to provide that "economic damages" has "the meaning given that term in ORS 31.710, except that [the term] does not include future impairment of earning capacity." ORS 31.710(2)(a) provides that "economic damages" are:

> *objectively 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.

(Emphasis added.)

The legislature thus deleted the requirement that the restitution would have been recoverable as damages in a civil action by replacing "pecuniary damages" with the term "economic damages" as defined in ORS 31.710(2)(a). Nothing in the text of the restitution provisions or in ORS 31.710(2)(a) limits restitution to damages recoverable in a civil action. The dominant fact is that the legislature deleted the "recover[able] * * * in a civil action" language, which was the only basis for that limitation, and it is presumed that the legislature did so intentionally. *See Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) (this court generally presumes that "the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes").

Defendant argues that, by incorporating the tort definition of economic damages into the restitution statute, the legislature intended to incorporate civil-law concepts to determine whether claimed expenses are economic damages. (Pet Br 37). But that does not follow. By amending ORS 137.103(2) to provide that the term "economic damages" has "the meaning given that term in ORS 31.710," the legislature signaled its intent to use that definition. That is as far as it goes. Nothing in the statutory text or context signals an intent by the legislature to incorporate the entire body of civil-law concepts, as defendant would have it. That conclusion is buttressed by the fact that ORS 31.710(2) is

not, itself, a provision that is the source of civil-law concepts and limitations but instead merely distinguishes economic damages from non-economic damages for purposes of applying the statutory cap on non-economic damages set forth in ORS 31.710(1). *See White*, 347 Or at 231-43 (explaining highly limited scope of provision and rejecting argument that the provision, itself, defined or limited the type of compensatory damages that could be recovered).

The statutory context of the compensatory-fine provision also supports the state's position. By its terms, ORS 137.101(1) authorizes a compensatory fine only when the injured person "has a remedy by civil action." That further demonstrates that, if the legislature wanted to limit restitution to civilly recoverable damages, the legislature knew how to do so as it had specifically done in the restitution statutes before the 2005 amendments. It is presumed—and, in fact, it is the only reasonable inference—that the legislature chose not to retain that requirement when it deleted the requirement from the restitution provisions and left a form of that requirement in the compensatory-fine provision. *See State v. Bailey*, 346 Or 551, 562, 213 P3d 1240 (2009) ("[g]enerally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that the omission was deliberate"); *Emerald PUD v. PP & L*, 302 Or 256, 269, 729 P2d 552 (1986) (when legislature amended one provision but did not amend another

similar provision in the same manner, the court presumed that the choice was deliberate).

The text and context provide a clear answer: the restitution statutes no longer limit restitution to damages that would have been recoverable in a civil action.

b. Legislature history provides additional support for the state's interpretation.

Defendant's contrary argument is almost exclusively based on the legislative history behind the 2005 amendment. The amendments to ORS 137.103 and ORS 137.106 (2005 Or Laws, ch 564, § 1-2) were part of House Bill 2230, which was introduced at the request of the Attorney General's Restitution Reform Task Force, to clarify the scope of recoverable damages. Defendant asserts that that legislative history establishes that the 2005 amendments were purely housekeeping in nature and did not intend to expand the scope of restitution. He concedes that, by deleting the recoverable-in-a-civil-action language, the amendment "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." (Pet Br 38). But he argues that the legislature did not jettison the requirement that restitution is

limited to those losses that could have been recovered as damages in a civil action. (Pet Br 31-40).[3]

Defendant's proposed interpretation is untenable, because it lacks a basis in the statutory text. Legislative history may be used to confirm seemingly plain meaning or to attempt to convince the court that superficially clear language is actually ambiguous. *Gaines*, 346 Or at 172. But "[w]hen the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different." *Id*. at 173 (footnote omitted). The "recover[able] * * * in a civil action" requirement was express in the prior definition of recoverable restitution, and the legislature deleted that text and did not replace it with any text that continues to impose such a requirement. This is a situation in which legislative history could not lead to a contrary result from the answer provided by the statutory text and context regardless of what that history reveals.

That said, defendant is mistaken in assuming that the legislative history favors his proposed interpretation, much less strongly does so, as he apparently

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[3] Defendant's concession that the 2005 amendment eliminated the requirement that there be a cognizable theory of civil liability (Pet Br 38) is inconsistent with his argument. The "recover[able] * * * in a civil action" text was the source of both the requirement that there be a civil theory of liability, and the requirement that the losses would have been civilly recoverable as damages. By deleting the operative text, the legislature eliminated both requirements.

maintains. Although the legislative history is ambiguous, it nonetheless bolsters the state's argument.

The legislative history demonstrates that the amendments were intended to clarify the scope of recoverable damages and that the primary source of confusion was the "recoverable in a civil action" requirement in the definition of pecuniary damages. In his testimony in introducing the bill, Fred Boss, then Chief Counsel of the Oregon Department of Justice's Civil Enforcement Division, specifically flagged and read the introductory sentence in the definition of pecuniary damages that contained the "recoverable in a civil action" language as highlighting the then existing problem. *See* Tape Recording, House Committee on Judiciary, Subcommittee on Civil law, HB 2230, January 24, 2005, Tape 5, side A, 122-199, Internet RealPlayer at 35:00-36:00 & Exhibit C (written testimony); Tape Recording, Senate Judiciary Committee, HB 2230, May 16, 2005, Tape 137, Side A, 328-380, Internet RealPlayer at 22:00-23:00 & Exhibit G (written testimony).

The legislative history further establishes that, by clarifying the law, the legislature sought to increase the likelihood that the victims would receive full compensation for all of their true economic losses. In his written testimony, Jason Barber, Assistant Director of the Oregon Department of Justice's Crime Victim's Assistance Section, explained that "the bill would clarify the definition

of 'damages,' thus increasing the victim's chances of recovering their **true** economic losses." House Committee on Judiciary, Subcommittee on Civil law, HB 2230, January 24, 2005, Exhibit D (written testimony) (boldface original). In testifying before the Senate Judiciary Committee, Connie Gallagher, Director of the Crime Victims' Assistance Section, explained that the amendment would provide greater consistency in imposing restitution by clarifying the scope of recoverable damages. Tape Recording, Senate Judiciary Committee, HB 2230A, May 16, 2005, Tape 137A, 290-328; Internet RealPlayer at 20:00-21:00.

The legislature thus was unmistakenly focused on eliminating the vague "recoverable in a civil action" requirement. That requirement had led to confusion and inconsistent results. The legislature deleted the language and did not include any similar language in the amended statute. The legislative history strongly suggests that, when the legislative omitted the "recover[able] * * * in a civil action" language in the amended provisions, it did so intentionally.

To be sure, the legislative history also contains a pair of statements at the final work session before the Senate Judiciary Committee about how the amendments would not broaden the scope of restitution. Legislative Counsel

Joe O'Leary[4] explained that the definition of pecuniary damages—*i.e.*, special damages that would have been recoverable in a civil action—would be replaced with the definition of economic damages and thus clarify the law; but that the bill exempted future earnings (in part because of constitutional concerns) and would not broaden the scope of restitution. Tape Recording, Senate Judiciary Committee, HB 2300A, June 16, 2005, Tape 171 Side B, 399-451, Internet RealPlayer at 1:21-1:23. And Committee Chair Senator Ginny Burdick noted that the purpose of the bill was to clean up the statute without expanding the scope of recoverable damages. *Id*.

Those comments are inconsistent with the statutory text and context and with the legislative history cited earlier that demonstrates that the legislature intended to eliminate the vague "recoverable in a civil action" requirement. The legislature clarified a murky area of the law by eliminating that requirement and, by doing so, made a modest expansion in the scope of restitution that impacts a subset of cases. The amendments were not merely housekeeping amendments—as defendant maintains—because the means by which the legislature chose to clarify the law broadened the scope of restitution. *See Hamilton v. Paynter*, 342 Or 48, 55, 149 P3d 131 (2006) (the "statutory text

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[4] In his brief (Pet Br 36), defendant mistakenly attributes statements made by Joe O'Leary to Fred Boss.

shows that, even if the legislature had a particular problem in mind, it chose to use a broader solution").

In sum, restitution is no longer limited to losses that would have been "recover[able] * * * in a civil action." The statutory text and context establish that the legislature eliminated that requirement, and the legislative history, although ambiguous, provides additional support for the state's position. Defendant's argument that the victim's lost wages would not have been civilly recoverable as damages misses the mark, because the argument hinges on a limitation that no longer exists.

2. "Economic damages" means "objectively verifiable monetary losses" that are reasonably incurred by the victim, because of the crime.

Restitution does, however, continue to be limited to monetary losses. ORS 31.710(2)(a) defines "economic damages" as "objectively verifiable monetary losses" and then provides a non-exclusive list of examples of included losses. The scope of the enumerated losses in ORS 31.710(2)(a) further informs the scope of the recoverable non-enumerated economic damages. *See Schmidt v. Mt. Angel Abbey*, 347 Or 389, 402, 223 P3d 399 (2009) ("[w]hen * * * the legislature uses a general term in a statute and also provides specific examples, those specific examples provide useful context for interpreting the general term"). The common characteristic of the enumerated losses is that

they are all verifiable, tangible monetary losses and expenses that are reasonably incurred, because of the criminal conduct.[5]

It bears emphasis that whether a victim is "forced" to incur a loss, as opposed to "reluctantly" incurring the loss, is not the test. When a defendant commits a crime, victims often must take a number of steps to respond to and fully remedy the harm. The test is whether the victim *reasonably* incurred the loss, because of the crime, which reduces to whether the expense was a reasonable response by the victim to remedy the harm and to address the consequences of the crime. *See e.g.*, *State v. Pumphrey*, 266 Or App 729, 736, 338 P3d 819 (2014), *rev den*, 357 Or 112 (2015) (restitution for safety measures taken by the victim was appropriate, because the defendant's "criminal activity was a 'but for' cause of the expenses that the victim incurred"). Defendant appears to recognize as much. (Pet Br 16).

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[5] The "necessarily" or "necessary" qualifier appears to apply to most if not all of the enumerated expenses and costs in ORS 31.710(2), and the state assumes that it applies to non-enumerated expenses as well. But it is not a demanding requirement and folds back to the question of causation. Losses are necessarily incurred if the victim becomes subject to or liable for the damages because of the criminal activities. *White*, 347 Or at 234. *See also State v. Romero-Navarro*, 224 Or App 25, 29, 197 P3d 30 (2008), *rev den*, 348 Or 13 (2010) ("reasonable charges necessarily incurred" are "those [] expenses that a [victim] has become subject to" as a result of the defendant's conduct).

3. The losses qualified as economic damages.

The victim's lost wages were reasonably incurred objectively verifiable monetary losses and thus qualified as economic damages. Economic damages "includes necessary expenses or losses that the victim incurred in order to address the consequences of criminal conduct." *State v. Reale*, 158 Idaho 20, 343 P3d 49, 55 (Idaho App 2014), *rev den* (2015). And "[c]ourt proceedings are obvious consequences of criminal conduct." *Id*. A victim's lost wages for attending court proceedings in the criminal case is a form of monetary loss that results from the defendant's crime and constitutes economic damages. *See Barkley*, 315 Or at 438 (recognizing that lost wages for court proceedings constitutes special damages that result from crime).[6] Indeed, the definition of "economic damages" in ORS 31.710(2)(a) specifically refers to "loss of income" and does not exclude lost income for attending court proceedings. *Contrast State v. Hefa*, 73 Wash App 865, 871 P2d 1093 (1994) (interpreting

[6] In *Barkley*, this court held that the trial court erred by imposing a compensatory fine to the victim's mother for lost wages that she incurred while accompanying the victim to court. 315 Or at 432-38. This court concluded that the lost wages were special damages "resulting from [the] defendant's criminal activities." *Id*. at 438. But the court held that the compensatory fine was not authorized, because there was no "civil theory of liability under which the [victim's] mother could recover her lost wages from defendant." *Id*. Here, defendant concedes that restitution no longer requires proof that the victim would have had a cognizable theory of civil liability (Pet Br 38) and, regardless, the victim would have had a cognizable theory under tort law to bring a civil suit against defendant.

Washington restitution provision that only authorized restitution for lost wages for "lost wages *resulting from physical injury*"; emphasis added).

Defendant's only argument as to why the victim's lost wages were not economic damages is the one flagged above—that is, his claim that the lost wages would not be recoverable as damages in a civil action. (Pet Br 41-42). As discussed, that argument hinges on a false premise, because restitution no longer is limited to losses that would have been recoverable as damages in a civil action. The victim's lost wages to attend court proceedings in defendant's criminal prosecution qualified as economic damages.

4. The restitution was proper even if restitution is limited to those recoverable as damages in a civil action.

Defendant's claim fails even if restitution is limited to damages that could be recovered in a civil action. As noted, defendant concedes that restitution no longer requires that the victim would have had a viable civil theory of liability. (Pet Br 38). But he argues that lost wages for court proceedings are akin to witness costs that are not civilly recoverable as damages in the same action in which they are incurred but instead are only recoverable, to the extent they are recoverable at all, as trial "costs." *See* ORCP 68A(2) ("[c]osts and disbursements" are "reasonable and necessary expenses incurred in the prosecution or defense of an action, other than for legal services").

That principle is inapposite. The victim was not a party to the criminal prosecution and did not bring or prosecute the case. Accordingly, by definition, the victim's lost wages were not trial costs in the pertinent sense—that is, when a party sues another party, prevails, and then seeks the recovery of costs at the conclusion of that case.

Nor was this an instance in which the victim incurred costs in bringing a separate civil suit against a defendant and then sought restitution for those costs in the criminal case. In such a case, a recoverable-as-damages-in-a-civil-action requirement would preclude restitution for those costs, because the victim would not have been able to recover the costs as damages in the civil suit. *Cf. O'Brien*, 96 Or App at 504-05 (overturning restitution award for attorney fees in that instance).

Rather, the victim incurred his lost wages because of the need to address the consequences of defendant's crimes by appearing at court proceedings in defendant's criminal prosecution. Under those circumstances, the general rule that witness costs are not damages has no application. That comports with the rule that, when a defendant's tortious or wrongful conduct involves the victim in litigation with others, the victim's associated losses, including loss of time, are recoverable as damages in a civil suit against the defendant, and that that is so regardless of whether that litigation was a separate action. *See Huffstutter v.*

Lind, 250 Or 295, 301, 442 P2d 227 (1968) ("attorney fees are generally allowable as damages in an action against a defendant where the defendant's tortious or wrongful conduct involved the plaintiff in prior litigation with a third party"); *Montara Owners Ass'n v. La Noue Development, LLC*, 357 Or 333, 362, ___ P3d ___ (2015) (exception applies regardless of whether expenses incurred in separate action); *Restatement (Second) of Torts* § 914 (1979) ("[o]ne who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation *for loss of time*, attorney fees and other expenditures thereby suffered or incurred in the earlier action"; emphasis added).

The victim incurred his lost wages to address the consequences of defendant's criminal activity, and lost income is an objectively verifiable monetary loss that is expressly included in the definition of economic damages. The fact that the lost wages were incurred in the course of a criminal prosecution—rather than in some other fashion—does not transform those losses from recoverable restitution into non-recoverable witness costs. The victim's lost wages qualified as economic damages.

CONCLUSION

Because defendant's crimes resulted in the victim's lost wages and because those losses qualified as economic damages, the trial court correctly imposed the restitution, and the Court of Appeals correctly affirmed. This court should affirm the judgments of the Court of Appeals and the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 12, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Morgen E. Daniels, attorneys for appellant, by using the court's electronic filing system.

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

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 8,480 words. I further 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(2)(b).

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