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 No. C092342CR CA A150423 SC S062942

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 Washington County
Honorable KIRSTEN E. THOMPSON, Judge

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

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

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 arson and attempted theft by setting fire to the building she leased to run her restaurant and by submitting a fraudulent claim to her insurance company, Oregon Mutual. As a result, Oregon Mutual incurred more than $28,000 in expenses in investigating and denying the claim and in cooperating with the criminal investigation and prosecution. On review, defendant challenges the trial court's order that she pay restitution to Oregon Mutual for those economic losses.

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

A. Defendant's Crimes and the Restitution Award to Oregon Mutual

Defendant set fire to her restaurant in December 2008 and immediately contacted Oregon Mutual to make a claim for loss of business property. Although defendant made rough estimates that the value of the lost property was approximately somewhere between $16,500 and $24,500, defendant had coverage for up to $34,000 for lost property and had unlimited coverage for lost business income. (Tr 199, 202, Tr 260-63; Ex 65, Inventory List; Ex 66, Tax

Document). When a claim is made, it was Oregon Mutual's practice to advise the insured of all the potential available coverage. (Tr 207). Given the circumstances and available coverage, Oregon Mutual ultimately could have paid defendant as much as $74,000 for her claim. (Tr 203, 207).

Oregon Mutual investigated the claim. Oregon Mutual hired attorney Daniel Thenell of the law firm Smith Freed & Eberhard (Smith Freed) in December 2008 to "provide legal guidance to the insurance company to determine its coverage obligations" and "to help[] steer the investigation into the cause and origin of the fire and whether there would be coverage for the fire." (Tr 244-45). Thenell's area of expertise was performing coverage investigations for insurance companies. (Tr 244). The bulk of his work involved insurance claims "where there is some suspicion of insurance fraud or misrepresentation in order to obtain insurance benefits." (*Id*.).

Thenell actively participated in the investigation. (Tr 245-46). He also retained others to assist in the investigation: a private fire investigation firm, ORCA Fire Investigations (ORCA) to investigate the cause and origin of the fire; CASE Forensics to examine and test electrical components to determine the cause and origin of the fire; and Sanders, a private investigator with Expert Investigations, to gather information and take witness statements. (*Id*.). Thenell ordered a credit check on defendant that revealed her financial situation, including that she was behind on her home mortgage. (Tr 254, 278).

Thenell, Ryan Fields from ORCA, and Ivan VanDeWege from CASE Forensics inspected the scene soon after the fire. (Tr 116, 150, 245). Fields examined the property and took photographs and samples of the materials from the scene. (Tr 116-48). VanDeWege assisted with the collection of evidence, took photographs, and tested the restaurant's electrical system. (Tr 148-76). CASE Forensics tested and retained the materials that Fields and VanDeWege collected. (Tr 178-86). Thenell conducted a sworn examination of defendant in January 2009. (Tr 246). Oregon Mutual concluded that defendant had misrepresented the cause of the fire and denied her claim within 35 days of the loss. (Tr 202).

Law enforcement also investigated the fire. Firefighters responded to the fire and called the State Fire Marshal, who responded and investigated the fire. A grand jury ultimately indicted defendant for second-degree arson and attempted aggravated first-degree theft, and a jury found her guilty of those offenses.

Oregon Mutual was the victim of the theft offense. The state's theory for that offense was that defendant, with intent to defraud, attempted to obtain money from Oregon Mutual by creating a false impression that she knew was not true—that is, that the fire had been accidental and that defendant had not been responsible for it. As the prosecutor explained in opening statements,

defendant was "attempting to steal more than $10,000 through fraud from [Oregon Mutual], which was her insurance company." (Tr 28).

The state sought restitution for Oregon Mutual. As of the date of trial, Oregon Mutual spent $28,417.98 as a result of defendant's criminal conduct. (Tr 213). The state supported its restitution request with the following documentation: (1) invoices from Smith Freed for lawyer and paralegal time and costs; (2) invoices from CASE Forensics for time and expenses for investigation, evidence storage, and grand jury testimony; (3) invoices from ORCA for time and expenses for investigation and grand jury testimony; (4) invoices from Expert Investigations for time and expenses for investigation; and (5) an invoice from a court reporter service related to defendant's examination under oath. (TCF, Restitution Exhibit 1).

The trial court ordered restitution in the amount of $28,417.98. (TCF, Supplemental Judgment).

B. The Court of Appeals affirmed the restitution award.

Defendant appealed, challenging the restitution award to Oregon Mutual. She challenged two categories of restitution: (1) attorney fees paid to Smith Freed and (2) expenses related to CASE Forensics' and ORCA's employees' grand jury and trial testimony. Alternatively, defendant contended that the restitution should not have included any expenses that Oregon Mutual incurred after denying her insurance claim.

The Court of Appeals affirmed, holding that defendant's criminal conduct was a cause of Oregon Mutual's losses, that the losses qualified as economic damages, and that, in 2005, the legislature deleted the requirement limiting restitution to those losses that would have been recoverable as damages in a civil action. *State v. Ramos*, 267 Or App 164, 340 P3d 703 (2014).

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 arson and made a fraudulent insurance claim, which resulted in the victim's losses—losses that the victim would not have incurred had defendant not committed her crimes. 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 losses. Moreover, defendant's claim would fail even if foreseeability was required. It was foreseeable that defendant's crimes would result in the victim's losses.

Defendant also disputes that the victim suffered "economic damages." She 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. That was what was involved here. The victim's expenses in investigating defendant's fraudulent claim and in cooperating with the criminal investigation and 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 incurred the expenses

to detect and protect itself from defendant's fraud and to protect its interests and cooperate with the ensuing criminal investigation and prosecution. These were investigation and third-party-litigation expenses that would be recoverable as damages in a civil action. The principle that attorney fees and costs are not recoverable as damages in the same action in which those expenses are incurred has no application here.

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 expenses, and because those losses qualified as economic damages, the trial court properly imposed the restitution.

A. The victim incurred the losses 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. She 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). She argues that restitution similarly is limited to damages that are "a reasonably foreseeable result of the defendant's criminal conduct." (Pet Br 2).

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 22). 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 her 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]

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

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

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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 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).

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*.

Defendant's crimes were a factual cause of the losses. Defendant committed arson and made a fraudulent insurance claim and, as a result, the victim incurred expenses in investigating the claim to determine whether it was fraudulent and in cooperating with the criminal investigation and prosecution. As the Court of Appeals explained, Oregon Mutual's need for that investigation (including the attorney fees paid to the law firm) and the expenses it incurred after denying defendant's claim (including the expenses related to grand jury and trial testimony) all flowed from defendant's crimes. *Ramos*, 267 Or App at 178-80. But for defendant's crimes, Oregon Mutual would not have incurred the losses. Nor is this a rare instance in which restitution is not authorized, because the losses are too remote or attenuated. The causation connection was obvious. Defendant's crimes "resulted in" the losses.

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.

By any measure, Oregon Mutual's losses were foreseeable. Defendant committed arson and then made a fraudulent insurance claim based on the fire. An insurance company's investigation of a fire loss is complicated, and Oregon Mutual had a duty to conduct a full and reasonable investigation before denying the claim. *See* ORS 746.230(1)(d) (prohibiting insurer from denying claim without "conducting a reasonable investigation based on all available information"); *Ivanov v. Farmers Ins. Co. of Oregon*, 344 Or 421, 185 P3d 417 (2008) (class action claiming inadequate insurance investigations). It was foreseeable that Oregon Mutual would have to incur expenses to investigate the claim.

It also was foreseeable that the victim would incur expenses in cooperating with the criminal investigation and prosecution. By law, Oregon

Mutual was required to report its findings to the state, was required to cooperate with the criminal investigation and prosecution, and was statutorily barred from recovering restitution if it failed to do so. *See* ORS 476.270 (requiring insurance company to make report to State Fire Marshal if it has reason to believe that a fire loss was caused by incendiary means and release any information requested by the public officials); ORS 731.592 (mandating that an insurance company cooperate with a criminal investigation and prosecution involving insurance and making cooperation a precondition for receiving restitution). Given those legal requirements, it was entirely predictable that Oregon Mutual would be entangled in the resulting criminal investigation and prosecution, thereby incurring substantial expenses. All of the victim's losses were foreseeable.[2]

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[2] Defendant asserts that it was not foreseeable that Oregon Mutual would incur losses that exceeded her claim. (Pet Br 38-39). This court should not consider that argument, because defendant failed to preserve it. Had she done so, the state or victim may have presented evidence on the issue. In all events, defendant is factually mistaken in characterizing Oregon Mutual's potential liability as $16,500, which was the value of the lost property reflected by a tax document that defendant provided to Oregon Mutual. (Tr 263; Ex 66, Tax Document). At her deposition, defendant estimated the value of the business property destroyed in the fire to be at least $24,500. (Tr 262-63). Moreover, defendant had coverage for up to $34,000 for loss of business property and had unlimited coverage for loss of business income. (Tr 199, 202). When a claim is made, it is Oregon Mutual's practice to inform the insured of all of her coverage. (Tr 207). At trial, the insurance adjuster estimated that defendant's claim could have resulted in payment of as much as $74,000 (Tr 203), which far exceeded the $28,000 in expenses Oregon Mutual

Footnote continued…

B. The losses were "economic damages."

The losses satisfied the definition of "economic damages" as well. Economic damages are objectively verifiable monetary losses incurred because of a crime. That was the nature of the victim's losses. 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 the fees paid to the law firm that handled the investigation and the expenses related to grand jury and trial testimony could not constitute "economic damages," because attorney fees and costs generally are not recoverable as damages when sought in the same action in which they are incurred. (Pet Br 42-43). The premise underlying defendant's argument is that restitution is limited to those losses that the victim could recover as "damages" against the defendant in a civil action arising out of the facts constituting the criminal activities.

(…continued)
incurred. [And even that $74,000 figure understates the matter by excluding Oregon Mutual's potential liability for having a claimant sue for wrongful denial]. Finally, defendant's argument is legally flawed, because it is foreseeable that an insurance company's losses could easily exceed its potential liability in a given case. An insurance company has an institutional interest and a statutory duty to follow the matter through to the end, and it is foreseeable that, in a given case, the company's total expenses may exceed its potential exposure.

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 36-38). 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 36). 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. Legislative 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. She 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 36). But she 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 29-38).[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

[3] Defendant's concession that the 2005 amendment eliminated the requirement that there be a cognizable theory of civil liability (Pet Br 36) is inconsistent with her 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.

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 her proposed interpretation, much less strongly does so, as she apparently 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

[4] In her brief (Pet Br 35), 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 attorney fees and testimony-related expenses would not have been civilly recoverable as damages misses the mark, because her 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 the victim is "forced" to incur the 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 15).

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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.

Oregon Mutual's losses qualified as economic damages. The victim's expenses in investigating defendant's fraudulent claim and in cooperating with the criminal investigation and prosecution were objectively verifiable monetary losses that the victim reasonably incurred, because of defendant's crimes.

Defendant advances three objections, none of which have merit.[6] First, defendant asserts that Oregon Mutual did not incur any expenses, because Oregon Mutual is in the insurance business and adjudicates insurance claims as part of its daily function. (Pet Br 40-41). That argument does not withstand scrutiny. Because of defendant's fraudulent claim, Oregon Mutual had to spend considerable funds to investigate the claim in deciding whether it was valid and then in cooperating with law enforcement and the prosecution—expenses that Oregon Mutual would not have incurred if defendant had not committed her crimes. The fact that Oregon Mutual was in the insurance business made it no less the victim, nor did it make the resulting expenses something other than losses due to criminal activity.

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[6] The first two of defendant's three challenges appear to include non-attorney-fee investigatory expenses that Oregon Mutual incurred before denying defendant's insurance claim. Yet the Court of Appeals concluded that defendant failed to raise and properly develop a challenge on appeal to those expenses and refused to consider the issue. *Ramos*, 267 Or App at 174 n 5. Hence, this court should refuse to consider defendant's challenges to that portion of the restitution.

Second, defendant asserts that restitution was improper, because Oregon Mutual "stepped into the shoes of the state" and took over the investigation and prosecution. (Pet Br 43-45). That argument is flawed factually and legally.

Factually, defendant's argument is flawed, because the state did not abdicate its duty to investigate and prosecute criminal cases. A Deputy State Fire Marshal promptly responded to the fire and investigated the incident, and the Washington County District Attorney's office prosecuted the case, calling the firefighters, the fire marshal who investigated the fire, and a police officer who responded to the scene as its first four witnesses. (Tr 36-107). In short, although Oregon Mutual cooperated with the criminal investigation and prosecution and although that cooperation undoubtedly was helpful to the state, the state investigated and prosecuted the case.

Legally, defendant's argument is flawed, because nothing in the restitution statutes excludes restitution when a victim's losses resemble expenses incurred by law enforcement in investigating and prosecuting cases. In some cases, crime victims need to conduct investigations to detect the existence of crimes, to uncover the extent of the harms, and to remedy the harms, and victims sometimes must take certain actions in the course of criminal prosecutions to protect their own interests and to address the consequences of the crimes. If a victim reasonably incurs economic damages in doing so, the losses are recoverable as restitution. And that is so regardless of

whether the victim's efforts were helpful to the prosecution, as they were in this case.

Third, defendant asserts that the expenses that Oregon Mutual incurred after denying her claim were not reasonably incurred because—in her view—those expenses were unnecessary and avoidable. (Pet Br 45-47). Defendant is mistaken here too. Defendant submitted a fraudulent insurance claim which—to state the obvious—put Oregon Mutual in a difficult legal position. Finalizing the investigation, storing the samples, and cooperating with authorities to secure an indictment and conviction were all necessary and prudent steps to respond to defendant's criminal conduct. The victim's interest in fully participating in that process through to the end was especially strong given the possibility that defendant would attempt to sue Oregon Mutual for denying her claim. The expenses in cooperating with the criminal investigation and prosecution and in protecting Oregon Mutual's interests were recoverable.

Moreover, although—as noted—economic damages are not limited to damages that a victim was "forced" to pay, it is worth noting that Oregon Mutual was forced to incur the expenses. As discussed above, under ORS 476.270 and ORS 731.592, Oregon Mutual's cooperation with the criminal investigation and prosecution was not optional but rather required and, in fact, essential to obtaining any restitution. The losses qualified as economic damages.

4. The restitution was proper even if restitution is limited to losses 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.[7]

In numerous cases in applying the prior version of the restitution statute, the Court of Appeals correctly held that labor costs incurred to investigate and remedy harm caused by criminal conduct are recoverable as restitution, thus necessarily recognizing that those expenses would be recoverable as damages in a civil action. *See e.g.*, *State v. Marquez*, 139 Or App 379, 383-84, 912 P2d 390 (1996); *State v. Lindsly*, 106 Or App 459, 462, 808 P2d 727 (1991); *State v. Louden*, 101 Or App 367, 369-70, 790 P2d 1182 (1990). For example, in *State v. Mahoney*, 115 Or App 440, 443-44, 838 P2d 1100 (1992), *modified on reconsideration*, 118 Or App 1 (1993), the Court of Appeals upheld restitution for attorney fees incurred to investigate sexual harassment at the victim's workplace and to counsel the victim through the criminal-complaint process until the defendant entered his plea. The court explained:

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[7] As noted, defendant concedes that restitution no longer requires proof that the victim would have had a viable civil theory of liability. (Pet Br 36). In all events, the victim presumably would have been able to bring a tort action for fraud or misrepresentation (as the prosecutor alluded to (Tr 407)) or perhaps an action based on an anti-fraud provision in the contract (as the trial court noted (Tr 406-08)).

> The evidence was to the effect that [the victim] sought legal advice to help her deal with defendant and her employer and to work toward an indictment and criminal prosecution. Certainly, a crime victim is entitled to do that. *See State v. Lindsly*, 106 Or App 459, 808 P2d 727 (1991). In a civil tort action against defendant, the victim would be entitled to seek as damages attorney fees expended to help her work through a criminal prosecution so that the sexual harassment could be stopped. The criminal process was a different action than the civil complaint that she filed [after the defendant entered his plea].

115 Or App at 443-44.

That reasoning is persuasive, and this court should apply it here. Defendant made a fraudulent insurance claim, which required Oregon Mutual to spend considerable money in investigating defendant's claim and in cooperating with law-enforcement authorities to work through the criminal prosecution. The fact that some of the fees were paid to an attorney is immaterial. Oregon Mutual made a reasonable choice to hire an attorney who specialized in insurance-fraud investigations to oversee the investigation and depose defendant. Attorney fees and costs incurred, because of a need to investigate, respond to, and prevent criminal activity would be recoverable as damages in a civil action.

Defendant's contrary argument hinges on the fact that attorney fees and witness costs generally are not recoverable as "damages" in civil cases in the same action in which the party incurred them but instead are recoverable, to the extent that they are recoverable at all, only as "attorney fees" and "costs." *See*

ORCP 68A(1) ("[a]ttorney fees" are "the reasonable value of legal services related to the prosecution or defense of an action"); 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"). Yet that principle is inapposite. Oregon Mutual was not a party to the criminal prosecution and did not bring or prosecute the case. Accordingly, by definition, Oregon Mutual's expenses were not attorney fees or trial costs in the pertinent sense—that is, when a party sues another party, prevails, and then seeks the recovery of attorney fees and costs at the conclusion of that case.

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

Rather, Oregon Mutual incurred these expenses in protecting itself from defendant's fraud and in fulfilling its statutory duty to cooperate with the ensuing criminal prosecution. Under those circumstances, "[t]he civil rule regarding whether attorney fees may be awarded as an element of damages and the 'American rule' for an award of attorney fees simply have no place in the

criminal restitution" analysis. *State v. Kinneman*, 155 Wash 2d 272, 119 P3d 350, 358 (2005). That is consistent with the principle that attorney fees and costs are recoverable as damages when they are incurred in third-party litigation, 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); *PGE v. Jungwirth Logging Inc*, 151 Or App 789, 794-95, 951 P2d 1101 (1997), *rev den*, 327 Or 432 (1998) (attorney fees incurred in third-party litigation were damages); *Restatement (Second) of Torts* § 914(2) (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").

Oregon Mutual incurred these expenses to investigate and protect itself from defendant's crimes. The fact that the expenses involved fees paid to a law firm and some costs related to the criminal prosecution does not transform those

expenses from recoverable restitution into non-recoverable "attorney fees" and "witness costs." The expenses qualified as economic damages.

CONCLUSION

Because defendant's crimes resulted in the victim's expenses 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 9,008 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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