

IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,

Plaintiff-Respondent,  
Petitioner on Review,

v.

SCOTT B. GERHARDT,

Defendant-Appellant,  
Respondent on Review.

Polk County Circuit  
Court No. 12P3329

CA A152760

SC S063612

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

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Review of the Decision of the Court of Appeals  
on Appeal from a Judgment  
of the Circuit Court for Polk County  
Honorable MONTE S. CAMPBELL, Judge

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*En Banc* Opinion Filed: September 16, 2015

Author of Opinion: Armstrong, J. (joined by Haselton, C.J., and Sercombe,  
Duncan, Hadlock, DeVore, Tookey and Garrett, JJ.)

Dissenting Judges: Egan, J.; Flynn, J. (joined by Ortega, Nakamoto, and Egan,  
JJ.)

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*Continued...*

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**BRIEF ON THE MERITS OF  
PETITIONER ON REVIEW, STATE OF OREGON**

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**INTRODUCTION**

Defendant was convicted of strangling his wife. At sentencing, the trial court awarded the victim restitution for attorney fees she incurred while defendant was in jail, including the fees for trying to enforce a no-contact order the court had entered and the fees for seeking a separate protective order under the Family Abuse Prevention Act (FAPA), ORS 107.700-.735. The Court of Appeals reversed the restitution because it concluded that these fees resulted from defendant's behavior in jail, not his crime of strangulation.

As explained below, the trial court correctly awarded the attorney fees as restitution. A crime victim is entitled to restitution for all economic damages that were factually caused by, and a reasonably foreseeable consequence of, the defendant's criminal act. Although defendant's behavior in jail may have been the *direct* cause of the victim's decision to hire an attorney, that decision was also factually caused by and a reasonably foreseeable consequence of the strangulation itself. This court therefore should reverse the decision of the Court of Appeals and reinstate the award of restitution.

## **QUESTION PRESENTED AND PROPOSED RULE OF LAW**

### **Question presented**

When the victim of a crime suffers economic damages that result directly from a defendant's unlawful behavior while in jail awaiting trial, is the victim entitled to those damages as restitution for the underlying crime?

### **Proposed rule of law**

If the victim would not have incurred the damages but for the underlying crime and it was reasonably foreseeable that the underlying crime might ultimately cause the victim to incur those damages, the award of restitution must include the damages, even if the defendant's later unlawful behavior was also a contributing cause.

## **STATEMENT OF THE CASE**

Defendant pleaded no contest to a misdemeanor count of strangulation as an act constituting domestic violence. (Tr 7). According to the prosecutor's account at the plea colloquy, which defendant did not dispute, defendant chased his wife down a set of stairs, grabbed her, held her down, and pressed his forearm against her throat. (*Id.*). The victim felt like she was choking for "a couple of minutes." (*Id.*). She told her mother that defendant was trying to kill her. (*Id.*).

Because the state alleged that the strangulation was a crime of domestic violence, the trial court was required to order defendant not to contact or

attempt to contact the victim while he was in pretrial custody. ORS 135.247(2). The victim believed that he violated that order, and she later obtained a FAPA protective order against him. (Tr 17, 22; ER 4).

As part of defendant's sentencing, the court held a restitution hearing. (Tr 19-27). The state sought, among other things, restitution for \$1,880 in attorney fees that the victim had incurred. (Tr 20-21). According to a written restitution request from the victim, she hired an attorney after defendant's "repeated violation of the no contact order while in jail." (ER 4). The restitution request and the attorney's bill reflected that the attorney had contacted the jail about the no-contact order, obtained a FAPA order, and advised the victim about the plea, sentencing, and restitution. (ER 4-5).

Defendant objected that attorney's fees are not "economic damages" that can be awarded as restitution. (Tr 24-25). The court rejected that argument and awarded the restitution. (Tr 26-27). The court did not award other items of restitution that the state sought, and those items are not at issue in this appeal. (Tr 23).

A divided Court of Appeals, sitting en banc, reversed the award of restitution. *State v. Gerhardt*, 273 Or App 592, 359 P3d 519 (2016). The majority held that the restitution could not be awarded because the victim's damages were caused by defendant's violations of the no-contact order, not the strangulation:

“[A]s the restitution request establishes, it was defendant’s repeated violation of the no-contact order that caused the victim to hire an attorney to address the violations, that is, to address defendant’s post-arrest conduct. Defendant’s commission of the crime of strangulation was a necessary predicate for all of that, but it was not sufficient to cause the victim to incur the attorney fees. In other words, it was defendant’s conduct after he committed the crime that led the victim to conclude that she needed to hire an attorney to address that conduct and, hence, caused her to incur the attorney fees.”

*Id.* at 595. The court acknowledged the “principle that restitution can be awarded for damages that are a foreseeable consequence of a defendant’s criminal conduct.” *Id.* at 598. But it rejected the argument that “that principle extends to allow an award of restitution for expenses incurred by a victim as a result of unlawful acts committed by a defendant after the criminal acts upon which the award is based.” *Id.*

Four judges dissented, noting that the Court of Appeals has “repeatedly affirmed orders of restitution when the defendant’s criminal conduct was not sufficient to cause the harm, *i.e.*, when additional contribution from subsequent events was needed to produce the ultimate damage.” 273 Or App at 601 (Flynn, J. dissenting). The dissent also pointed out that the Court of Appeals had previously affirmed restitution awards based on attorney fees incurred by a victim in response to a defendant’s criminal acts. *Id.* at 604.

The state petitioned for review, and this court held the petition in abeyance pending its decisions in *State v. Ramos*, 358 Or 581, 368 P3d 446



(2016), and *State v. Kirschner*, 358 Or 605, 368 P3d 21 (2016), which had already been briefed and argued. After deciding *Ramos* and *Kirschner*, the court granted the petition for review.

### **SUMMARY OF ARGUMENT**

A crime victim is entitled to restitution for all economic damages that resulted from the crime. Damages can result from the crime if the crime is *a* cause of them, even if it is not the only cause. Restitution is proper if (1) the crime was a factual cause of the damages; and (2) it was reasonably foreseeable that the damages might result from the crime. The crime need not have caused the damages directly or been sufficient by itself to cause the damages.

Here, defendant did not dispute that the victim would not have incurred the attorney fees but for his criminal act of strangling her, which means that the strangulation was a factual cause of the damages. He also did not dispute that factually, it is reasonably foreseeable that a victim of domestic violence will hire an attorney to seek protection from the abuser. Thus, although defendant's behavior in jail may have been the direct cause of the victim's decision to hire an attorney, the trial court properly awarded the fees as restitution based on the underlying crime.

### **ARGUMENT**

ORS 137.106 requires a trial court, when sentencing a defendant for a crime that has "resulted in economic damages," to enter a judgment requiring

the defendant to pay the victim restitution equal to “the full amount of the victim’s economic damages as determined by the court.” Economic damages are “objectively verifiable monetary losses” other than future impairment of earning capacity. ORS 31.710(2)(a); 137.103(2)(a).<sup>1</sup>

**A. Reasonable foreseeability, not the directness or sufficiency of the causal link, determines whether a victim is entitled to restitution.**

Economic damages that result from a crime must be awarded as restitution if two requirements are satisfied. First, there must be “factual causation” between the crime and the damages that the victim suffered. *Ramos*, 358 Or at 593. Factual causation is established by showing that the crime was a but-for cause of the damages—that is, that the victim would not have suffered the damages if the defendant had not committed the crime. *Id.* n 6. If the crime was not a but-for cause of the damages, it may still be possible to establish factual causation by showing that the crime was a “substantial factor” in bringing about the damages. *Id.* at 586 n 3.

Second, it must have been “reasonably foreseeable” that the victim would suffer the damages as a result of the crime. *Id.* at 604. In *Ramos*, this court rejected the defendant’s argument that the test should be stricter and require “that the causal connection be ‘direct.’” *Id.* at 597 (emphasis in original).

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<sup>1</sup> The restitution statutes have been amended since 2012, when the sentencing proceeding at issue here was held, but the relevant language has not changed.

Rather, it concluded that the test mirrored the ordinary civil-law concept of reasonable foreseeability. *Id.*

The court should not add an additional requirement that the crime directly cause the damages, that it be sufficient by itself to cause the damages, or that no other unlawful acts by defendant contribute to the damages. In ordinary tort litigation, the fact that the defendant's conduct may not have caused the plaintiff's damages by itself does not relieve the defendant of liability. "Tortious conduct by an actor need be only *one* of the causes of another's harm." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 26 cmt c (2010) (emphasis added). That the conduct need only be *a* cause, not the *sole* cause, "is well recognized and accepted in every jurisdiction." *Id.*, reporter's note cmt c.

For example, in *Fazzolari v. Portland School District No. 1J*, this court held that a school district could be liable a girl's rape if it had provided inadequate security on the school grounds. 303 Or 1, 20-22, 734 P2d 1326 (1987). The harm itself was not caused directly by the lack of security; it was caused by a third party's separate criminal act of rape. But the court explained that the school district nonetheless could be held liable if the rape was a foreseeable risk of its failure to provide adequate security. *Id.* at 20.

The same principle applies here. Even if the victim would not have hired an attorney based on the strangulation alone, that fact by itself would not relieve

defendant of liability for the damages in a civil suit that involved the same conduct, and it should not relieve him of liability for restitution. Rather, defendant's liability for the victim's economic damages should be "dealt with \* \* \* as part of the general analysis of foreseeable risks." *Id.* If the strangulation was a but-for cause of the victim's decision to hire an attorney, even if not the only cause, and if it was reasonably foreseeable that she might hire an attorney as a result of the strangulation, then the cost of the attorney must be included in the restitution. Only if one of these prerequisites is not met may the economic damages be excluded from restitution. *See Ramos*, 358 Or at 603.

Applying a more restrictive test for liability here, as the Court of Appeals did, would conflict with the principle that someone who causes harm intentionally should be liable for a broader range of consequences than someone who causes harm negligently. *Fazzolari* involved a claim based on negligence—that is, the tortious conduct may have caused the harm unintentionally. 303 Or at 3. But defendant's criminal act of strangulation here was more analogous to an intentional tort such as battery. And an actor who intentionally causes harm is generally "subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently." *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 33(b); *see also id.* cmt e (stating that this principle is "universally accepted"). Thus, in a civil action by the victim, defendant might well be held

liable even for some unforeseeable consequences of his criminal act. Because restitution includes monetary losses that a victim could recover in a civil action against the defendant, *State v. Islam*, 359 Or 796, 801, \_\_ P3d \_\_ (2016), the restitution here should include—at a minimum—all foreseeable economic damages factually caused by the strangulation, even if other events (such as defendant’s behavior while in jail) also played a role in causing the damages.

**B. Under the correct standard, the trial court’s award of restitution should be affirmed.**

Defendant did not dispute that his criminal act of strangulation was a but-for cause of the victim’s attorney fees. As the Court of Appeals recognized, defendant’s commission of the crime of strangulation was a “necessary predicate” for the original no-contact order and all the later events, including the victim’s decision to hire an attorney to try to enforce the no-contact order and ultimately to seek a separate protective order under FAPA. 273 Or App at 595. The victim was eligible for a FAPA order only because she was “the victim of abuse within the proceeding 180 days.” ORS 107.700(1). There is no evidence in this record that the defendant committed any act of abuse within that 180-day period other than the strangulation for which he was convicted. Had defendant not strangled the victim, there is no reason to believe that she would have had a no-contact order in place, hired an attorney, or sought a FAPA order. Because defendant did not dispute that the victim would not have

incurred the attorney fees but for the strangulation, the element of factual causation is satisfied here.

Defendant also did not dispute that it was reasonably foreseeable that the victim would incur attorney fees after he strangled her. “An argument that fees and cost were not reasonably foreseeable must be made, in the first instance, to a trial court for its factual determination.” *Ramos*, 358 Or at 598. It is not unforeseeable as a matter of law that a victim of domestic violence may hire an attorney to seek protection from additional abuse. And defendant did not make any factual argument on this issue to the trial court. In particular, he did not object to the trial court’s finding that there was a “pretty direct relationship” between the strangulation and the victim’s need for a restraining order. (Tr 26). Because defendant did not preserve an argument to the contrary on this issue, the trial court properly awarded the attorney fees as restitution. *See Kirschner*, 358 Or at 610.

As explained earlier, that should be the end of the analysis even if it was defendant’s behavior in jail that directly prompted the victim to hire an attorney. On the sparse record presented here, it is not clear what defendant did while in jail that caused the victim to hire an attorney, including whether he actually violated the original no-contact order that the trial court presumably imposed after he was arrested. (Cf. Tr 22 [prosecutor’s statement that his office was not able to confirm the reported violations]). But it does not matter. Even

if defendant did nothing wrong while in jail, the victim still was entitled to restitution because (1) she would not have incurred the attorney fees but for the crime and (2) it is reasonably foreseeable that a domestic-violence victim will hire an attorney to enforce or seek an order protecting the victim from further abuse.

Defendant did argue to the trial court that attorney fees are categorically excluded from restitution awards. (Tr 24-26). But this court rejected that absolute position in *Ramos* and *Kirschner*, holding that at least some kinds of attorney fees could constitute economic damages recoverable as restitution—for example, those incurred because of the victim’s involvement in the underlying criminal prosecution and restitution proceeding. *Ramos*, 358 Or at 602; *Kirschner*, 358 Or at 609-10. This court explained that even though those kinds of fees might not be recoverable if they had been incurred in a tort action against the defendant, it was appropriate to include them in restitution because “restitution is a criminal sanction that is sought by the state, not by the victim.” *Kirschner*, 358 Or at 610. Defendant did not preserve any more specific argument against the fees here, and this court therefore should not address any such argument.

Because the Court of Appeals’ basis for reversing the restitution award was incorrect and defendant did not preserve any other meritorious argument,

this court should reinstate the trial court's award of restitution in the amount of \$1,880.

### **CONCLUSION**

This court should reverse the ruling of the Court of Appeals and affirm the judgment of the circuit court.

Respectfully submitted,

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## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on July 1, 2016, I directed the original Brief on the Merits of Petitioner 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, and upon Rosemary W. Brewer, attorney for amicus curiae, 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 2,688 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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