IN THE SUPREME COURT OF THE STATE OF OREGON

---

| | |
|---|---|
| STATE OF OREGON,<br><br>Plaintiff-Respondent,<br>Respondent on Review,<br><br>v.<br><br>RASOOL ISLAM ISLAM,<br><br>Defendant-Appellant,<br>Petitioner on Review. | Multnomah County Circuit Court No. 130331128<br><br>CA A154949<br><br>SC S063202 |

---

# 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 Multnomah County
Honorable ERIC J. BERGSTROM, Judge

---

Opinion Filed: February 11, 2015
Authored: Haselton, Chief Judge
Before: Duncan, Presiding Judge, and Haselton, Chief Judge, and Lagesen, Judge

---

*Continued…*

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
EMILY P. SELTZER #124513
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: emily.seltzer@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
MICHAEL S. SHIN #135966
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: michael.s.shin@doj.state.or.us

Attorneys for Respondent on Review

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases Cited

**Constitutional & Statutory Provisions**



**Other Authorities**

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

## INTRODUCTION

This case concerns the appropriate measure for criminal restitution for theft when the victim is a retail merchant. Because retailers both buy goods from suppliers and sell those goods to consumers, the market value of their inventory could be measured by either the acquisition cost or the retail sales value. The measure used for restitution for theft should depend on the time and location of the theft: if the theft occurs before the stolen goods are offered for sale to consumers—for example, while stored as excess inventory in a warehouse—then the replacement cost measure would be appropriate; however, if the goods are stolen from a retail store while they are offered for sale to consumers, then the retail value should apply.

The reason that market retail value best approximates the actual loss caused by the theft of retail goods is that it accounts not only for the value of having the goods (replacement cost) but also for the lost *use* of those goods. That lost use is best measured by the cost of the victim's missed opportunity to sell the particular items that were stolen, along with the concomitant lost opportunity to profit from those sales. Limiting restitution for retail goods stolen to replacement cost, as defendant urges this court to do, would fail to account for that lost use, and as a result, it would fail to compensate the victim

fully and would provide a windfall for the thief. That was not the legislature's intent in enacting the restitution statutes.

## QUESTION PRESENTED AND PROPOSED RULE OF LAW

### Question Presented

ORS 137.106 requires a sentencing court to impose restitution in the full amount of the victim's "economic damages." When a retail merchant is the victim of a theft, is the proper measure for restitution the retail value of the stolen items or their replacement cost?

### Proposed Rule

Where a defendant steals merchandise that is offered for retail sale, restitution is measured by the reasonable retail market value of the stolen merchandise at the time of the theft.

## STATEMENT OF MATERIAL FACTS

Defendant was charged with first-degree theft for stealing merchandise from a Macy's department store. He pleaded no contest to a lesser charge of second-degree theft and agreed to pay restitution. At the restitution hearing, the parties stipulated that 15 pairs of jeans were stolen from Macy's and that defendant and his codefendants were jointly and severally liable for restitution. (Tr 19). The state offered evidence that the retail "shelf price" of each pair of jeans was $68, for a total of $1,020. (Tr 19–20). Defendant did not dispute the retail value but argued that restitution should be limited to the "wholesale

expense to replace the jeans," which he claimed was $35.98 per pair, for a total of $539.70. (Tr 20–21). Defendant reached that figure based on a listing on eBay that offered 50 pairs of Levi's jeans for $1,799. (Tr 21). The prosecutor did not know the wholesale cost for the jeans and did not have any information about Macy's inventory of jeans at the department store where the theft occurred. (Tr 24).

The trial court imposed restitution in the amount of $1,020, which represented the retail price of the jeans. (Tr 26). Defendant appealed, challenging the restitution. The Court of Appeals affirmed. *State v. Islam*, 269 Or App 22, 344 P3d 22 (2015). The court explained that under its prior case law, Macy's was entitled to restitution corresponding to the "reasonable market value" of the stolen jeans "at the time it was taken." *Id.* at 29. The court agreed with the trial court's determination that because "the jeans were stolen from shelves in retail space, where they were available to customers for sale," the market in which the stolen goods were traded at the time of the theft was "the retail market." *Id.* at 29–30. Thus, the Court of Appeals held that the trial court properly based restitution on the retail value of the stolen jeans. *Id.* at 30.

## SUMMARY OF ARGUMENT

Defendant was convicted of stealing 15 pairs of jeans from a department store, and the victim store was entitled to restitution equal to the economic damages it suffered from that theft. Because, at the time of the theft, the 15

pairs of jeans were offered for retail sale to consumers, the plain terms of the restitution statutes—and to the extent applicable, civil tort law principles—dictate that the victim's economic damages must be measured by the reasonable market value of the stolen jeans in the retail market. Based on that measure, the trial court correctly determined that the retail sales price of the jeans represented the relevant market value of the jeans and based restitution on that price.

Defendant contends that the trial court should have, instead, based the restitution amount on the wholesale cost of the stolen jeans, because the wholesale cost represents the amount that a victimized store would need to replace the stolen merchandise. He characterizes the difference between the wholesale and retail value as lost profits and asserts that the state failed to prove that the victimized store was unable to replace the stolen jeans with jeans in its inventory or that it otherwise suffered any lost profits from the theft. Yet whether the victim suffered any net lost profits in its overall business is beside the point. Rather, restitution is based on the market value of the particular property stolen at the time and place it was stolen, and that value in this case necessarily incorporates anticipated sales profits.

Here, defendant shoplifted jeans that were offered for sale to the public. But for defendant's theft, the store could have sold the 15 pairs of jeans at the retail price and obtained the profits associated with those sales. By stealing and

disposing of the jeans, defendant deprived the victim of those sales—the store will never be able to sell those particular 15 pairs of jeans—and those lost sales constitute the economic damage for which the victim must be compensated. The state provided sufficient evidence of those lost sales and was not required to offer any additional evidence of lost overall profits. The possibility that the store may have been able to mitigate the loss by replacing the stolen jeans with *other* jeans in its inventory does not affect the nature or extent of its loss from the theft of the jeans.

## ARGUMENT

Under Oregon's restitution statutes, a defendant is required to pay restitution to a victim in the full amount of the victim's "economic damages." For the reasons explained below, when a person steals property from a retail store—as defendant did here—the appropriate measure of the store's "economic damages" is the retail value of the stolen items, not their wholesale replacement cost. The trial court thus properly required defendant to pay restitution in the amount of the retail price of the jeans that he stole.

### A. Under the statutory definition of "economic damages," the victim's losses are measured by the retail market value of the stolen jeans representing the cost of the lost opportunity to sell the jeans.

The plain language of the restitution statutes dictates the use of retail market value for stolen, nonreplaced property such as the stolen jeans at issue in this case. ORS 137.106(1)(a) requires a trial court to order restitution "in a

specific amount that equals the full amount of the victim's economic damages as determined by the court." ORS 137.103(2)(a) provides that the term "economic damages" has "the meaning given that term in ORS 31.710[.]"[1] ORS 31.710(2)(a), in turn, defines "economic damages" as "objectively verifiable monetary losses." Based on the express language of those statutory definitions, the monetary losses for stolen property that has not been returned is measured by the costs of the lost use of that property, not by replacement costs. Because the lost use was Macy's lost opportunity to sell the jeans, its losses were the retail market value of the jeans, including any profit above wholesale cost.

**1. ORS 31.710 permits the use of replacement costs only for damaged property and measures losses for lost property by the costs of lost use or, in this case, retail market value.**

ORS 31.710(2)(a) defines "economic damages" as follows:

> Economic damages means 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 and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, *reasonable and necessarily incurred costs*

[1] ORS 137.103 excludes from that definition the "future impairment of earning capacity" and sets forth additional conditions and considerations for crimes not at issue in this case.

> *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 subsection thus makes an explicit distinction between damages resulting from lost and damaged property, and it provides different measures of monetary losses for those two types:

> (1) reasonable and necessarily incurred costs due to loss of use of property and
>
> (2) reasonable costs incurred for repair or for replacement of damaged property, whichever is less.

As a result, although ORS 31.710(2)(a) contemplates using replacement costs as a possible measure of monetary losses for *damaged* property, the provision states that for the lost *use* of property, monetary losses are the "costs" of that loss. The provision's explicit use of replacement costs for the former but not the latter indicates a legislative intent to allow the use of replacement costs to measure monetary losses only where property is damaged. *See State v. Bailey*, 346 Or 551, 562, 213 P3d 1240 (2009) (can infer that omission of a term was "deliberate" where the same term is expressly used a related provision).

Had the legislature intended to allow replacement costs to serve as a measure for stolen, unreturned property in addition to damaged property, it could have done so. In fact, the legislature did exactly that in defining "value" in the statutory provisions governing theft and related offenses.

ORS 164.115(1) states that "value means the market value of the property at the time and place of the crime, or if such cannot reasonably be ascertained, the cost of replacement of the property within a reasonable time after the crime." Thus, as in ORS 31.710(2)(a), the legislature explicitly provided for the use of replacement costs to measure the value of property. The fact that the legislature did not do so for the lost use of stolen property suggest that wholesale replacement cost should not be used in that context.[2]

The distinction between damaged and lost property forecloses using wholesale replacement cost to determine restitution in this case. Because the stolen jeans were disposed of, not damaged,[3] Macy's economic damages were properly measured by the "costs" resulting from its lost use of the stolen jeans, which is the store's lost opportunity to sell the jeans to its customers. Those

---

[2] For that reason, defendant's reliance on *People v. Chappelone*, 183 Cal App 4th 1159, 1179, 107 Cal Rptr 3d 895 (2010), is misplaced; that case actually supports the state's argument. California's statutory restitution provisions, like Oregon's, require that the sentencing court order restitution in an amount sufficient to reimburse victims for "economic loss incurred as a result of the defendant's criminal conduct." Cal Penal Code § 1202.4 (f)(3). Unlike ORS 31.710(2)(a), however, the California statute states that "[t]he value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible." Cal Penal Code § 1202.4 (f)(3)(A). Thus, California's statute expressly allows *only* replacement cost for stolen property. By contrast, ORS 31.710(2)(a) does not limit economic damages to replacement costs and expressly includes the costs associated with the lost use of stolen property.

[3] The record is silent as to what happened to the stolen jeans.

costs equaled the retail market value of the jeans, which was the amount for which the store would have sold the jeans.

Defendant acknowledges that the portion of ORS 31.710(2)(a) that allows for replacement costs "concerns damaged property rather than property lost to theft." (Pet Br 8). And he does not dispute that the jeans were stolen and never recovered. But he nonetheless argues that the jeans should be treated as if they were merely "damaged." Specifically, he argues that because the "post-offense condition" of property does not affect the amount of the victim's loss where the property is not recovered, restitution is the same whether that (non-recovered) property has been lost, damaged, or destroyed. (Pet Br 8). But the relevant distinction is not between non-recovered property that has been lost, damaged, or destroyed. Rather, 31.710(2)(a) distinguishes between instances in which property has not been recovered, such as when it has been stolen, and those in which property has been recovered—or never was taken—and has merely been damaged. The statute expressly allows a replacement cost measure only for the latter, and this case falls squarely within the former. [4]

---

[4] Even if this court were to determine that replacement cost is correct measure, the cost of replacing stolen retail merchandise is not necessarily equivalent to their wholesale acquisition cost. Rather, replacement costs would include overhead and other costs required to bring the goods to the retail market. *See United States v. Lively*, 20 F3d 193, 195, 200–03 (6th Cir1994) (listing retailer's out-of-pocket expenses required to bring goods to the retail market). Because it relied on retail value, the trial court did not make

*Footnote continued…*

The distinction between stolen and damaged property in ORS 31.710 makes sense because the two scenarios can result in different losses from the victim's perspective. Whereas repair or replacement costs for damaged property compensates a victim for the damage to the value of the property itself, costs for the loss of property altogether include more than just the value of general possession of the property. Indeed, as detailed above, the costs of lost use for retailers ordinarily exceed replacement costs because they include the lost opportunity to sell the property for profit in the retail market. ORS 31.710(2)(a) thus makes a meaningful delineation between the costs of damage to property and the costs of lost use, and the subsection expressly provides for different measures to gauge those two categories of losses. [5]

---

*(…continued)*
any determination about replacement costs for the stolen jeans. Thus, in the event this court determines that replacement costs are the proper measure, it should remand the case to the trial court to determine those costs in the first instance.

[5] As defendant acknowledges, (Pet Br 20 n 5), civil tort law appears to recognize a similar distinction between damaged property and the deprivation of property. Thus, this court has held that whereas the proper measure of damages is wholesale replacement cost for damaged property, the proper measure for the deprivation of property is the retail market value. *Compare Mock v. Terry*, 251 Or 511, 512, 446 P2d 514 (1968) (damaged property), *with Hall v. Work*, 223 Or 347, 357, 354 P2d 837 (1960) (deprivation of property).

**2. The state met its burden by presenting evidence of the retail price of the jeans and was not required to provide additional evidence of lost profits.**

ORS 137.106(a)(1) requires the state to investigate and present "the nature and amount" of the victim's economic damages. As demonstrated above, the amount of Macy's losses was equal to the reasonable costs resulting from the lost use of the stolen jeans, which was their retail market value. The state therefore satisfied its evidentiary burden by providing the retail price of the jeans at the time of the theft. Although defendant disputed that retail price was the correct measure, he did not dispute that the retail price requested by the state was accurate and appropriately measured the jeans' retail market value. (Tr 19–20). As a result, the trial court properly relied on the retail price presented by the state to determine the amount of the victim's economic damages.[6]

---

[6] Courts in a several federal circuits have adopted a similar view of losses of the uses for restitution. *See, e.g.*, *United States v. Susel*, 429 F3d 782, 784 (8th Cir 2005) (affirming the use of retail value of stolen software sold on eBay, resulting in lost sales to the software company); *United States v. Rice*, 38 F3d 1536, 1544 (9th Cir1994) (concluding that there was no abuse of discretion where restitution was based on "book price," which included a profit markup, rather than manufacturing cost of free samples illegally obtained by the defendant). In *Lively*, the Sixth Circuit explained the rationale underlying use of retail value to measure restitution, noting that before the theft of retail merchandise, the victimized companies "had merchandise that could be sold at the retail price level," but after the theft, "they no longer had this merchandise to sell at the retail price level," and as a result, the defendant "precluded these companies from being able to realize the profits of their labor." 20 F3d at 203.

Defendant contends that the trial court erred by using the retail price without proof that the victimized store lost profits as a result of the theft. Defendant does not dispute that the theft of the 15 pairs of jeans prevented Macy's retail store from selling *those* jeans, and he concedes that losses from stolen property "would include a retailer's lost profits" because the retailer cannot sell the property and "[i]f a retailer cannot hold the property out for sale, it cannot make a profit." (Pet Br 8). Instead, defendant contends that to recoup retail value, Macy's should have been required to prove affirmatively that it lost profits in its overall business due to the theft by demonstrating that the store lost sales or profits as a result of insufficient inventory to replace the stolen jeans. (Pet Br 24). Absent such evidence, defendant asserts that restitution should exclude any lost profits attributable to lost sales. Defendant, however, conflates the costs of the lost opportunity to make a profit, which is the relevant measure in ORS 31.710, with a victim's overall profits and sales, which do not measure the injury caused by a theft.

ORS 31.710(2)(a) counts as economic damages any costs that result from the lost use of property, and Macy's unquestionably lost the use of the stolen jeans to earn a profit. Nothing in that provision, expressly or implicitly, suggests that any costs from the lost use of property should be disregarded because of any outside factors that mitigate the costs, such as the victim's ability to use *other* property. Nor does it suggest that any costs should be

discounted based on any features of the victim. Rather, the statute treats the economic injury resulting from theft the same whether the victim is a department retail store with a vast inventory or a mom-and-pop corner store with no extra inventory.[7] Thus, by its plain terms, economic damages under ORS 31.710 are not affected by whether Macy's may have been able to replace the stolen jeans with jeans from its inventory to prevent an overall decrease in its bottom-line business sales or any loss of total profits. The relevant statutory measure concerns the costs associated with the lost use of property, which in this case was the lost retail sales of the stolen jeans.

**3. Legislative history and statutory context are consistent with the use of retail market value to measure restitution.**

Neither the legislative history for the 2003 and 2005 amendments to Oregon's restitution statutes nor statutory context provided in related statutes directly addresses the issue in this case, but both are consistent with the use of retail market value to measure the loss to a retailer resulting from the theft of retail merchandise. As the Court of Appeals noted in its opinion below—and defendant also recounts in his brief—the legislative history for the 2003 and 2005 amendments indicates that in amending the restitution provisions, the

---

[7] Of course, a retailer that incurs verifiable monetary losses to restock its inventory due to a theft may have additional costs that it could recoup as restitution, beyond those from the lost use.

legislature intended to ensure that crime victims were fully compensated for their losses and to clarify the definition of recoverable damages. *See Islam*, 269 Or App at 25–26; (Pet Br 12–18). Beyond those general objectives, however, the legislative history does not shed any light on the issue here, much less contradict the answer provided by the text outlined above.

Nor do any related statutes provide context that indicates a legislative intent to limit restitution to wholesale replacement costs. If anything, as noted above, the explicit use of a replacement cost measure in the definition of "value" in the theft statutes provides a telling counterexample to ORS 31.710(2)(a)'s definition and suggests a legislative intent not to use such a measure for losses resulting from the lost use of property.

Defendant notes that ORS 161.625(3)(a) authorizes a sentencing court to impose a fine for a felony up to double the "amount of the defendant's gain from the commission of the crime." He argues that because the legislature phrased that statute in terms of the defendant's gain, rather than the victim's loss, ORS 31.710, which does the reverse, should be viewed from the perspective of the victim, not the defendant. (Pet Br 11). The state does not quarrel with the idea that the restitution is properly viewed from the victim's perspective. But that does not mean that defendant should prevail; rather, it merely begs the question as to what the victim's losses were. Indeed, in the

state's view, the victim's loss and defendant's gain in this case are the same and equal the retail market value of the jeans.

The use of "defendant's gain" in ORS 161.625(3)(a) for criminal fines does not provide insight on ORS 31.710 for the additional reason that fines and restitution have different underlying purposes and address different scenarios. Because fines are inherently punitive—and perhaps deterrent—in nature, it makes sense to base the amount of a fine on defendant's unlawful net gain from the commission of the offense. Restitution, on the other hand, is primarily meant to compensate victims and is rightfully based on a victim's losses. Thus, ORS 31.710(2)(a)'s phrasing in terms of a victim's loss cannot reasonably be read as legislative intent to prohibit any restitution that could also be viewed in terms of defendant's gain.

Moreover, ORS 161.625(3)(a) only authorizes fines where "a person has gained money or property through the commission of a felony" and the maximum amount of fine is set accordingly. "Economic damages" under ORS 31.710, in contrast, span a much broader scope and include instances in which a defendant may not have had any monetary gain—for example, where a defendant damages another's property. Restitution necessarily must be framed in terms of a victim's view to capture all such cases, and that framing therefore

does not shed any light on the legislature's view of the value of losses in any particular case.[8]

**B. To the extent applicable, principles of civil tort law support the trial court's use of retail market value to determine restitution.**

In 2005, in addition to adopting ORS 31.710's definition of "economic damages," the legislature also eliminated a provision limiting restitution to the amount recoverable in an analogous civil action.[9] As the Court of Appeals noted in its opinion below, that change was meant to "*expand* recovery beyond that which was previously available." 269 Or App at 26 (emphasis in original). As a result, the court noted that in "Venn diagram terms" recovery under the prior statutory restitution provisions "is necessarily a subset within the broader 'economic damages' universe." *Id.* The extent to which "economic damages" in ORS 31.710 may exceed the scope of damages recoverable in civil tort cases,

---

[8] Defendant's citation to ORS 137.103(2)(b), which also measures damages in terms of the defendant's gain, is likewise inapposite. That provision addresses the measure of "economic damages" in the unique circumstances presented in cases of involuntary servitude and trafficking in persons. In those cases, attempting to measure restitution in terms of a victim's "monetary losses" would be difficult, if not impossible.

[9] Under the former version of the statutes, a victim was entitled to restitution for "pecuniary damages," which was defined as "all special damages, but not general damages, which a person could receive against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities." ORS 137.103 (2003).

however, is not presented in this case.[10] In the state's view, the plain terms of the restitution statutes dictate the use of retail market value to determine restitution in this case, and resort to civil tort principles is therefore unnecessary. But to the extent they are relevant here, civil tort principles support the state's argument and demonstrate that the retail market value is the correct measure of restitution in this case.

Under basic tort principles, damages resulting from wrongfully taken property are properly measured by the retail market value of the property at the time and location of the taking. Basic tort principles also dictate that liability for damages resulting from a theft should not be discounted by collateral factors that mitigate the loss. Applied here, those basic principles support the trial court's reliance on the retail price of the stolen jeans to determine the restitution amount.

**1. The market value of the stolen jeans must be measured at the time and location of the theft, which in this case was at a retail store.**

As a starting principle, the relevant market value for the stolen jeans—whether measured by wholesale or retail cost—is at the time and location of the theft. That principle is derived from the fact that the analogous tort action

---

[10] That issue is, however, more squarely presented in *State v. Ramos*, S062942, which is pending in this court.

corresponding to theft is conversion, *see Mustola v. Toddy*, 253 Or 658, 663, 456 P2d 1004 (1969) (defining conversion), and the fact that damages in a conversion action are measured by the "reasonable market value of the goods converted at the time and place of the conversion." *Hall v. Work*, 223 Or 347, 357, 354 P2d 837 (1960).

Here, although Macy's operates in the wholesale market in its acquisition of goods, the jeans were stolen from the shelves of Macy's retail store, where they were on sale to customers. As a result, the trial court expressly found—and the Court of Appeals agreed—that the "market in which the goods were being traded" was the retail market. (Tr 25); *Islam*, 269 Or at 29. Thus, the relevant market value for purposes of restitution was the retail market value, and the trial court properly relied on the retail price of the jeans.[11]

---

[11] Federal courts likewise assess the market value of stolen property "at the time and the place that the property was stolen." *United States v. Robinson*, 687 F2d 359, 360 (11th Cir 1982). A number of federal courts applying that standard have held that retail market value applies where the merchandise was stolen from a retail setting. *See, e.g.*, *id.* ("[T]he type of buyer seller transaction used for determining the value of the stolen property is the transaction in which the person from whom the property was stolen would have engaged. If the property is stolen from a retail merchant the market value is the retail sales price. If the property is stolen from a wholesale merchant the market value is the wholesale price."); *United States v. Cummings*, 798 F.2d 413, 416 (10th Cir 1986) ("When merchandise is stolen from a merchant, market value is the sales price the merchant would have obtained for the merchandise. Thus, where the victim is a retail merchant, the market value is the retail sales price, and where the victim is a wholesale merchant, the market value is the wholesale price." (internal citations omitted)).

Defendant attempts to shift the inquiry away from the time and place of the theft to Macy's ability to replace the stolen property on the wholesale market "because a retailer can replace its property on the wholesale market[.]" (Pet Br 19). Defendant does not explain—based on the statutory language, under tort principles, or otherwise—the basis for this argument.

Nor do the cases to which defendant cites in support of his argument apply here because those cases uniformly involve damage to, or the destruction of, the plaintiffs' inventory or stock in warehouses or other similar settings. For instance, *Illinois Central R. Co. v. Crail*, 281 US 57, 50 S Ct 180, 74 L Ed 699 (1930), concerned the defendant rail carrier's failure to deliver coal to the plaintiff coal dealer. *Id.* at 62. Clearly, that failed delivery occurred on the wholesale-acquisition side of the plaintiff's business and the relevant market was the wholesale market. Thus, *Illinois Central* and the other cases relied on by defendant are entirely consistent with the principle that damages must be assessed at the time and place of the tortious conduct, but they are factually distinguishable from this case because none involved a theft in a retail setting.[12]

---

[12] Two of the other three cases defendant cites, *Mock* and *Chappelone*, are inapplicable for the reasons separately discussed above. In the third, *United States v. Ferdman*, 779 F3d 1129, 1140 (10th Cir 2015), the Tenth Circuit applied the federal restitution statute, 18 U.S.C. § 3663A, and held that wholesale replacement costs were the appropriate measure for the victim retailer's loss of fraudulently obtained cellphones. That decision stands in

*Footnote continued…*

*See Aldredge v. Moses*, 595 So 2d 379, 381 (La Ct App 1992) (holder of chattel mortgage sued creditor for removal of jewelry inventory that was the security for the mortgage); *Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1, 10, 407 P2d 695 (1965) (broken water pipe caused damage to inventory stored in business's basement); *Dubiner's Bootery, Inc. v. Gen. Outdoor Adver. Co*, 10 AD2d 923, 923, 200 NYS2d 757 (1960) (damages to retailer's stock).

Finally, defendant's reliance on various tort law treatises does not suggest a different result. Although the treatises state that the measure of damages for a retailer whose goods have been taken is their wholesale replacement cost, they do so only as a general default rule, absent any conscious wrongdoing by the tortfeasor. Different principles apply when a tortfeasor engages in unlawful conduct, such as the theft of the jeans in this case.

For instance, while § 911 of the Restatement (Second) of Torts provides that a retailer can recover the wholesale price of lost goods, § 901 notes that "the measure of recovery against a conscious wrongdoer may be greater than that permitted against a tortfeasor who was not aware that his act was tortious." To that end, comment i of § 927 provides that where "the converter has disposed of the chattel," the owner can, in addition to an action of tort,

---

*(…continued)*
contrast to cases cited above from other federal circuits that have applied the retail market value in similar circumstances.

"maintain a restitutionary action in which he is entitled to the amount received by the converter, if the disposal was with knowledge that it was wrongful." Thus, tort law contemplates an action to recover an amount equal to the value of the property to the converter where the conversion was intentional. Under that principle, even though the Restatement ordinarily measures the value of converted property in terms of replacement costs, Macy's in this case would be entitled to receive the value of the jeans that defendant received (the retail value) because defendant intentionally stole them.

The Restatement (Third) of Restitution and Unjust Enrichment likewise distinguishes between innocent and wrongful gain. Section 3 of that treatise states that "[r]estitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claim—a result that is generally not permitted when the restitution claim is against an innocent recipient." In addition, § 40 states that the measure of recovery "often depends on the blameworthiness of the defendant's conduct." The section further provides:

> Consistent with general principle, a conscious wrongdoer will be stripped of gains from unauthorized interference with another's property (§§ 3, 51(4)); while the restitutionary liability of a defendant without fault will not exceed the value obtained in the transaction for which liability is imposed.

*Id.* § 40, comment b. Thus, neither the Restatement (Second) of Torts nor the Restatement (Third) of Restitution and Unjust Enrichment limits the recovery of a retailer to replacement costs where they are the victims

of an intentional taking, as in this case. And both treatises are consistent with the general tort principle that damages for a theft should be measured according to the market at the time and place of the theft, which is the retail market where the theft occurred at a retail store.

**2. Under the collateral source rule, restitution should not be reduced by the victim's ability to avert lost profits through its inventory of jeans.**

Defendant's claim that Macy's should not receive the market retail value of the stolen jeans because there was no evidence that it did not prevent the loss of profits by replacing the stolen jeans with jeans in its inventory is additionally inconsistent with the general tort principle underlying the collateral source rule. Under that rule, "[d]amages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently[.]" *Cary v. Burris*, 169 Or 24, 28–29, 127 P2d 126 (1942); *see also White v. Jubitz Corp.*, 347 Or 212, 234, 219 P3d 566 (2009) ("Whether or by what means the plaintiff or a third party satisfies medical charges is a matter between the plaintiff, the third party, and the medical providers.").

The policy behind the collateral source rule is that a tortious wrongdoer "should not reap the benefits of or be credited with money or services *received as a result of the injury from sources other than the wrongdoer*." *Seibel v. Liberty Homes, Inc.*, 305 Or 362, 373, 752 P2d 291 (1988) (Peterson, CJ, concurring in part and dissenting in part) (emphasis in original); *see also*

*Reinan v. Pacific Motor Trucking Co.*, 270 Or 208, 213, 527 P2d 256 (1974) ("The salutary policy underlying the collateral source rule is simply that if an injured party receives some compensation from a source wholly independent of the tortfeasor such compensation should not be deducted from what he might otherwise recover from the tortfeasor.").

Applied here, that principle dictates that Macy's potential ability to avoid any overall lost sales by replacing the stolen jeans with items in its inventory should not reduce defendant's liability. Admittedly, the analogy is not exact given that the collateral source rule generally applies to payments from third parties, but the principle has equal force in this situation. Indeed, potential excess inventory plays essentially the same role as reimbursement from an insurance policy, which would squarely fall within the collateral source rule. *See* Restatement (Second) of Torts § 920A comment c.

Put differently, injury to a victim retailer from theft should be viewed the same whether that retailer has no excess stock or—as defendant assumes Macy's had—unlimited stock. Restitution compensates the victim for losses caused by the theft and outside factors or features of the victim that might mitigate those losses should not affect the defendant's liability. Although in some instances the victim might be afforded a double recovery, "it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor." Restatement (Second)

of Torts § 920A comment b; *see also Lysenko v. Sawaya*, 1999 UT App 31, ¶ 20, 973 P2d 445 (1999), *aff'd*, 7 P3d 783(2000) (Orme, J., dissenting in part) ("While the majority is concerned that plaintiff not reap a windfall by being awarded the in-place value of the property, our concern instead should be to make sure the tortfeasor does not benefit from his wrongful conduct."). Thus, whether Macy's might have averted any losses to its overall business profits is immaterial to the amount of restitution for which defendant was liable.

Accordingly, under both the plain terms of the restitution statutes and general tort principles, the trial court properly ordered restitution based on the retail market value of the stolen jeans.

## CONCLUSION

This court should affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
PAUL L. SMITH
Deputy Solicitor General

/s/ Michael S. Shin

MICHAEL S. SHIN #135966
Senior Assistant Attorney General
michael.s.shin@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 9, 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 Emily P. Seltzer, attorneys for petitioner on review, 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 6,105 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).

/s/ Michael S. Shin

MICHAEL S. SHIN #135966
Senior Assistant Attorney General
michael.s.shin@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

MSS:aft/6842539