

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

TISCHA NICHELLE WHITE,
Defendant-Appellant.

Washington County Circuit Court
16CR19861; A164878

Beth L. Roberts, Judge.

Argued and submitted July 9, 2019.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Greg Rios, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Supplemental judgment reversed; remanded for resentencing; otherwise affirmed.

LAGESSEN, P. J.

Defendant appeals two judgments: a judgment of conviction and a supplemental judgment imposing restitution and a compensatory fine. Her convictions for one count of first-degree criminal mistreatment, ORS 163.205, and one count of third-degree assault, ORS 163.165, resulted from physical injuries she caused to her eight-year-old son, who was evaluated at CARES Northwest (CARES) and Randall Children's Hospital (Randall) for those injuries. On appeal, defendant assigns error to the trial court's award of \$3,491.28 to Providence Oregon Option (Providence) for the amounts it paid to CARES and Randall for the evaluations; the trial court awarded that amount partially as restitution and partially as a compensatory fine. We conclude that, under *State v. Moreno-Hernandez*, 365 Or 175, 442 P3d 1092 (2019), decided after the trial court entered its monetary award, the court's monetary award to Providence was legally erroneous. We therefore reverse the supplemental judgment, remand for resentencing, and otherwise affirm.

The relevant facts are as follows. After defendant injured her son, he was seen for those injuries at CARES and at Randall. Defendant's son has insurance coverage through Providence, and Providence paid a total of \$3,491.28 to CARES and Randall for the evaluations. After defendant was convicted, the state sought restitution in that amount on behalf of Providence. Its theory was that Providence qualified as a "victim" under ORS 137.103(4)(d), which makes an insurance carrier a "victim" for purposes of the compensatory fine and restitution statutes, ORS 137.101 and ORS 137.106, if the insurance carrier expends amounts on behalf of a person defined to be a victim under ORS 137.103(4)(a), that is, a "person or decedent against whom the defendant committed the criminal offense, if the court determines that the person or decedent has suffered or did suffer economic damages as a result of the offense." ORS 137.103. Specifically, the state argued that the amounts that Providence paid were expended on behalf of defendant's son who, in the state's view, had suffered "economic damages" as a result of defendant's conduct, namely, the costs of the two evaluations. Defendant objected on several grounds.

She contended that “CARES NW costs are investigatory in nature and not recoverable.” She also argued that recovery was prohibited because there is no evidence that “the victim or his family could be liable for the costs of the evaluations,” such that they would be entitled to seek to recover those moneys from defendant in a civil action, as required under ORS 137.103(2) and ORS 31.710. *See State v. Herfurth*, 283 Or App 149, 157, 388 P3d 1104 (2016), *rev den*, 361 Or 350 (2017) (explaining that a person has not suffered the requisite “economic damages” for purposes of ORS 137.103 if the person would not have a civil action against the defendant for the amounts claimed).

The trial court rejected defendant’s arguments. It concluded “that the Providence Oregon option is money that was paid by the victim’s family, that they are classified as a victim that suffered economic damages as the result of the defendant’s actions,” and that the amounts sought were ones that the court lawfully could award to Providence as restitution or in the form of a compensatory fine. Consistent with its ruling, the court entered a supplemental judgment (which it later amended) imposing \$2,641.28 in restitution and \$850 as a compensatory fine, for a total of \$3,491.28, all payable to Providence. On appeal, she challenges the restitution award and the imposition of the compensatory fine. She contends, among other things, that the trial court erred in concluding that it was statutorily authorized to award restitution and a compensatory fine to Providence.

Meanwhile, the Supreme Court decided *Moreno-Hernandez*. There, the court held that, under longstanding Oregon law, the medical expenses of an unemancipated minor child are not damages suffered by the child but, instead, are damages suffered by the child’s parents. *Moreno-Hernandez*, 365 Or at 189. The upshot of that holding is that an unemancipated minor who claims only medical expenses as damages as a result of a defendant’s conduct does not qualify as a “victim” under ORS 137.103(4)(a). *See id.*; *State v. Toth*, 365 Or 169, 172-73, 442 P3d 1089 (2019) (minor child did not qualify as “victim” within meaning of ORS 137.103(4)(a) because, under Oregon law, medical expenses of an unemancipated minor—the only damages

claimed to have been suffered by the child—are the damages suffered by the child’s parents, not the child). That is because, by the plain terms of ORS 137.103(4)(a), a person is not a “victim” within the meaning of that provision unless the person (1) is the one against whom the defendant committed the crime and (2) incurred economic damages as a result.

In view of *Moreno-Hernandez*, the trial court’s award of restitution and a compensatory fine to Providence was legally erroneous.¹ Assuming without deciding that it is appropriate to view the costs of the evaluations in this case as medical expenses, under *Moreno-Hernandez*, those costs were not damages suffered by defendant’s son. As a result, as was the case in *Moreno-Hernandez*, defendant’s son is not a “victim” within the meaning of ORS 137.103(4)(a). That, in turn, means that Providence is not a “victim” within the meaning of ORS 137.103(4)(d). Under that provision, an insurer is a “victim” only insofar as it “expend[s] moneys on behalf” of a person who qualifies as a victim under ORS 137.103(4)(a). Because defendant’s son is not a “victim” under ORS 137.103(4)(a), moneys spent on his behalf by Providence do not operate to make Providence a victim under ORS 137.103(4)(d).

We note that, in its oral ruling, the trial court referred generally to the amounts paid by Providence as amounts incurred by defendant’s son’s “family.” But the evidentiary record is clear that those amounts were expended on behalf of defendant’s son alone. Besides that, defendant’s son was the only person against whom defendant’s crimes were committed and, thus, the only person in this case with the potential to qualify as a victim under ORS 137.103(4)(a). That means that expenditures on behalf of defendant’s son are the only ones that could potentially render Providence a victim within the meaning of ORS 137.103(4)(d), and we have already concluded that those expenditures do not suffice here.

¹ The state argues that defendant’s *Moreno-Hernandez* argument is not preserved. We disagree. Although defendant’s argument did not fully anticipate the direction the Supreme Court would take in *Moreno-Hernandez*, that argument sufficiently put at issue whether defendant’s son was a person who qualified as a victim under ORS 137.103(4)(a), because that argument put at issue the question whether the charges paid by Providence were damages incurred by defendant’s son for purposes of ORS 137.103(4)(a).

Turning to disposition, we again take our cue from *Moreno-Hernandez*. Once the Supreme Court held that the trial court erred in ruling that the minor in that case was a “victim” under ORS 137.103(4)(a), the court determined that the proper disposition was to reverse and remand for resentencing. *Moreno-Hernandez*, 365 Or at 190-91. It did so because it recognized that the trial court might have other permissible options by which to hold the defendant financially accountable for the consequences of his crime, possibly by imposing a compensatory fine payable to someone else qualifying as a “victim” under a different provision of ORS 137.103(4), or by imposing a larger punitive fine. *Id.* Under those circumstances, the court deemed it appropriate to remand to permit the trial court to consider other possibilities. *Id.* Here, as in *Moreno-Hernandez*, the record suggests that the trial court may have other permissible options available to it. We therefore reverse the supplemental judgment and remand for resentencing.

Supplemental judgment reversed; remanded for resentencing; otherwise affirmed.