IN THE SUPREME COURT OF THE STATE OF OREGON

TYLER TURNER,

Plaintiff—Appellant—Respondent on Review,

v.

STATE OF OREGON, through its Department of Transportation,

Defendant—Respondent—Petitioner on Review,

and

CITY OF DEPOE BAY and LINCOLN COUNTY,

Defendants—Respondents,

and

CAROL COLIP,

Defendant—Appellant—Respondent on Review.

CITY OF DEPOE BAY, et al.,

Cross-Plaintiffs,

v.

CAROL COLIP, et al.,

Cross-Defendants.

Trial Court No. 10C17842
Court of Appeals No. A151193
Supreme Court No. S063319

RESPONDENT COLIP'S BRIEF ON THE MERITS

December 2015

Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the Marion County circuit Court,
by the Honorable Thomas M. Hart, Judge

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I. INTRODUCTION

This personal injury action arises out of the collision of a car and a motorcycle at the intersection of a state highway and a county road within the limits of a city. Plaintiff, the motorcyclist, sued defendant Colip, the motorist, for alleged negligence in operating her vehicle. He also sued the state, the county, and the city for alleged negligence in failing to fix the intersection so as to prevent accidents of this sort or to warn motorists of the risk. Colip, in turn, filed cross-claims for contribution against the government defendants. The trial court ruled summarily that plaintiff's claims against those defendants were barred by the statute of limitations and that Colip's claims against them were barred by discretionary immunity. The court then entered a limited judgment in favor of the city, the county, and the state, dismissing them from the case. Plaintiff and Colip filed separate appeals, both seeking reversal of the judgment and remand of the case for a trial against all defendants. Meanwhile, the court abated what remained of the case, namely, plaintiff's claim against Colip, until the appeals end.[1]

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[1] By the way, the case title on the cover of this brief, which the Appellate Courts Records Section instructed the parties to use, might be confusing. As noted, Colip is a cross-*claimant* and the public bodies are cross-*defendants*, not the other way around. And Colip, as the sole cross-claimant, probably shouldn't have "*et al.*" after her name.

The Court of Appeals concluded that the county was entitled to summary judgment based on discretionary immunity, but that questions of fact precluded summary judgment for the city and state on that ground or statute of limitations grounds. *Turner v. Dept. of Transportation*, 270 Or App 353, 348 P3d 253 (2015). Accordingly, the court affirmed the judgment for the county, but reversed the judgment for the city and the state and remanded the case for trial against those parties. The state filed a petition for review, but only to challenge the discretionary-immunity ruling. The city didn't seek review of the decision against it, and plaintiffs didn't seek review of the decision for the county. So the proceedings in this court involve only the state and its discretionary immunity defense.

II. QUESTIONS PRESENTED

1. Is the government immune from liability for failing to take precautions against the risk of injury on property it owns when it doesn't even consider, let alone decide, whether to take them? In other words, is the government immune from liability for doing nothing when it doesn't even decide whether to do something?

2. Did ODOT decide not to fix the sight line hazard at the Highway 101 and Collins intersection? More precisely, did ODOT decide against fixing that hazard when it adopted a policy of putting the road sites with the worst crash records – which didn't include this intersection – on a list of road-safety projects to be funded by the legislature?

III. PROPOSED ANSWERS

1. The government is not immune from liability for failing to take precautions against the risk of injury on property it owns when it doesn't even consider, let alone decide, whether to take them. The government is not immune for doing nothing when it doesn't even decide whether to do something. Not deciding is not an option when, as here, there is a duty of care. Discretionary immunity applies to exercises of discretion – to decisions, not non-decisions.

2. ODOT did not decide *not* to fix the sight line hazard at the Highway 101 and Collins intersection. In particular, it didn't decide against fixing the hazard when it adopted a policy of putting the road sites with the most crashes on a list of road-safety projects to be funded. That's because

there are other ways for a project to make it onto the list, and because even off-list projects can get funding.

IV. MATERIAL FACTS

Plaintiff was travelling northbound on State Highway 101 through the City of Depoe Bay when his motorcycle collided with a car driven by Carol Colip, as she was turning left onto the highway from Collins Street, a county-owned road. He was seriously injured.

Turning onto busy 101 from Depoe Bay's side streets, including Collins, has always been hazardous, because cars are permitted to park diagonally along the highway, obstructing the sight lines of motorists. In the 1980s, ODOT installed signs on the highway prohibiting vehicles over six feet tall from parking there. TCF 2/15/12 (Second Johnson Dec), Ex 54 and Ex 63, p 70. And, in the early 1990s, ODOT added a fog line to the highway, which, ODOT believed, would prevent overlong vehicles from blocking traffic and making "entering the highway very dangerous." TCF 1/13/12 (Johnson Dec), Ex 13.

But these "fixes" didn't solve the problem, or at least didn't solve it at the intersection of 101 and Collins, as ODOT has known since at least 1995. That year, an ODOT traffic analyst wrote to his district manager about this

intersection, noting that it had a "significantly higher amount of accidents" than other intersections in the area. TCF 1/13/12 (Johnson Dec), Ex 21. He went on to say that, because of the "very substandard" sight line, drivers "turning from Collins onto the highway will experience unacceptable levels of service by the year 2000." *Id.*[2] Later in 1995, a Depoe Bay supervisor wrote to ODOT, warning it that it was still "very dangerous" to turn south onto 101 from Collins and suggesting that cars should not be allowed to do so. *Id.* at Ex 4. But not such action was taken.

A decade later, in early 2005, an ODOT traffic engineer, Angela Kargel, drafted yet another memo about the intersection. She reported that it was "very difficult" for motorists on Collins "to see far enough to judge a safe gap in traffic to enter the highway." *See* TCF 1/13/12 (Johnson Dec), Ex 25. But, still, nothing was done to rectify the problem. Later that year, the county decided to re-grade Collins to address the abrupt change of grade where the street meets the highway. *See* TCF 2/15/12 (Second Johnson Dec), Ex 61, 62. Before doing the work, the county had to get ODOT permission, *id.* at Ex 61, which presumably could have been conditioned on addressing the sight line problem. But, for reasons that are not disclosed in

[2] In 1996 and 1997, two different engineering firms reached similar conclusions about the intersection. TCF 1/13/12 (Johnson Dec), Exs 5 and 6.

this record, ODOT didn't impose that condition or even consider whether to impose it. Nor did ODOT do anything else to address this problem between 2005 and June 27, 2008, the date of the accident at issue here. As ODOT admits, before the accident, the agency never made a "specific" decision about the intersection. *See* ODOT's Merits Br 2 (admitting that it "did not consider" any of "the specific improvements suggested by plaintiff"); TCF 2/23/12 (Third Johnson Dec), Ex 67 (testimony from ODOT manager who does not recall ODOT making any "specific decision" about the intersection).

ODOT *did* make some decisions several months *after* the accident. Among other things, it added bump outs and crosswalks, which presumably improved the sight line for motorists turning onto 101 from Collins. *Compare* App 41 *with* App 43.

V. RELEVANT PROCEEDINGS

Plaintiff filed this lawsuit against Colip and ODOT,[3] alleging that Colip was negligent in the way she operated her vehicle and that ODOT was negligent in failing to do various things to make the Highway 101 and Collins intersection reasonably safe. Plaintiff's ER 5. ODOT moved for

[3] Plaintiff also sued the city and the county, but, as explained above, his claims against those public bodies are not before this court.

summary judgment on statute of limitations and discretionary immunity grounds. TCF 1/12/11 (ODOT's MSJ). With regard to the immunity defense, ODOT argued that it made a policy-based decision *not* to make safety-related changes to the intersection each time it submitted to the legislature a list of projects for the Statewide Transportation Improvement Program, or STIP, that did not include a request for appropriations to improve the intersection. *Id.* at 6-7. The intersection was left off the list, ODOT explained, because it did not rank high enough in ODOT's list of most dangerous road sites, based on crash data, compiled through a process known as the Safety Priority Index System, or SPIS. The decision to omit the intersection from the STIP list, ODOT argued, was an exercise of discretion that entitled it to immunity from liability for not having made the intersection safer. *Id.*

The trial court granted ODOT's motion on statute of limitation grounds and thus did not rule on its immunity defense. Pltf's ER 96-98; Tr 14-15. In the meantime, Colip filed a crossclaim for contribution against the governmental defendants in which she reiterated the allegations of negligence in plaintiff's complaint and added some new ones. Colip's ER 1-6. In particular, she alleged that ODOT was negligent in failing to (1) prohibit diagonal parking along the highway; (2) restrict left turns onto the

highway; (3) post signs warning highway users about the intersection; (4) close the intersection to traffic; or (5) take any other measures to increase visibility for drivers approaching and entering the intersection or to otherwise mitigate the sight distance problem. Colip's ER 2-3. Because these acts of negligence "made the intersection more dangerous to the traveling public," ODOT "should contribute to any amount owed to Plaintiff," Colip alleged.

ODOT moved for summary judgment against Colip, re-raising the immunity arguments that it raised earlier against plaintiff. TCF 12/8/11 (ODOT's MSJ against Colip). The court granted the motion, and then entered a limited judgment in favor of the state and against plaintiff and Colip. TCF 3/8/12 (Order); Pltf's ER 99.[4]

On appeal, the Court of Appeals reversed the trial court's judgment for ODOT. *Turner v. Department of Transportation*, 270 Or App 353, 365-68, 348 P3d 253 (2015). The court concluded that the summary judgment record does not establish that ODOT's crash-data driven ranking system is the "exclusive mechanism" for including a safety-related project in the STIP or for addressing safety issues on state highways. *Id.* at 367. To the contrary, the court explained, there are *other* ways the intersection could

[4] The trial court then abated what was left of the case – plaintiff's negligence claim against Colip – pending the outcome of the appeals.

have made it into the STIP and *other* ways the sight line problem could have been addressed without including the intersection in the STIP. *Id.* at 367-68. Accordingly, the court concluded that ODOT was not entitled to summary judgment based on discretionary immunity.

VI. SUMMARY OF ARGUMENT

Plaintiff and Colip claim that ODOT is liable for failing to take reasonable steps to protect motorists from the sight line hazard at the Highway 101 and Collins intersection, such as restricting parking along the highway, prohibiting left turns from Collins, closing the intersection, and posting warning signs. ODOT argues that it's immune from liability because the failure to make these improvements was the result of a deliberate policy choice by authorized policy-makers and, therefore, that ODOT is entitled to "discretionary" immunity under ORS 30.265(3)(c).[5]

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[5] At the time of the events at issue in this case, ORS 30.265(3) provided:

> "Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:
>
> "* * * * *

That might be true if ODOT had in fact decided, for policy reasons, not to fix the problem at that intersection. But that isn't what happened. ODOT didn't decide *not* to fix that problem. There is no evidence to the contrary. The only decision ODOT points to is its decision to use the SPIS index as one method of determining which highway-improvement projects should be included on the STIP list and thus become eligible for line-item funding. The Highway 101 and Collins intersection did not make it on to the list that way, because it didn't have a high enough SPIS rating. But, contrary to the state's suggestion, the SPIS is not the only way to get onto the STIP list. What is more, off-list projects can still get funded. Failure to make the list doesn't prevent a project from being undertaken, if necessary for public safety. If follows that, even if the state exercised discretion in deciding to use the SPIS to put projects on the STIP, it still did not exercise discretion in failing to fix the Highway 101 and Collins intersection. And, for that, the state is not immune.

> "(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

In 2011, the above language was moved to ORS 30.265(6). *See* Or Laws 2011, ch 270, § 1. This brief, like ODOT's brief, uses the old statutory number.

VII. ARGUMENT

The OTCA makes public bodies liable for their torts and those of their officers, employees and agents. *See generally* ORS 30.260 to 30.300. There is an exception to liability under the OTCA, however, for what are commonly known as "discretionary functions." Under ORS 30.265(3)(c), public bodies and their officers, employees, and agents are "immune from liability" for claims that are "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."

The so-called discretionary immunity is based on the separation-of-powers doctrine, which prohibits one branch of government from exercising the "functions" of another branch. *See Stevenson v. State Dept. of Transp.*, 290 Or 3, 10 and n 3, 619 P2d 247 (1980); *see* Or Const. Art III, § 1. Discretionary immunity thus shields from judicial oversight the policy decisions reserved for the executive or legislative branches of government. *See, e.g., Hall v. State*, 290 Or 19, 29, 619 P2d 256 (1980) (claim cannot be predicated on the ground that the "legislature should have allocated [sufficient] funds"). It protects those branches from liability for decisions they make while exercising functions that are reserved for their discretion, if the decision involves policy considerations "such as the availability of funds,

public acceptance, and the ordering of priorities." *Smith v. Cooper*, 256 Or 485, 506, 475 P2d 78 (1970).

For the reasons set forth below, ODOT has not established that it is entitled to immunity for failing to fix the sight line problem at the intersection of Highway 101 and Collins – or at least it hasn't established that it is entitled to immunity as a matter of law.

A. No Immunity for Non-Decision

When the government has a duty of care, it has to decide what care to take. It can't not decide. As this court explained in *Garrison v. Deschutes County*, 334 Or 264, 274, 48 P3d 807 (2002), "the 'discretionary immunity' doctrine does not immunize a decision not to exercise care at all, if action of *some* kind is required." (Emphasis in original.) *See also id.* ("In other words, the decision whether to protect the public by taking preventive measures, or by warning of a danger, if legally required, is not discretionary[.]"); *Miller v. Grants Pass Irrigation*, 297 Or 312, 320, 686 P2d 324 (1984) ("If there is a legal duty to protect the public by warning of a danger or by taking preventative measures, or both, the choice of means may be discretionary, but the decision whether or not to do so at all is, by definition, not discretionary."); *id.* at 321 ("To repeat, if the district had such

a legal duty [to warn of or prevent harm], it had no discretion to 'determine not to exercise its discretion' to choose one or another course of action, though the choice itself might be the exercise of discretion."); *Mosley v. Portland School District No. 1J.*, 315 Or 84, 92, 843 P2d 41 (1992) (" A public body that owes a particular duty of care * * * has wide policy discretion in choosing the means by which to carry out that duty. The range of permissible choices does not, however, including the choice of not exercising care")."

Even when it owes a duty of care, the government can decide not to take certain precautions. *E.g.*, *Garrison*. But it has to decide to do *that* – to take no precautions – in order to enjoy "discretionary" immunity. *Id.* Doing nothing has to be an exercise of discretion, a conscious choice, not just happenstance. To put it another way, there is no immunity for inaction that results solely from indecision. Or to put it yet another way, where the government has a duty of care, it must decide to do *something*, even if that something is *nothing*. It can decide not to enact new safety measures because, for example, it concludes that existing measures are sufficient. But it has to decide one way or the other. Immunity attaches to policy choices, not failing to choose. Fence-sitting, procrastination, and shirking aren't protected – not where there is a duty of care.

Little v. Wimmer, 303 Or 580, 588, 739 P2d 564 (1987), illustrates this point. In that case, the plaintiffs alleged that they were injured in an accident caused by ODOT's negligence in maintaining an intersection in such a fashion as to prevent motorists from seeing approaching vehicles. ODOT "had reason to know of the high number of accidents occurring at or near this intersection," 303 Or at 584, but took no steps to rectify the situation for more than ten years. This court held that ODOT did not enjoy immunity for its "continuing *non-decision*." *Id.* at 588 (emphasis added).

At the same time, and for the same reason, one decision doesn't immunize the government for not making another, at least where the one doesn't preclude the other. *Stevenson* is on point. In that case, the plaintiff claimed that ODOT was negligent in failing to install shields on the traffic lights in an intersection in order to reduce the confusion motorist sometimes had about which lights controlled which intersection. ODOT argued that it was entitled to a directed verdict on discretionary immunity grounds because the evidence showed that it was following the national guidelines that it had adopted for intersection design. This court held that ODOT was not entitled to discretionary immunity, or at least wasn't entitled to it as a matter of law, because, even if adopting the guidelines was a policy decision, the guidelines didn't "prevent" ODOT from making "appropriate changes" to

the signals, and there was no evidence of some other policy-based decision not to shield the lights. *Id.* at 15-16.

Vokoun v. City of Lake Oswego, 335 Or 19, 33-34, 56 P3d 396 (2002), illustrates the same rule in a different context. In *Vokoun*, the plaintiffs claimed that the City of Lake Oswego was negligent in failing to repair and maintain a storm drain and that the negligence caused a landslide that damaged their property. *Vokoun*, 335 Or at 23. The city argued that it was entitled to discretionary immunity because it had not included this particular storm drain in the multi-year capital improvement plan it had adopted in the years preceding the landslide. This court disagreed. *Id.* at 33. It concluded that the city was not entitled to immunity because the multi-year plan "would not necessarily have *barred* the city from making the necessary repairs." *Id.* (emphasis added). The repairs also *could* have been funded through the adoption of a supplemental budget, the court explained, and there was no evidence that the city had considered whether to fund the repairs that way. *Id.*

In *Stevenson* and *Vokoun*, the public bodies offered policy-based explanations for their inaction. Even so, they were not entitled to discretionary immunity because their policy choices did not "prevent" or "bar" them from taking action anyway. They were not entitled to immunity

because, in those cases, it was the failure to act *notwithstanding* the policy decision – as opposed to the failure to make a *different* policy decision – that was under scrutiny.

B. ODOT Had a Nondiscretionary Duty of Care

As this court explained in *Hughes v. Wilson*, 345 Or 491, 502, 199 P3d 305 (2008), public bodies "*must* make public property reasonably safe for members of the public who use the property" by eliminating conditions that create an unreasonable risk of harm or by warning the public of the risks, so harm can be avoided. 345 Or at 497 (emphasis added). This duty, arising from the common law duty owed by a landowner to an invitee, is "nondiscretionary," meaning it can't be avoided. *Id.*[6] The choice of how to fulfill the duty might be discretionary, but ignoring it altogether is not within the range of permissible choices. *Id.* at 496*; see also Miller*, 297 Or at 320 ("If there is a legal duty to protect the public by warning of a danger or by taking preventative measures, or both, the choice of means may be

[6] The situation is different when the public body has the discretion not to decide. In *Miller*, for example, this court held that the state marine board was immune from liability for failing to make a decision that it had the discretion not to make. *See Miller*, 297 Or at 317-18 ("the board had no mandatory duty to consider or to decide whether to consider the subject; either action or inaction was discretionary").

discretionary, but the decision whether or not to do so at all is, by definition, not discretionary.").

State highways are public property. ODOT, then, has a nondiscretionary duty to eliminate conditions on state highways that create an unreasonable risk of harm, or to warn motorists of the risks so they can avoid them.[7] Plaintiff and Colip allege that ODOT was negligent in both respects: not eliminating and failing to warn. More specifically, they allege that ODOT was negligent in failing to (1) prohibit diagonal parking along the highway; (2) restrict left turns onto the highway; (3) warn highway users of the dangerous intersection or the impaired sight distance; (4) close the intersection to traffic; or (5) increase visibility for drivers approaching and entering the intersection or otherwise mitigate the sight distance problem. Plaintiff's ER 7-8; Colip's ER 2-3.

[7] The state also has a statutory duty, arising from the legislature's decision to assign responsibility over state highways to the Oregon Transportation Commission, ORS 366.205(1), and the Oregon Department of Transportation, ORS 366.290(1). *See Little*, 303 Or at 589 (concluding that ORS 366.205(1) and ORS 366.290(1) "impose upon the state the duty to make highway travel reasonably safe to the general public"); *Hughes*, 345 Or at 497 (concluding that analogous statutes making counties responsible for county roads effectively codify common law duty to make public property reasonably safe).

As explained next, ODOT is not immune because it never got around to considering, let alone making a decision about, how to address the sight line hazard.

C. ODOT Did Not Make A Decision About the Intersection

As explained above, ODOT has a duty to make its highways safe for motorists. And there is ample evidence that Highway 101, where it intersects Collins, is not safe because it lacks the improvements identified in plaintiff's and Colip's claims. There is also evidence that ODOT knew about the problem – for the longest time. But there is no evidence that ODOT ever considered, let alone decided, whether to make those improvements. There is evidence, instead, of a prolonged failure to address a problem – of what *Little* called a "continuing non-decision." There is, in short, no evidence of an exercise of discretion and, hence, no basis for a defense of discretionary immunity.

ODOT recognizes that it "is entitled to immunity [only] if it can point the court to a policy decision encompassing the alleged failures at the heart of plaintiff's negligence claim." ODOT's Merits Br 9. And it concedes that it did not ever make a decision not to fix the hazard at Highway 101 and Collins. *See id.* at 2 (admitting that "did not consider" any of "the specific

improvements suggested by plaintiff"); "); *see also* TCF 2/23/12 (Third Johnson Dec), Ex 67 (testimony from ODOT district manager, who does not recall ODOT making any "specific decision" about the intersection). It argues, however, that it is still entitled to immunity because it engaged in what it calls a "global and non-particularized decision-making process" for highway safety projects – one that "obviates the need" to consider the hazards at any given intersection. *Id.* at 12. That process, ODOT says, is the practice of using the SPIS rankings of crash sites to determine which road-improvement projects to include on the STIP list of projects to be funded. According to ODOT, it has decided to include on the STIP list the "worst" sites in the SPIS rankings – the 5 percent of sites with the highest ranking. The intersection at issue here was not among the highest ranked before plaintiff's accident. Therefore, ODOT argues, the decision to use the SPIS rankings to create the STIP list was, in effect, a decision not to fix that intersection before the accident. *Id.* at 9-11.

The flaws in that argument are the assumptions that only the highest sites in the SPIS rankings get on the STIP list and that off-list safety projects don't get funded. Neither assumption is correct. A high SPIS ranking is just one way for a project to be identified – or to qualify – for the STIP. A project can be *identified* for consideration by request from a variety of

sources, including citizens, another public body, and ODOT staff and managers. App 11-12 and 26-28. And a project can *qualify* for the STIP based on a "cost-benefit ratio of 1.0 or greater" or because the work has been justified by a "risk narrative." App 6, 10-14.[8]

Even if the intersection here didn't make the STIP list, one way or another, it still could have been fixed. As one of its engineers explained, ODOT can still make road improvements "[o]f minor sorts," using funds from a "maintenance budget" or from "a flexible safety bucket that appears as a line item" in the STIP. *See* App 9, 22-24, and 29-35.[9] Thus, ODOT

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[8] The procedures for determining eligibility under the cost-benefit analysis and the risk narrative are described in the ODOT Highway Safety Guide. For the court's convenience, the guide is included in the appendix to this brief. *See* App 1-21.

[9] For what it's worth, this explanation is consistent with the STIP Users' Guide, which indicates that the STIP is only used to fund "major" highway projects or projects of "regional or statewide significance." *See STIP Users' Guide*, p 1-1 (http://www.oregon.gov/ODOT/TD/STIP/documents/stipusers.pdf) and *Oregon's Statewide Transportation Improvement Program:* A *Citizens' Primer*, p 5 (http://www.oregon.gov/ODOT/TD/STIP/documents/primereng.pdf) (last viewed December 9, 2015).

ODOT asks the court to take judicial notice of these on-line publications, which explain the STIP process. ODOT's Merits Br 10 n 5. Colip does not object to this request to the extent these publications provide a *general* overview of the purpose of the STIP and its regulatory framework.

Colip does object, however, to using these publications to fill-in any missing details about the STIPs that were in place in the years preceding the

could have placed speed limit and no-parking signs at the Highway 101 and Collins intersection without including the intersection in the STIP, and those changes might have been enough to save plaintiff from harm.[10] It also could have conditioned its approval of the county's 2005 re-grading project on changes to the intersection. *See* TCF 2/15/12 (Second Johnson Dec), Ex 61, 62; *see also* App 27 and TCF 1/13/12 (Johnson Dec), Ex 16 (ODOT can conduct a "safety review" when considering whether to approve "an upcoming construction project"). Indeed, several months after plaintiff's accident, ODOT made changes to the intersection, adding bump outs and a crosswalk, which presumably improved the sight line for motorists turning onto 101 from Collins. *Compare* App 41 *with* App 43. As the Court of Appeals noted, it can be inferred from the timing of these changes that the funding for them was not part of the earlier-adopted STIP.

2008 accident in this case or how those particular STIPs were created. Many of the on-line publications are undated, and there's no way to tell whether the detailed processes the documents describe (in particular, the procedures they describe for each specific region) were in place in the years preceding the accident.

[10] *See* TCF 2/15/12 (Second Johnson Dec), Ex 65, p 32 (indicating that a "no parking" sign would have cost only $250 to $300); *id.* at Ex 34 (State Traffic Engineer has authority to set speeds on state highways); TCF 1/13/12 (Johnson Dec), Ex 27 (State Traffic Engineer has "final approval authority for all parking prohibitions on state highways"); *id.* at Ex 14 (State Traffic Engineer has ultimate authority over parking, including parking restrictions, along the highways); App 30-31 (funds for altering parking along 101 could come out of a maintenance budget).

In sum, ODOT's decision to put the top SPIS-ranked sites on the STIP list was not a decision *not* to fix the Highway 101 and Collins intersection. The SPIS-to-STIP process was not, as ODOT suggests, a "global decision" that encompassed all road improvement projects in the state. ODOT's Merits Br 19. Therefore, the process did not immunize ODOT for failing to make a decision about improvements at this particular intersection. The STIP is no different than Lake Oswego's capital improvement plan, at issue in *Vokoun*. As explained above, the plan did not include repair of the drainage outfall. But the city could have included the repairs in a supplemental budget. So adoption of the plan was not the equivalent of a decision not repair. 335 Or at 33; *see also Stevenson*, 290 Or at 16 (no immunity because nothing "in the [traffic control] manual *prevented* appropriate changes to existing traffic signals") (emphasis added).

ODOT argues that *Vokoun* is not controlling here because, in that case, the city never "considered" putting the storm drain in its improvement plan and, in this case, ODOT made a "global decision" when it adopted the STIP that made a "particularized" decision about the intersection unnecessary. ODOT's Merits Br 13, 19.

ODOT misreads *Vokoun*. That case did not turn on whether the city "considered" putting the storm drain in its capital improvement plan,

although it's true that it didn't. As explained above, it turned instead on whether the plan "necessarily * * * *barred* the city from making the necessary repairs." *Vokoun*, 335 Or at 33 (emphasis added). This court determined that it didn't because the repairs *could* have been made another way, through the adoption of a supplemental budget, and there was no evidence that the city had considered whether to fund the repairs that way. *Id.* One decision doesn't immunize the public body for not making another, if the first doesn't preclude the second.

In the end, ODOT hasn't shown that it *can't* take measures to make an intersection safer unless the intersection ranks high enough on in the SPIS rankings to be included, for that reason alone, in the STIP. The record shows, instead, that a project also can qualify for the STIP for other reasons.[11] A jury could conclude, then, that the SPIS-to-STIP process does not result in a "global decision" about whether to improve any and all intersections. The process contemplates, instead, that each intersection and roadside will (or at least can) receive some level of particularized consideration.

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[11] ODOT appears to concede as much. *See* ODOT's Merits Br 20 (arguing that "ODOT is entitled to immunity notwithstanding the potential availability of other mechanisms for funding improvements to the intersection at issue").

This intersection didn't get that. There is no evidence that ODOT actually considered whether the intersection qualified for the STIP under the other two options – based on the cost-benefit ratio or a risk narrative – in the years preceding the accident. And there's no evidence that ODOT considered the various non-STIP options. In short, ODOT has not shown that it made a decision about the intersection, let alone a policy decision. For all this record shows, it just as easily could have been because no one at ODOT thought to do the cost-benefit analysis or to prepare a risk narrative or to consider to act outside of the STIP process. As in *Little*, 303 Or at 588, ODOT has failed to establish that its continuing failure to address a known hazard was based on a policy decision.

D. At Most, the SPIS-to-STIP Process Makes the State Partially Immune

ODOT does not argue on review (nor did it argue below) that the STIP should be viewed as a policy decision not to make any particular improvement to the Highway 101 and Collins intersection, such as prohibiting diagonal parking on the highway or prohibiting left turns from Collins.[12] Nor can it be viewed that way because, as explained above, there

[12] To the contrary, ODOT admits that it "did not consider" any of "the specific improvements suggested by plaintiff." ODOT's Merits Br 2.

are several ways for a project to be included in the STIP and inclusion in the STIP is not the only way to fund an improvement. But even if the STIP could be viewed as a decision not to take a particular precaution, it wouldn't get ODOT very far. In that situation, ODOT would be immune only from liability for failing to take *that* precaution, not others.

Take, for example, traffic signals. Assuming for the sake of argument that the STIP actually qualified as a policy-decision not to allocate funds for traffic signals at the intersection, and that the decision not to do so was within the range of permissible policy choices, ODOT may be immune to the extent plaintiff and Colip are claiming that it was negligent in failing to install traffic signals. It would not be immune, however, for failing to make other changes to the intersection.

If the STIP depends on crash-data only, as ODOT contends, if including the intersection in the STIP was the only way traffic signals for the intersection could be funded, and if not funding them was a permissible policy decision, ODOT might be immune to the extent plaintiff and Colip allege that it was negligent in failing to install traffic signals. But *only* to that extent. There are a number of actions ODOT could have taken, short of installing traffic signals, which would have made the intersection safer, including restricting parking near the intersection, prohibiting left-hand turns

onto the highway, and/or warning drivers about the intersection. And ODOT would not be immune for failing to make these *other* changes just because it made a policy choice not to install traffic signals. Choosing not to do anything was not within the "range of permissible choices." *Mosley*, 315 Or at 92.

E. The Federal Cases ODOT Cites Are Inapposite

ODOT does not cite any cases from this court to support its "global decision" interpretation of the SPIS and STIP processes. That's not surprising – there are no such cases. So ODOT cites, instead, to two Third Circuit cases, *Mitchell v. United States*, 225 F3d 361, 364 (3d Cir 2000), *cert den*, 532 US 1007 (2001), and *Merando v. United States*, 517 F3d 160 (3d Cir 2008), both of which address the scope of the discretionary function exception to the federal government's liability under the Federal Tort Claims Act (FTCA).

These cases have limited value here because this court has rejected the "planning-operational" approach that federal courts have adopted for analyzing discretionary immunity under the FTCA. *See Smith*, 256 Or at 504 ("we do not find the planning-operational dichotomy to be of assistance and do not adopt it"). They are also inconsistent with *Hughes*, which, as

explained above, holds that "public landowners *must* make public property reasonably safe for members of the public who use the property in a manner that is consistent with its public purpose." 345 Or at 497 (emphasis added).

In any event, these federal cases are distinguishable because they actually *did* involve policy decisions that were, to use ODOT's terminology, "global decisions." At issue in *Mitchell* and *Merando* were the National Park Service's failure to address dangerous conditions, a culvert and a tree, along a highway running through a national recreation area. In both of these cases, the court held that the park service was immune under the discretionary function exception to the FTCA because it had a limited budget for identifying and repairing the most dangerous conditions in that particular park and had established specific plans for determining how it would identify hazardous trees in the park and how it would allocate its limited funds for repairing the various hazards it had identified on the highway running through it.

In *Merando*, the park service decided to inspect trees in low-use areas of the park by doing drive-by surveys. *Merando*, 517 F3d at 170. And the defect in the tree that fell on the roadway, injuring the plaintiff, was never identified as hazardous in any of the drive-by survey's the park service did.

In *Mitchell*, the park service determined that it would focus on "a few highly dangerous portions" of the highway, rather than the whole thing. It determined that the culvert where the plaintiff was injured was, relatively speaking, "low risk" compared to other problems on the highway it needed to address, so it chose to focus on the other areas first. *Mitchell*, 225 F3d at 364, 366.

This case is different. The crash-data driven SPIS isn't like the plans the park service made in *Merando* or *Mitchell*. It clearly isn't a comprehensive method for identifying which safety projects will be included in the STIP. And the STIP isn't a comprehensive method of determining which safety projects to fund.

In any event, to the extent this court is inclined to look to federal cases for guidance, or reassurance, it need look no further than our home circuit. In a number of recent cases, the Ninth Circuit has cautioned against reading the discretionary function exception too broadly, especially in public property cases, where the government is functioning as a "landowner." *O'Toole v. U.S.*, 295 F3d 1029, 1037 (9th Cir 2002). After all, as the court has explained, "[e]very slip and fall, every failure to warn, every inspection and maintenance decision can be couched in terms of policy choices based on allocation of limited resources." *Id.* If discretionary immunity turned on

the ability of the government to connect the injury to budget decision, the exception would swallow the rule. *See Terbush v. U.S.*, 516 F3d 1125 (9th Cir 2008) ("we decline to adopt a rule that would eviscerate the original purpose of the statute by an overly-generous reading of the policy-based prong of the [discretionary function] exception").

Nearly everything ODOT does or doesn't do – indeed, nearly everything *any* state agency does or doesn't do – can be tied in some way to a budgetary decision of some sort. But it's not enough to connect the inaction to a budgetary decision. It's not enough for the public body to show that some action could have been, but wasn't, included in the budget. As explained above, in Oregon, the discretionary function exception applies only when a budget-driven decision actually *prevents* the public body from taking a particular action. Even then, it only immunizes the public body to the extent it is being sued for failing to take *that* particular action. It does not make the public body immune for failing to take action of *some* kind when, as in this case, that's not a policy choice it has the discretion to make. At the very least, ODOT could have warned motorists about the intersection. It didn't even do that.

VIII. CONCLUSION

This court should affirm the decision of the Court of Appeals, which reverses the limited judgment in favor of the state and the city, remands the case for trial against them and Colip.

Dated: December 10, 2015.

Respectfully submitted,

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I certify that this brief complies with the 14,000 word-count limitation in ORAP 5.05(2)(b)(i) and that the word count of this brief, as described in ORAP 5.05(2)(a), is 6,667 words.

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s/ Thomas M. Christ

Thomas M. Christ

Certificate of Filing and Service

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