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.

Marion County Circuit Court No. 10C17842

CA A151193

SC S063319

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REPLY 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 District Court for Marion County
Honorable THOMAS M. HART, Judge

_____

Opinion Filed: April 15, 2015
Author of Opinion: Timothy J. Sercombe, Presiding Judge
Concurring Judges: Erika L. Hadlock, Judge, and Douglas L. Tookey, Judge

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INTRODUCTION

This case involves claims that the Oregon Department of Transportation (ODOT) was negligent for not improving the safety of a particular highway intersection. ODOT asserts that it is immune from liability on those claims under the doctrine of discretionary immunity. That doctrine requires ODOT to point to a decision that entitles it to such immunity. Here, ODOT points to a systematic and data-driven decision for allocating limited funds among potential safety improvement projects. (ODOT Br 9–17). At issue is whether that decision is the sort of decision that will support discretionary immunity.

In response, respondent Turner has assumed away the legal question on review, asserting additional facts or factual disputes that are immaterial under ODOT's proposed rule of law. Colip, on the other hand, confronts that legal question but argues—incorrectly—that ODOT's data-driven budgetary decision cannot give rise to immunity. Finally, both respondents mistakenly assert that ODOT's proposed rule would amount to a rule of blanket immunity. Below, ODOT discusses each of those issues in turn.

A. Respondent Turner's facts are irrelevant under ODOT's proposed rule of law.

Respondent Turner's brief on the merits focuses primarily on the extent to which officials did or did not consider particular improvements at the

intersection in question, reciting various facts that he believes ODOT overlooked in its brief on the merits. (*See* Turner Br 1–2, 5–14). But, by focusing on those factual questions, Turner misses the thrust of ODOT's argument and simply assumes away the issue on review.

For example, to dispute ODOT's assertion that it did not conduct a particularized study of the particular intersection at issue in this case, Turner points to actions outside its data-driven budget decision (the STIP process). (Turner Br 1). But ODOT asserts that the STIP process supports immunity because that process amounts to a decision not to improve the intersection. If ODOT is correct that the STIP process gives rise to immunity, then the extent to which officials acting outside that process did or did not consider particular improvements is immaterial. Similarly, to dispute ODOT's assertion that it considered the intersection for possible safety improvements as part of a periodic and systematic statewide safety review, Turner assumes that the data-driven process is not consideration at all. (Turner Br 2). But that is the very question at issue. (Turner Br 2). Finally, Turner seems to dispute ODOT's assertion that it decided that accident data supported prioritizing improvement projects at locations other than the intersection at issue, but points only to facts regarding ODOT's actions—through other decision-making mechanisms—with

respect to that intersection *after* the events at issue. (Turner Br 2). Again, those actions are immaterial under ODOT's proposed rule of law. [1]

B. Respondent Colip is mistaken that the decision at issue cannot give rise to discretionary immunity.

Unlike Turner, Colip more squarely confronts the issue presented in this case: whether ODOT can claim immunity based on its data-driven STIP process. Disputing immunity, Colip advances two arguments. First, she argues that discretionary immunity "applies only when a budget-driven decision actually *prevents* the public body from taking a particular action." (Colip Br 29 (emphasis in original); *see also id*. at 22 (arguing that "ODOT's decision * * * was not a decision *not* to fix" the intersection at issue (emphasis in original)).

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[1] Turner also asserts that ODOT's focus on its data-driven decision reflects a position contrary to the arguments that ODOT previously made in this case. (Turner Br 3). But he acknowledges that ODOT's argument here is the same as the one it presented to the trial court. (Turner Br 3 n 6). And the Court of Appeals addressed that same argument:

> The state first argues that all improvements or changes to [the intersection] * * * were considered, but not funded, in the State of Oregon Statewide Transportation Improvement Program (STIP), and the adoption of the STIP immunizes the state from liability for the negligence alleged in the amended complaint and cross-claims. The summary judgment record does not bear out the state's assertion.

Turner v. State ex rel. Dept. of Transp., 270 Or App 353, 365, 348 P3d 253 (2015).

Thus, the Court of Appeals expressly rejected the very argument that ODOT advances in this court. That is the ruling on review in this case.

Second, she argues that ODOT had no discretion to "fail[] to take action of *some* kind" with respect to the intersection at issue. (Colip Br 29). As discussed below, however, neither argument is well taken.

1. Budget-driven decisions never fully *prevent* a public body from taking a particular action, but they nevertheless give rise to discretionary immunity.

Colip argues that ODOT's data-driven STIP process cannot give rise to immunity here because that decision was "not a decision *not* to fix" the intersection at issue. (Colip Br 22). In her view, ODOT is not entitled to immunity unless it can identify a decision that affirmatively prevented it from implementing the particular safety improvements underlying the negligence claims here. That is, Colip argues that "one decision doesn't immunize the government for not making another, at least where the one doesn't preclude the other." (Colip Br 14).

But if that proposition were correct, then budgetary decisions could never give rise to discretionary immunity. A budgetary decision to allocate funds to one project over another never amounts to an affirmative decision *not* to perform the unfunded project. When making difficult prioritization decisions, a government body necessarily is always willing to perform every unprioritized project if funds are available for that purpose. For that reason, a budgetary decision never precludes action in the way that Colip argues is required under the discretionary immunity doctrine. Rather, such decisions preclude action as

a *practical* matter, given the limited nature of public funding, and in that way they reflect a decision not to perform unfunded projects.

Any rule to the contrary would be inconsistent with the purposes of discretionary immunity. Budgetary decisions are at the core of what discretionary immunity insulates from judicial review. *See Stevenson v. State Dept. of Transp.*, 290 Or 3, 8–9, 619 P2d 247 (1980) (explaining that discretionary immunity protects the executive's prerogative to consider "'the whole spectrum of the ingredients for governmental decisions such as *the availability of funds*, public acceptance, *order of priority*, etc.'" (emphases added, quoting *Smith v. Cooper*, 256 Or 485, 506, 511, 475 P2d 78 (1970))).

This court's decision in *Garrison v. Deschutes County*, 334 Or 264, 48 P3d 807 (2002), reveals how immunity can arise from a financially-motivated decision to pursue one course of action over another. That case involved an injury at a county-owned waste transfer station, which was designed such that users could back their vehicles onto an upper concrete slab and dump their waste into semi-truck trailers waiting on a concrete slab below. *Garrison*, 334 Or at 267. The county had placed a railroad tie at the edge of the upper slab as a wheel stop for vehicles, but no other measures prevented users from falling from the upper slab to the lower one. *Id*. At issue was whether the county should have improved safety by, for example, erecting a barrier to prevent falls. *Id*. at 268. This court concluded that the county was immune because its

officers had decided against that course of action for reasons including concerns that "refuse could become entangled in the barrier, creating a risk for patrons or employees attempting to untangle it" or that "refuse that was prevented from falling over the edge by the barrier could create a slip hazard." *Id.* at 269. In light of those concerns, the county officers had concluded that a barrier "would increase the county's cost to operate the facility because more personnel would be required to keep the area free of debris." *Id.*

That is, the county in *Garrison* was immune even though its decision did not fully preclude erecting a barrier. The county officers' conclusions reveal that, given enough funds to employ personnel to clear debris, the county would have erected a barrier. Thus, the county's decision reflects a choice to allow one recognized problem to persist rather than creating a worse problem that would be too costly to solve; that is, that decision reflects a decision not to do something because doing so would have been too expensive. *See Garrison*, 334 Or at 275–76 (explaining that the benefits of the county's chosen design included that it was the "least expensive"). And that budgetary decision was entitled to immunity. *Id.* at 276 (rejecting, as "the kind of second-guessing that is defeated by immunity under ORS 30.265(3)(c)," the argument that the county did not satisfy its duty of care by "deciding that safety measures would not be adopted, whether due to expense, inconvenience, or some other reason").

Colip also seems to suggest that the Ninth Circuit has been reluctant to allow discretionary immunity for budgetary decisions, but the cases she cites do not support that proposition. (Colip Br 28–29). For example, one of Colip's cited cases recognizes that maintenance decisions can involve a balancing of "fiscal policy and budgetary constraints." *Terbush v. United States*, 516 F3d 1125, 1134 (9th Cir 2008).[2] The trouble in that case was that such decisions do not always involve such policy considerations, and the government had not established whether the decisions at issue were based on such considerations. *Id*. For that reason, the Ninth Circuit remanded to allow the government to develop a record on that issue. *Id*. at 1135. Here, of course, ODOT has established that its safety improvement decisions involve budgetary constraints.

In short, discretionary immunity applies to budgetary decisions to fund one project over another, even if that decision does not fully "preclude" or "prevent" action on the other. Colip's proposed rule to the contrary would mean that budgetary decisions *never* give rise to immunity—a result that does not square with the discretionary immunity doctrine in general, or with this court's cases in particular. Indeed, the irony in Colip's proposed rule is

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[2] Another Ninth Circuit case also explicitly recognized that an agency may "invoke the discretionary function exception based on budgetary considerations." *Nat'l Union Fire Ins. v. United States*, 115 F3d 1415, 1421–22 (9th Cir 1997), *cert den*, 522 US 1116 (1998).

manifest. The legislature cannot have intended that, when an agency has insufficient funds to fix all problems, that agency must then be liable for any claims arising from unfixed problems, especially when the agency's funding limitations result from legislative policy choices.

2. ODOT was entitled to discharge its duty of care by improving the safety of some locations rather than others.

Colip is also mistaken that ODOT's duty of care required it to do something at the intersection in question. In her view, ODOT had no discretion to decline to improve the safety of that particular intersection.[3] (Colip Br 13). She is correct that ODOT's duty of care requires it to consider and improve the safety of the roads for which it is responsible. But that duty does not require it to improve the safety of *every* road in the state, at least not without unlimited funding. That is, so long as it is subject to funding constraints, ODOT is entitled—and arguably *required*—to determine how to allocate that funding in order to maximize safety on state roads. (*See* ODOT Br at 8 (explaining that the discharge of ODOT's duty of care "may often require declining to act on some tasks in order to allow action on other tasks")).

Again, *Garrison* is instructive. There, the county had limited funds to build and maintain the transfer station, and the county concluded that

[3] Oregon Trial Lawyers Association, appearing as amicus curiae, presents a similar argument in its brief. That argument is without merit for the reasons explained above in response to respondent Colip's argument.

maximizing safety required allowing a dangerous condition to persist because fixing it would have created other dangers. That is, the county made a decision to prioritize mitigating one danger over mitigating another, and the county was entitled to immunity for permitting the unmitigated danger to persist. As this court explained in *Stevenson*, when officials conclude that "their budgets [will] not permit them to provide all desirable safety features and that the public [will] be better served by facilities other than [certain safety features], that [will] constitute the immune exercise of governmental discretion." 290 Or at 14–15; *see also id*. at 15 (explaining that, where an agency's "budget would permit the repaving of either of two sections of a highway but not both," the "decision to repair one rather than the other" can give rise to immunity if based on budgetary priorities).

If a government body is entitled to immunity for prioritizing one safety improvement over another at one location, logic suggests that a government body should also enjoy immunity for using a similar analysis to prioritize a safety improvement at one location over a competing improvement at another location. Perhaps a different analysis applies when a budget is tied to a particular location. But where, as here, the agency has a global budget for improving the aggregate safety of multiple locations, the agency's duty of care must be analyzed in the aggregate.

C. ODOT's proposed rule does not amount to a rule of blanket immunity.

Finally, ODOT reiterates what it explained its opening brief—that its proposed rule will not create blanket immunity. (*See* ODOT Br 16–17). Turner's and Colip's assertions to the contrary are wrong and fail to acknowledge the scenarios that ODOT enumerated in its opening brief as examples when its proposed rule would not support immunity. (*See* Turner Br 17; Colip Br 29).

As explained in its opening brief, ODOT's rule would not immunize ODOT against claims of negligence in the ministerial implementation of its data-driven process or in performing improvements at the sites selected through that process. Similarly, its data-driven process could not be characterized as a decision with respect to dangers not captured in the data underlying that process. In fact, ODOT's internal procedures recognize that some hazards—such as those affecting pedestrians or bicyclists—cannot be identified with crash data. (*See* Colip Br App 10 (explaining that "risk narratives" can be used to identify projects "where crash trends may not be evident such as bicycle or pedestrian improvements"); Colip Br App 13 ("Pedestrian and bicycle safety improvements are often justified by a risk narrative because they do not necessarily have significant crash history but have the potential for severe or fatal crashes.")).

In short, because ODOT has identified several categories of negligence claims where the proposed rule would not support immunity, this court should reject the suggestion that ODOT is seeking blanket immunity.

CONCLUSION

For the foregoing reasons—in addition to those already discussed in ODOT's opening brief on the merits—this court should reverse the decision of the Court of Appeals with respect to ODOT and affirm the trial court's grant of summary judgment in favor of ODOT.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 23, 2015, I directed the original Reply Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Thomas M Christ, attorney for respondent on review Carol Colip, W. Eugene Hallman, attorney for respondent on review Tyler Turner, and Kathryn H. Clarke, attorney for amicus curiae, by using the electronic filing system.

I further certify that on December 23, 2015, I directed the Reply Brief on the Merits of Petitioner on Review, State of Oregon to be served upon William Keith Dozier and John M. Coletti, attorneys for respondent on review Tyler Turner, by mailing two copies, with postage prepaid, in an envelope addressed to:

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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 2,509 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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