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-Appellee, 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. 10C17831
Court of Appeals A1511934
Supreme Court S063319

Merits Brief of *Amicus Curiae* Oregon Trial Lawyers Association

---

Kathryn H. Clarke OSB 791890
kathrynhclarke@mac.com
PO Box 11960
Portland, Oregon 97211
(503) 460-2870
Attorney for *Amicus Curiae* Oregon Trial Lawyers Association

Submitted December 2015

W. Eugene Hallman OSB 741237
office@hallman.pro
Hallman Law Office
PO Box 308
Pendleton, Oregon 97801
(541) 276-3857

Wm. Keith Dozier OSB 012478
keith@wkd-law.com
385 First Street Suite 215
Lake Oswego, Oregon 97035
(503) 594-0333

John M. Coletti OSB 942740
john@paulsoncoletti.com
Paulson & Coletti
1022 NW Marshall St. Suite 450
Portland, Oregon 97209
(503) 226-6361

Attorneys for Plaintiff-Appellant, Respondent on Review Turner

Ellen F. Rosenblum OSB 753239
Attorney General
Anna Marie Joyce OSB 013112
Solicitor General
Peenesh H. Shah OSB 112131
Assistant Attorney General
peenesh.h.shah@doj.state.or.us
1162 Court Street NE
Salem, Oregon 97301
(503) 378-4402

Attorneys for Defendant-Respondent, Petitioner on Review State of Oregon

Thomas M. Christ OSB 834064
tchrist@cosgravelaw.com
Julie A. Smith OSB 983450
Cosgrave Vergeer Kesster LLP
888 SW Fifth Avenue Suite 500
Portland, Oregon 97204
(503) 323-9000

Attorneys for Defendant-Appellant, Respondent on Review Colip

Janet M. Schroer OSB 813645
jms@hartwagner.com
Hart Wagner LLP
1000 SW Broadway Suite 2000
Portland, Oregon 97205
(503) 222-4499

Gerald L. Warren OSB 814146
gwarren/geraldwarrenlaw.com
901 Capitol Street NE
Salem, Oregon 97301
(503) 480-7252

Attorneys for Defendants-Respondents City of Depoe Bay & Lincoln County

TABLE OF CONTENTS

Introduction 1

The State's Question Presented 2

Proposed Rule of Law 2

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases

Fazzolari v. Portland School Dist. No. 1J, 303 Or 1, 734 P2d 1326 (1987) 5

Garrison v. Deschutes County, 334 Or 264, 48 P3d 807 (2002) 6

Hughes v. Wilson, 345 Or 491, 199 P3d 305 (2008) 1,3,4

John v. City of Gresham, 214 Or App 305, 165 P3d 1177 (2007) 7

Little v. Wimmer, 303 Or 580, 739 P2d 564 (1987) 3

Miller v. Grants Pass Irrigation Dist., 297 Or 312, 686 P2d 324 (1984) 1,6

Mosley v. Portland School Dist. No. 1J, 315 Or 85, 843 P2d 415 (1992) 6

Taylor v. Baker, 279 Or 139, 566 P2d 884 (1977) 4

Vokoun v. City of Lake Oswego, 335 Or 19, 56 P3d 396 (2002) 4,5

Woolston v. Wells, 297 Or 548, 687 P2d 144 (1984) 4

Introduction

ORS 30.265 provides public entities with an immunity from liability from claims based on the performance or nonperformance of "a discretionary function or duty." As this court said in *Hughes v. Wilson*, 345 Or 491, 495, 199 P3d 305 (2008), "[t]ensions inherent in the text of that statute have defied easy resolution." The concept of a "'discretionary function or duty' is notoriously obscure and difficult," *Miller v. Grants Pass Irrigation Dist.*, 297 Or 312, 686 P2d 324 (1984); as Justice Lent noted in that same case, the pairing of "discretionary" and "duty" creates an inherent contradiction. 297 Or at 324 (Lent, J., concurring)("I really don't know what a discretionary duty looks like."); *see also Hughes v. Wilson*, *supra*, 345 Or at 495 n 4 ("The pairing of the terms 'discretionary' and 'duty' is particularly paradoxical.").

This case once again presents the question of what that "discretionary duty" looks like, or does not look like. OTLA believes that the Court of Appeals had it right: the record does not sustain the state's argument that it made any discretionary decision and establishes instead that it simply did nothing to ameliorate a known risk at the intersection in question. Even if the state's non-inclusion of this intersection in its "Statewide Transportation Improvement Program," a program designed to obtain funding for major

highway projects, is regarded as a "decision" about the problems it did not include, it cannot entitle the state to immunity; it was nothing more than a failure to exercise reasonable care.

The State's Question Presented

"Is the state entitled to [discretionary] immunity for deciding not to improve a particular roadway site if it can show that – although the Oregon Department of Transportation (ODOT) did not conduct a particularized study of that site – ODOT did consider the site for possible improvements as part of a periodic and systematic statewide review and then decided that accident data supported prioritizing improvement projects elsewhere instead?" State's Petition for Review at 1-2.

Proposed Rule of Law

If the law requires a government to exercise reasonable care in the management of its highways, then ORS 30.265 does not immunize its failure to take any steps at all to reduce known risks, even where that failure results from a decision to give priority to other projects. Where there is a duty to exercise reasonable care, it cannot be met by inaction, whether that inaction results from inattention or deliberate decision-making; the government must take action that satisfies the duty.

Argument

OTLA believes that respondents establish in their briefing that on this record there is no evidence of that the state made any decision regarding this intersection, much less a policy decision to which discretionary immunity must attach. OTLA believes that this court has repeatedly made clear that a failure to decide does not constitute the exercise of a discretionary function, and is not entitled to immunity. *Hughes v. Wilson*, 345 Or 491, 496, 199 P3d 305 (2008) ("[I]f the law requires a government to exercise due care, then ORS 30.265 does not immunize its decision not to exercise care at all."); *Vokoun v. City of Lake Oswego*, 335 Or 19, 31, 56 P3d 396 (2002) the doctrine "does not immunize a decision not to exercise care at all, if action of some kind is required); *Little v. Wimmer*, 303 Or 580, 739 P2d 564 (1987)(the state could not claim discretionary immunity for "a continuing *non-decision*."). OTLA has nothing to add on this point to the briefing provided by respondents Turner and Colip.

But even if the state had made a deliberate decision not to fix the hazard at this intersection and to give priority to other projects, that decision would not be immune. The state's argument implicates the question the court said it "need not decide" in *Vokoun v. City of Lake Oswego, supra*. In that case, there was no evidence that the city had made a specific budget-

related decision not to repair the problem that caused the plaintiff's damage, and therefore the court noted:

> We need not decide whether, assuming the city council had considered and then decided not to approve a supplemental budget for correcting the erosion in the drainage course, such a policy judgment would qualify for discretionary immunity. 335 Or at 33, n. 7.

335 Or at 33, n 7. There may be no more evidence in this case than in *Vokoun*, but the state has, in fact, made the argument to this court. It should be as unavailing here as it was in *Vokoun*; the state's continuing failure to take any action to reduce the known risk at this intersection was not an exercise of discretion.

In *Hughes v. Wilson*, 345 Or at 497. the court set the stage for the discretionary immunity issue by revisiting the law that imposed liability in the first place:

> The common law imposes a general nondiscretionary duty on landowners to make their property reasonably safe for their invitees. Accordingly, 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. *See Woolston v. Wells*, 297 Or 548, 557-58, 687 P2d 144 (1984) (possessor of land has a duty to use reasonable care to make land safe for invitees); *Taylor v. Baker*, 279 Or 139, 146, 566 P2d 884 (1977) (invitees include members of the public on land for purpose for which land is open to public).

Later in the opinion, the court went on to state:

> This court also has explained that, if the law requires a government to exercise due care, then ORS 30.265 does not immunize its decision not to exercise care at all. When a public body owes a duty of care, that body has discretion in choosing the means by which it carries out that duty. **But "[t]he range of permissible choices does not * * * include the choice of not exercising care."** 345 Or at 496 (citations omitted, emphasis added).

Thus while a government may have "discretion in choosing the means" to fulfill its duty of care, there is a "range of permissible choices." That range clearly does not "include the choice of not exercising care." As the court said in *Vokoun, supra*: "The doctrine of discretionary immunity does not immunize a decision not to execute care at all, if action of some kind is required." 335 Or at 31. This sentence in the text of the *Vokoun* opinion actually seems to answer the question that the court in its footnote said it "need not decide." 335 Or at 33 n 7, quoted *supra.* If choosing not to take action when action is required is not entitled to immunity, then the city's decision not to approve a budget for taking action is not entitled to immunity. Dressing the issue in budgetary raiment should not change anything.

In *Fazzolari v. Portland School Dist. No. 1J,* 303 Or 1, 734 P2d 1326 (1987), the plaintiff claimed negligence in the district's failure to provide security on the school grounds before school was in session but at a time when the district knew that students would be present. The court said:

> We think that a school principal's failure to take any precautions whatsoever, if that was unreasonable, is not an exercise of policy discretion, though **a school board's choice between expenditures on security personnel or other types of safeguards might be**. (Citation omitted, emphasis added.)

303 Or at 22 n 20. In *Mosley v. Portland School Dist. No. 1J*, 315 Or 85, 92, 843 P2d 415 (1992), the court said:

> 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, include the choice of not exercising care.

In *Garrison v. Deschutes County*, 334 Or 264, 274, 48 P3d 807 (2002), after quoting that language from *Mosley*, the court added:

> 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; however, the government's choice of *means* for fulfilling that requirement may be discretionary.

In *Miller v. Grants Pass Irrigation Dist.*, 297 Or 312, 320, 686 P2d 324 (1984), the court said:

> If there is a legal duty to protect the public by warning of a danger or by taking preventing [*sic*] 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.

The court went on to say that when there is a duty to exercise reasonable care to avoid foreseeable risks of harm, the government has "a

nondiscretionary duty at least to examine what to do," and then stated that "[w]hen different precautions **might satisfy this duty**, the choice of which one to use **may** be discretionary." 297 Or at 329-30 (emphasis added). For instance, perhaps the state could not be faulted for deciding that a complete reconstruction of a particular stretch of highway was not economically feasible, and for choosing instead to change the signage and add traffic control devices to ameliorate the risk. But any choice made by the state must "satisfy this duty" of reasonable care; the state cannot exercise "discretion" not to meet the duty the law imposes.

As said succinctly by the Court of Appeals in *John v. City of Gresham*, 214 Or App 305, 314, 165 P3d 1177 (2007), regarding evidence that a city employee deferred to the county's recommendation regarding a particular crosswalk:

> [A] jury could find that the city's decision was, in actuality not a decision at all. * * * [D]iscretionary immunity does not apply to decisions not to decide.

The state admits that it never made any deliberate decision regarding the safety hazard at this intersection; it never considered taking the steps that plaintiff and defendant Colip contend would have reduced the risk. State's Merits Brief at 2. The state insists that its failure to give "particular consideration" to the hazards presented by this intersection is justified by the

fact that it had other major projects on its agenda. *Id.* at 12-13. That position is inconsistent with the case law summarized above, and would make an empty charade of the nondiscretionary duty to exercise reasonable care to make the highway reasonably safe for the public. This court should reject the state's attempt to cloak its "decision not to decide" with discretionary immunity.

Conclusion

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/Kathryn H. Clarke

Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

Brief length:

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 1783 words.

Type size:

I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **Brief of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator and by so doing served a copy electronically on

Ellen F. Rosenblum
Anna Marie Joyce
Peenesh H. Shah
Attorneys for Petitioner on Review State

W. Eugene Hallman
Wm. Keith Dozier
John M. Colletti
Atttorneys for Respondent on Review Turner

Thomas M. Christ
Julie A. Smith
Attorneys for Respondent on Review Colip

Janet M. Schroer
Attorney for Defendants-Respondents City and County

DATED this 14th day of December, 2015.

/s/ Kathryn H. Clarke
Kathryn H. Clarke OSB 791890
Attorney for *Amicus Curiae*
Oregon Trial Lawyers Association