

**FILED: December 14, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ERIN SMITH,  
Plaintiff-Appellant,

v.

BEND METROPOLITAN PARK AND RECREATION DISTRICT,  
a municipal corporation,  
Defendant-Respondent.

Deschutes County Circuit Court  
08CV0777AB

A146575

Alta Jean Brady, Judge.

Argued and submitted on September 06, 2011.

Tim Williams argued the cause for appellant. With him on the briefs was Dwyer Williams Potter Attorneys, LLP.

Thomas W. McPherson argued the cause for respondent. With him on the brief was Mersereau Shannon, LLP.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Reversed and remanded.

1 SCHUMAN, P. J.

2 While running to prevent a child from falling into the water at a city  
3 swimming pool, plaintiff slipped on a "splash pad" and slid into a slightly elevated  
4 fountain fixture, seriously injuring her ankle. She brought this negligence action against  
5 defendant, the City of Bend Metropolitan Park and Recreation District, alleging four  
6 specifications of negligence.<sup>1</sup> Two dealt with defendant's decisions to choose and place  
7 the fountain fixtures, and two dealt with defendant's failure to provide adequate warnings  
8 about them. After cross-motions for summary judgment, the trial court granted  
9 defendant's motion on the grounds that, first, the choice of a fountain cover design and  
10 the placement of the fountains were discretionary decisions for which defendant had  
11 immunity as a matter of law, and second, that plaintiff did not adduce any evidence of  
12 causation connecting plaintiff's injuries to defendant's failure to warn. Plaintiff appeals.

13 We reject plaintiff's assignment of error regarding causation with little  
14 discussion. Uncontradicted evidence supports the court's finding that plaintiff knew of  
15 the dangers at the pool, and where an injured party is "fully aware of the danger  
16 presented," there is no causation. [Garrison v. Deschutes County](#), 334 Or 264, 279, 48  
17 P3d 807 (2002). Further, plaintiff testified, "I don't know of a warning that [defendant]  
18 could have placed" that would have prevented her from running across the splash pad to  
19 keep a child out of harm's way.

---

<sup>1</sup> Plaintiff also brought claims based on alleged violations of Oregon administrative rules dealing with pool decks. Those claims were dismissed, and plaintiff does not assign error to the dismissal.

1           However, we conclude that the trial court erred in granting defendant's  
2 motion for summary judgment as to the two specifications of negligence regarding the  
3 choice and placement of fountain covers, because there is evidence in the record on  
4 summary judgment from which a trier of fact could find that defendant's decisions  
5 regarding the design and placement of the fountains did not require the exercise of  
6 discretion within the meaning of ORS 30.265(3). We therefore reverse the trial court in  
7 part and remand.

8           In reviewing the court's grant of summary judgment, we view the facts and  
9 all reasonable inferences in the light most favorable to the nonmoving party, in this case,  
10 plaintiff. *Jones v. General Motors Corporation*, 325 Or 404, 408, 939 P2d 608 (1997).  
11 We will affirm the trial court's ruling granting defendant's motion for summary judgment  
12 if there is no genuine issue of material fact and defendant was entitled to judgment as a  
13 matter of law. ORCP 47 C.

14           Defendant's Juniper Swim & Fitness Center in Bend has an outdoor  
15 children's pool next to a large padded deck, the "splash pad," on which there are a variety  
16 of interactive play features, including eight spray fountains. Each fountain has a circular,  
17 metal fountain cover that tapers up to a maximum height of about one-half inch above the  
18 surface of the splash pad.

19           Plaintiff was at the pool with a friend and was familiar with its features,  
20 including the fountains. When she ran onto the splash pad to prevent a child from darting  
21 into the pool, she slipped and slid approximately two and a half feet. Her right foot

1 caught on one of the raised fountain covers, causing her injury.

2           Plaintiff initiated this action alleging, among other particulars, that  
3 defendant was negligent in "causing or allowing an obstruction (the raised interactive  
4 fountain cover) to exist on the pool deck where customers would walk" and in "causing  
5 or allowing the pool deck to become slippery around the raised interactive fountain  
6 covers." Defendant asserted the affirmative defense of discretionary immunity under  
7 ORS 30.265(3)(c), which provides:

8           "Every public body and its officers, employees and agents acting  
9 within the scope of their employment or duties \* \* \* are immune from  
10 liability for:

11           "\* \* \* \* \*

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

15 On cross-motions for summary judgment, the parties disagreed about whether defendant's  
16 decision regarding the selection and placement of the raised interactive fountain cover  
17 was the type of decision that was subject to discretionary immunity. Defendant offered  
18 the affidavit of Don Horton, defendant's executive director, who averred that the  
19 fountains and other interactive features were added as a part of an expansion of an  
20 existing pool. In planning for the expansion, defendant retained the services of an  
21 architect and aquatic consultant to develop a master plan. Defendant's board of directors  
22 adopted the expansion plan developed by the architect and aquatic consultant and  
23 approved of a contract with the architect. The architect, aquatic consultant, and district

1 staff then collaboratively developed the design for the renovation of the pool, and  
2 defendant's board of directors reviewed and approved the design and budget and directed  
3 staff to proceed. Horton averred that

4 "the splash pad surface option was selected because the membrane provided  
5 a durable, water impermeable, sanitary and slip resistant surface while the  
6 underlying pad provided cushion for comfort. The specific spray features  
7 were selected based on their quality, entertainment value and ability to  
8 interface with the membrane line to provide a safe, water tight seal."

9 Horton's statement, couched as it was in the passive voice, did not specify by whom the  
10 surface option and the spray features were selected.

11 However, Matthew Mercer, the project manager for the expansion of the  
12 pool, testified that, although defendant's board of directors reviewed different types of  
13 pools, different configurations, capacities, values, and benefits, including the fountain  
14 and splash pad, *he* selected the system that was ultimately put in place. In response to the  
15 question, "Who made the decision to go with the Vortex [fountain cover] in terms of the  
16 type of spray fountains?" he responded:

17 "A. Like I said, that decision would have been made by me in  
18 conjunction with the aquatic consultant and [the architect and] \* \* \* the  
19 design team as a whole.

20 "Q. Just given your position of manager of the pools out there, that  
21 decision, is it true, would fall into more of your day-to-day in terms of  
22 business when you have been \* \* \* hired?

23 "\* \* \* \* \*

24 "A. It would.

25 "\* \* \* \* \*

26 "Q. Did the board, either in writing or orally, give you a written

1 directive in terms of what type of either matting or cover to use?

2 "A. No."

3 Mercer clarified that the pool and splash pad were designed and built as a single facility  
4 and that there were not separate deliberate decisions relating to the placement of the  
5 fountains on the splash pad portion. Based on that evidence, the trial court concluded  
6 that defendant's decisions regarding the choice and placement of the fountain feature  
7 were the type of policy-making decision to which immunity attaches under ORS 30.265.  
8 Plaintiff appeals.<sup>2</sup>

9 A significant body of case law addresses the question whether a particular  
10 governmental decision or function is discretionary for purposes of ORS 30.265(3). The  
11 classic discussion comes from *McBride v. Magnuson*, 282 Or 433, 436-37, 578 P2d 1259  
12 (1978):

13 "[N]ot every exercise of judgment and choice is the exercise of  
14 discretion. It depends on the kind of judgments for which responsibility  
15 has been delegated to the particular officer. Discretion, as this court has  
16 noted in other contexts, involves 'room for policy judgment,' \* \* \* or the  
17 responsibility for deciding 'the adaptation of means to an end, and  
18 discretion in determining how or whether the act shall be done or the course  
19 pursued.' \* \* \* It involves the delegated responsibility for 'assessment and  
20 ranking of the policy objectives explicit or implicit in the statute' and for

---

<sup>2</sup> In order for the court to consider a challenge to a ruling, the ruling must be assigned as error. *See* ORAP 5.45(2). Plaintiff has not properly assigned error to the trial court's rulings on cross-motions for summary judgment. Plaintiff's assignments of error are to the trial court's *conclusions* that defendant's actions or failures to act are protected by discretionary immunity and that there was an absence of evidence to support the specification of negligence involving failure to warn. These are improper assignments of error. However, because it is clear from the briefs, including the described standards of review and argument, that plaintiff intends to assign error to the trial court's rulings on summary judgment, we treat the assignments as having challenged those rulings.

1 the judgment that one or more of these objectives will be served by a given  
2 action \* \* \*. In other words, insofar as an official action involves both the  
3 determination of facts and simple cause-and-effect relationships and also  
4 the assessment of costs and benefits, the evaluation of relative effectiveness  
5 and risks, and a choice among competing goals and priorities, an official  
6 has 'discretion' to the extent that he has been delegated responsibility for the  
7 latter kind of value judgment."

8 Somewhat more succinctly, discretionary immunity protects actions that embody "a  
9 choice among alternative public policies by persons to whom responsibility for such  
10 policies have been delegated." *Miller v. Grants Pass Irrigation District*, 297 Or 312,  
11 316, 686 P2d 324 (1984). We have parsed that formulation as follows:

12 "This statement identifies three criteria that a government function  
13 or duty must meet in order to qualify for discretionary immunity. It must  
14 be the result of a *choice*, that is, the exercise of judgment; that choice must  
15 involve public *policy*, as opposed to the routine day-to-day activities of  
16 public officials; and the public policy choice must be exercised by a body  
17 or person that has, either directly or by delegation, the *responsibility* or  
18 authority to make it."

19 [\*Ramirez v. Hawaii T & S Enterprises, Inc.\*](#), 179 Or App 416, 419, 39 P3d 931 (2002)  
20 (emphasis in original).

21 In the present case, the court ruled in favor of defendant's affirmative  
22 defense of immunity on the ground that defendant's board of directors "made a policy  
23 decision regarding the type of pool, configuration and play features," and that the  
24 decision "involved the assessment of costs and benefits and making choices among  
25 competing options"--in other words, that defendant's board made a *choice*, and that the  
26 choice was a *policy* decision within the board's discretionary *authority*. Defendant, of  
27 course, agrees, explaining that, in selecting the splash pad and spray fountains, defendant

1 had to consider and prioritize at least ten competing qualities, safety among them:  
2 "Durability, water impermeability, hygiene, slip resistance, comfort, entertainment value,  
3 safety, water tight seal, and compatibility of the spray fountains with the splash pad." In  
4 defendant's view, prioritizing those qualities was a policy-driven discretionary decision.

5           In support of its understanding of the discretionary immunity analysis,  
6 defendant relies on this court's opinion in *Day v. City of Canby*, 143 Or App 341, 922  
7 P2d 1269 (1996). In *Day*, the plaintiff brought an action against the city to recover for  
8 injuries she suffered when she was struck by a runaway horse that, after a parade, had  
9 bolted after being frightened by a firecracker. The plaintiff alleged, among other  
10 specifications, that the city was negligent in failing to require the design of a proper  
11 staging area; failing to require the provision of barriers; and failing to require the hiring  
12 of adequate crowd control. The city asserted that its liability was precluded by  
13 discretionary immunity. The plaintiff contended that the only decision by the city that  
14 was protected by discretionary immunity was the decision to have the parade, and that all  
15 other decisions made in conjunction with the parade were ministerial in nature. The trial  
16 court held, without amplification, that the decisions that had formed the basis for  
17 plaintiff's negligence allegations involved the exercise of discretion and were therefore  
18 immune. The court explained:

19           "It is undisputed that City did consider safety to the public when it  
20 granted the parade permit to [the Canby Arts Association (Association)]. It  
21 directed Association to coordinate planning with the police and public  
22 works departments and Association did so. The department of public  
23 works provided Association with barricades to mark the parade route and  
24 the police department assigned additional officers and reserve officers to



1 work on the day of the parade. Plaintiff's reasoning--that city is not entitled  
2 to discretionary immunity, because it did not consider the specific dangers  
3 to the public from horses--would extend liability to City for every  
4 conceivable danger that could occur when it grants a parade permit and  
5 someone is injured at that parade. Such reasoning would assign courts the  
6 role of deciding whether governmental entities and their officials had  
7 adopted proper policies or whether a given course of action was effective in  
8 furthering a given policy. That is not our function. *Stevenson [v. State*  
9 *Dept. of Transp.]*, 290 Or [3, 10, 619 P2d 247 (1980)]. City's decisions  
10 about public's safety are 'classic policy choices that are entitled to  
11 discretionary immunity.'"

12 143 Or App at 353 (quoting *Mosley v. Portland School Dist. No. 1J*, 315 Or 85, 93, 843  
13 P2d 1259 (1978)).

14 Defendant's contention and its reliance on *Day* miss the point and fail to  
15 take into consideration one of the essential aspects of immunity analysis: delegation. In  
16 *Day*, the decisionmaker whose immunity was at issue was "the City," and the particular  
17 issue was whether "the City" had failed to take a variety of safety precautions. 143 Or  
18 App at 344. If it were beyond dispute that the decisions regarding the choice and  
19 placement of the fountain covers in this case was made by defendant's board, *Day* might  
20 be instructive. But that is not the case. There is at least a disputed issue of fact with  
21 respect to who had the authority to make those decisions. It is inferable from the  
22 testimony of Mercer, the board's project manager, that the decisions were delegated to  
23 him; as noted above, in response to the question, "Did the board, either in writing or  
24 orally, give you a written directive in terms of what type of either matting or cover to  
25 use?", he replied, "No." Thus, the question in this case is not whether the defendant,  
26 acting as a board, made a design decision that resulted from the weighing of competing

1 policy considerations, including safety. Arguably, it did, but that is not relevant. The  
2 relevant question in this case is whether the board delegated those decisions to Mercer  
3 and, if so, whether Mercer's decisions are immune. Put another way: The question  
4 involving whether the decision to choose the particular components that allegedly caused  
5 plaintiff's injury was the exercise of discretion is intertwined with the question involving  
6 whose decision counts. The evidence at least raises the possibility that the decision was  
7 delegated to Mercer. His decision is the one that counts.

8           Two recent cases illustrate the importance of correctly identifying the  
9 person or persons to whom authority to make decisions has been delegated, and confirm  
10 that, in this case, that person is Mercer. In [\*Vokoun v. City of Lake Oswego\*](#), 335 Or 19,  
11 33, 56 P3d 396 (2002), the defendant argued that it had immunity in an action brought by  
12 a homeowner whose property was damaged by erosion resulting from the city's  
13 presumably negligent decisions regarding the acquisition and improvement of a drainage  
14 course.<sup>3</sup> The Supreme Court rejected that argument, explaining that the proper focus was  
15 not on the city's policy choice reflecting economic priorities, but on the decision by  
16 maintenance employees about how to repair the erosion: "Maintenance employees  
17 decided to repair the erosion by filling the hole with asphalt debris. The decision how to  
18 respond to the erosion problem about which plaintiffs had complained was a routine  
19 decision made by employees in the course of their day-to-day activities. Such decisions

---

<sup>3</sup> We say "presumably" because the immunity defense presumes the existence of a negligent act or decision.

1 do not qualify for discretionary immunity." *Id.* Of similar effect is [John v. City of](#)  
2 [Gresham](#), 214 Or App 305, 307, 165 P3d 1177 (2007). In that case, the plaintiff brought  
3 an action for damages resulting from a presumably negligently designed urban  
4 intersection. Defendants raised the affirmative defense of immunity, arguing that the  
5 design decision was the exercise of policy discretion. We stated:

6 "Before determining whether a decision or action embodies such a  
7 choice that is subject to discretionary immunity, we must first ascertain the  
8 nature of the decision or action involved. In this case, the city and the  
9 county both describe their decisions in broad terms--as part of the larger  
10 determination to approve the Ped-to-MAX design. Plaintiff, on the other  
11 hand, insists that the decision at issue is much narrower--it is the decision to  
12 paint the crosswalk.

13 "Case law makes clear that, although the overall design of a  
14 government project may entail the type of decisions that implicate  
15 discretionary immunity, that does not mean that every aspect of the project  
16 is subject to that defense. As we explained in [McComb v. Tamlyn](#), 173 Or  
17 App 6, 12, 20 P3d 237 (2001), 'a decision to build a highway rather than a  
18 railroad in a particular location is a governmental policy that cannot give  
19 rise to liability under the statute. On the other hand, many decisions in the  
20 planning and design of highways require the exercise of some technical  
21 discretion but do not necessarily involve governmental policy choices.'"

22 *Id.* at 312-12.

23 Thus, the relevant and dispositive question in this case--presuming that the  
24 disputed issue of fact with respect to the scope of Mercer's authority is resolved in favor  
25 of plaintiff's position that it included the authority to choose and locate the fountain  
26 covers--is whether those decisions embodied a policy judgment. We conclude that a  
27 reasonable juror could find that they did not.

28 That is so for several reasons. First, Mercer himself agreed that his

1 decisions were within his "day-to-day operations"; such operations have been identified  
2 as ministerial and not discretionary. *Vokoun*, 335 Or at 33. Second, the Supreme Court  
3 has explained that discretionary or policy decisions are ones that are made by "the  
4 executive branch of the government which should not be reviewed by the judicial  
5 branch." *Stevenson*, 290 Or at 8. In explaining that distinction, the court elaborated:  
6 "Like virtually every other activity, both planning and design, as well as maintenance of  
7 roads, frequently require the making of decisions which do not involve the making of  
8 public policy; for example, *the decision whether to make a safety fence two feet rather*  
9 *than three feet high.*" *Id.* at 10 (emphasis added). A juror could rationally find that, in  
10 the circumstances of this case, there is no significant difference between the height of a  
11 safety fence and the height of a fountain cover.

12           Finally, the Supreme Court has held repeatedly that, where a public entity  
13 has a duty to protect people from injury, the entity may have discretion in choosing how  
14 to accomplish that objective, but it does not have discretion to fail to do so entirely.  
15 *Miller*, 297 Or at 318; *Fazzolari v. Portland School District No. 1J*, 303 Or 1, 22 n 20,  
16 734 P2d 1326 (1987) ("We think that a school principal's failure to take any precautions  
17 whatever, if that was unreasonable, is not an exercise of policy discretion."); *Mosley*, 315  
18 Or at 92 ("The range of permissible policy choices does not, however, include the choice  
19 of not exercising care."). Here, defendant had a duty to provide reasonable protection to  
20 its invitees, *Woolston v. Wells*, 297 Or 548, 557-58, 687 P2d 144 (1984), and there is  
21 evidence from which a jury could conclude that the relevant decisionmaker--Mercer--did

1 not consider taking safety precautions in choosing and placing the fountain covers, as  
2 (arguably) demonstrated by the following testimony:

3 "Q: Was it a slipping or tripping hazard in terms of the Vortex, the  
4 raised flange, was it--did that--was that ever a concern for you prior to Ms.  
5 Smith's incident?

6 "A: No.

7 "Q: Is that something you even thought about? Not being a concern  
8 can be one thing.

9 "A: I just wasn't concerned--well, frankly, I never thought about it."

10 In sum, we conclude that disputed issues of fact remain with respect to whether defendant  
11 is entitled to immunity under ORS 30.265(3)(c). For that reason, the court erred in  
12 granting defendant's motion for summary judgment as to plaintiff's first two  
13 specifications of negligence.

14 Reversed as to summary judgment ruling on discretionary immunity;  
15 otherwise affirmed.