

Oregon Tort Claims Act Shaped Further

The Oregon Supreme Court recently held, in *Cheryl Vaughn v. First Transit Inc.*, 346 Or 128, 206 P3d 181 (2009), that the Port of Portland, for whom First Transit Inc. provided shuttle service by contract, was not vicariously liable for the negligent act of First Transit's employee, shuttle driver Zavoral. This case involves the statutory scheme of the Oregon Tort Claims Act (OTCA) and analysis of the terms "agent" and "agency" as those terms are used in the act. The relevant portion of the OTCA states:

[E]very public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function[.] The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification . . . shall be an action against the public body only. ORS 30.265(1).

The trial and appeal courts agreed with Defendant's argument that Zavoral was an agent, once removed, of the Port and therefore the sole cause of action under the OTCA was against the public body. The Supreme Court began its review by looking at the OTCA and concluded that the Port's liability depended upon a determination both that Zavoral was an "agent" of First Transit and, ultimately, that First Transit was an "agent" of the Port. Zavoral, as an employee of First Transit, was indisputably its agent under the laws of agency. However, the Court had significantly more trouble making a determination that First Transit was an "agent" of the Port. The question came down to an issue of control as it concerns the relationship between the parties. While the Court agreed that the Port had imposed limitations and guidelines on First Transit through the parties' contract for shuttle services, there did not exist a "master-servant" relationship where the Port not only decided what the end result of First Transit's work would be but also decided how it would be performed.

Because the Court determined this "right-to-control" was lacking in the Port's relationship with First Transit, it concluded that it was unreasonable to assume that the legislature intended public bodies to be more liable for the tortious acts of its so-called agents than are private persons and corporations. The Court opined that an analysis that reached any other conclusion would run counter to the statutory history in which the legislature worked to establish "liab[ility] for [public bodies'] torts to the *same* extent as private persons and corporations." *Id.* at 140 (emphasis added).

The decision of the Court of Appeals and judgment of the circuit court were reversed and the case remanded to the circuit court for further proceedings. This is a good decision for Oregon's cities, in so far as it further clarifies the facts that a court will look to in determining whether a contracted service provider is or is not covered under the OTCA. Contract language clearly setting out that a city is concerned only with the service provider's result, and not the manner in which it arrives at that result, will be a key part of such a factual inquiry.