

IN THE SUPREME COURT OF THE STATE OF OREGON

OLIVIA CHERNAIK, A MINOR AND
RESIDENT OF LANE COUNTY,
OREGON; LISA CHERNAIK,
GUARDIAN OF OLIVIA CHERNAIK;
KELSEY CASCADIA ROSE
JULIANA, A MINOR AND RESIDENT
OF LANE COUNTY, OREGON; AND
CATIA JULIANA, GUARDIAN OF
KELSEY JULIANA,

Petitioners on Review,

v.

KATE BROWN, IN HER OFFICIAL
CAPACITY AS GOVERNOR OF THE
STATE OF OREGON; AND STATE OF
OREGON,

Respondents on Review.

Lane County Circuit Court
Case No. 161109273

Oregon Court of Appeals
A159826

Oregon Supreme Court
S066564

***AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION
BRIEF IN SUPPORT OF PETITIONER ON REVIEW**

Review of the decision of the Court of Appeals on appeal from a judgment of
the Circuit Court for Lane County, Honorable Rasmussen, Judge.

Court of Appeals Opinion Filed: January 9, 2019

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STATEMENT OF THE CASE/INTRODUCTION

The Court of Appeals in *Cherniak, et al. v. Brown, et al.*, 295 Or App 584, (2019), incorrectly held that the state has no fiduciary duty to manage the shared public resources of the atmosphere and water so they may be protected from the impacts of climate change and or otherwise preserved for present and future generations of Oregonians. *Amicus Curiae* OTLA urges this Court to reverse that decision and recognize that the state failure to adequately protect shared public resources in the atmosphere and water from unreasonable waste may violate common law fiduciary duties.

SUMMARY OF ARGUMENT

OTLA *Amicus* appears in this action to emphasize that plaintiffs' claims do not require a foray into new legal territory, but rather fit succinctly within traditional common law concepts of duty and breach. Those concepts provide the well-traveled touchstones for determining the state's role in preventing harm to a shared public resource.

OTLA agrees with plaintiffs that the resolution of their claims may be informed by case precedents in which the courts have concluded that states have a duty to preserve air and water resources because they are held in a "public trust." However, OTLA does not appear in this matter to further discuss the law of "public trust" precedent. OTLA appears to emphasize this Court's authority to recognize a

common law fiduciary duty based on the relationship between the parties notwithstanding the existence of public trust precedent regarding management of a specific resource.

In particular, a common law fiduciary duty arises, not by looking at the type of resource managed, but whether the relationship between the defendant and the plaintiffs is such that the defendant has a duty to protect the resource or in the best interests of the plaintiffs. Here, the record is sufficient to find that such a relationship exists, and consequently, plaintiffs' claims against the state for violating fiduciary obligations are viable.

PROPOSED RULE OF LAW

The State of Oregon has a fiduciary duty to protect plaintiffs' interests in avoiding unwarranted waste or harm to the shared public resources of the atmosphere and water.

ARGUMENT IN SUPPORT OF PROPOSED RULE OF LAW

Under Oregon law, a fiduciary duty exists when the parties are in a "special relationship" in which one party is obliged to pursue the other party's best interests. *Conway v. Pacific University*, 324 Or 231, 237, 924 P2d 818 (1996). In determining whether such a relationship exists:

"The focus [of the Court's inquiry] is not on the subject matter of the relationship, such as one party's financial future; nor is it on whether one party, in fact, relinquished control to the other. The focus instead is on whether the nature of the parties' relationship itself allowed one

party to exercise control in the first party's best interests. * * * [T]he law implies a tort duty only when that relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf."

Bennett v. Farmers Ins. Co., 332 Or 138, 161–162, 26 P3d 785 (2001) (citing *Conway*, 324 Or at 241).

The above test for the existence of fiduciary duties in Oregon is appropriately elegant and simply applied to this case. That is, if the state exercises judgment and decision-making over shared resources and plaintiffs have a legitimate interest in preserving those resources, then the state's decision-making is governed by a duty to reasonably protect those resources in plaintiffs' best interests.

Here, the record provides substantial scientific and other evidence regarding the existential importance of the atmosphere and water to plaintiffs and all Oregonians, particularly in the context of climate change. When viewed in the light most favorable to plaintiffs, ORCP 47C, the record establishes that plaintiffs' interest in preserving the atmosphere and water as a shared resource in Oregon is legitimate. Likewise, the state is in the position to regulate those resources on behalf of plaintiffs and that "relationship is of the type that, by its nature, allows one party to exercise judgment on the other party's behalf." *Bennett*, 332 Or at 162. The answer is easy under *Bennett* and *Conway*; the state has a fiduciary duty to protect plaintiffs' interests in avoiding unwarranted waste or harm to the shared public resources of the atmosphere and water. So, when viewed through the general

common law lens of what triggers a fiduciary duty, the question for this Court does not involve *whether* the elements of a fiduciary duty are met – clearly they are – but whether the state can justifiably argue *an exception* to those common law elements of duty, as it appears to be doing.¹

The Court should decline any suggestion that the State of Oregon enjoys such an exception. Indeed, if plaintiffs’ record is correct regarding the scope of the environmental crisis facing Oregon, and again for the purposes of this motion for summary judgment the Court should assume that it is, ORCP 47C, then a likely cause of the crisis is a failure of government to have a clear duty to preserve the resource. Instead of preserving a “no duty” model which implicitly permits the government to

¹ Governor Brown has specifically recognized:

“Our generation will be judged not on the fact of climate change, but how we responded to it. We must fight to protect what makes Oregon special.”

Available at <https://katebrownfororegon.com/environment>.

Attorney General Rosenblum has similarly recognized:

“The only way to avoid the worst-case scenario [of climate change] is to act now[.] * * * We no longer have the luxury of waiting, we must make these changes now.”

Available at <https://www.law.nyu.edu/centers/state-impact/press-publications/press-releases/ace-final-rule-announcement>. Based on such public statements it is unclear why the state takes the position here that it has no duty to act reasonably to protect the air or water in relation to climate change concerns.

“freely cause or allow harm,” the Court should recognize that the common law, much like other common law rules against causing injuries, require that the state meet a minimum, apolitical floor of responsibility and accountability.

Likewise, it should be emphasized that the state’s accountability for ongoing harms to these resources does not come solely from the ballot box; it comes from a duty to protect Oregonians from undue and irreversible waste of fundamental resources to sustain life. *See e.g. Broughton v. Stricklin*, 146 Or. 259, 275, 28 P.2d 219, 224 (1933) (“[w]ith the great necessity for the use of water * * * waste should not be permitted. The appropriator of water must exercise a reasonable degree of care to prevent waste.”). While political debate may persist, a floor of minimum responsibility and accountability under the common law is warranted.

OTLA prays that this Court recognize that the state has a fiduciary duty to protect the fundamental resources of the atmosphere and water from undue waste.

CONCLUSION

For all the reasons stated in this *amicus* memorandum, OTLA urges this Court to reverse the Court of Appeals and the trial court and recognize that the State of Oregon has a fiduciary duty to protect plaintiffs' interests in avoiding unwarranted waste or harm to the shared public resources of the atmosphere and water.

DATED: July 31, 2019.

Respectfully submitted,

/S/ Travis Eiva.
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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,186 words.

Type Size

I 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(4)(f).

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this date I served the foregoing *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION BRIEF IN SUPPORT OF PETITIONER ON REVIEW on:

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I hereby certify that on this date, I filed this BRIEF IN SUPPORT OF REVIEW OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION on the:

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DATED: July 31, 2019.

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