IN THE COURT OF APPEALS

OF THE STATE OF OREGON

BRIAN STOVALL, JOHN OLMSTEAD, CONNIE KRUMMRICH, and KAREN BROWN,

Plaintiffs – Appellants – Cross-Respondents,

v.

NORTHERN OREGON CORRECTIONS dba NORCOR,
an intergovernmental corrections entity,

Defendant – Respondent – Cross-Appellant,

and

WASCO COUNTY,

Defendant – Respondent.

TC No. 17CV31082
CA No. A170661

Appeal from the Judgment of
the Wasco County Circuit Court, by
the Honorable John A. Wolf, Judge

Respondent NORCOR's Reply Brief on Cross-Appeal

May 2020

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I. INTRODUCTION

In its cross-appeal, NORCOR argues that the trial court erred in declining to dismiss plaintiff's claim summarily for want of standing. As NORCOR explained, there is no evidence that it is losing money on its contract with ICE, let alone that plaintiffs' taxes might go up because of the contract, and thus plaintiffs can't show that they have standing, as taxpayers, to seek a judicial declaration under the contract is unlawful. Plaintiffs don't dispute that they must show a likely increase in their taxes to establish standing under the Uniform Declaratory Judgments Act, or UDJA, ORS 28.010 to 28.160. They argue, instead, that there is some evidence of adverse tax consequences. Alternatively, they argue that, even if they don't have standing under the UDJA, they have it under ORS 294.100, or maybe even the common law. Neither argument, discussed in turn below, is well-taken.

II. NO EVIDENCE OF ADVERSE TAX CONSEQUNCES

As explained in NORCOR's prior brief, the evidence the trial court relied on to find taxpayer standing – the only evidence plaintiffs offered on that issue – is the one-page letter from NORCOR's administrator, Bryan Brandenburg, to plaintiff's counsel at the Oregon Law Center, explaining that it costs NORCOR $97 per day to house inmates generally, but only $39 per day to house ICE detainees, well below the $80 per day fee that NORCOR charges ICE for that service, so the cost

to NORCOR is "covered" by the contract, plus a substantial profit (SER 17). Relying on the inmates-generally cost, and ignoring the ICE-specific cost, the trial court concluded that Brandenburg got it wrong: NORCOR is actually losing money on each detainee. (ER 87.)

In their answering brief on cross-appeal, plaintiffs repeat the trial court's mistake: misstating what Brandenburg said. Like the trial court, plaintiffs claim that Brandenburg said the cost to house ICE detainees is the same as it is to house detainees generally, namely, $97 per inmate per day, above the price ICE pays under the contract. But that's not true. Brandenburg said just the opposite. And to put the matter to rest, here is the relevant paragraph from Brandenburg's letter, so the court can see for itself:

> "The contracts we have account for another 40-60 beds/detainees, this varies but we will use the larger number as that is what we are projecting. The same process is used. $5,640,363 divided by 160, divided by 365 = *$97 per day for all detainees*. Next you subtract the total detainee number from the county number, $155 - $97 = $58. This difference in cost is then subtracted from the total detainee cost *to determine our cost per day per contract detainee. $97 - $58 = $39 per day, which is our cost to house the contract detainees.* This cost is covered by their contract rates of $80, $70 and $50 per day[,] respectively."

(SER 17) (emphasis added).

There is no way for plaintiffs to dance around this language. Brandenburg clearly said that the housing cost for "all detainees" is $97 per day, but is just $39 per day "to house the contract detainees," meaning the ICE detainees. More

importantly, that cost "is covered," Brandenburg said, "by [ICE's] contract rates of $80, $70 and $50 per day." On this evidence – which is, again, the only evidence – NORCOR is not losing money on the contract.

Unable to make the letter say what it doesn't, plaintiffs try a different track: they assert that Brandenburg's all-detainee calculations are reliable but his ICE-detainee calculations are not. The former numbers are "actual," plaintiffs argue, while they latter are just "hypothetical." Ans Br on Cross-Appeal at 22.

There is, however, no basis for that assertion – no evidence from which to challenge some of the numbers in Brandenburg's letter but not others – to distinguish the actual from the hypothetical. There is only his letter, which, on its face, says that the daily cost of the ICE detainees is just $39. The number is unrebutted. So, right or wrong, plaintiffs can't dispute it. More importantly, they can't dispute it without disputing all of the other numbers in the letter. And where would that leave them? This is, after all, *their* evidence, offered by *them* on the issue of standing, which is *their* burden to prove. Without the letter, they can't carry that burden.

On this record, there is no basis for finding that NORCOR is losing money on this contract. But even if there were, that would not carry plaintiff's burden. As explained in NORCOR's prior brief, taxpayers don't have standing to challenge government action unless they can show that the action will raise their taxes. Op

Br on Cross-Appeal at 30-32. And plaintiffs don't even try to show that here. They don't explain why, if it's losing money on the ICE contract, NORCOR will just continue blithely doing so – why it won't cancel the contract, readjust the reimbursement rate as the contract allows periodically, negotiate a new contract, or cover the loss with other revenues. They just ask the court to assume that NORCOR won't take corrective measures. And they also ask it to assume that Wasco County, likewise won't take measures to stop the bleeding, but will instead raise their property taxes. This is all just wild speculation on plaintiffs' part – a parade of "hypothetical contingencies" of the kind the Supreme Court said in *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or 189, 201, 301 P3d 419 (2013), "is inadequate to satisfy the standing requirements under the [UDJA]."[1]

The trial court erred in ruling that plaintiffs had standing as taxpayers to seek a judicial declaration about the validity of NORCOR's contract with ICE.

III. NO STANDING UNDER ORS 294.100

Plaintiffs' fallback argument is that, even if they don't have standing under the UDJA, which requires proof of higher taxes, they have it under ORS 294.100, which doesn't. There are two problems with that argument. The first is that

[1] Plaintiffs complain that NORCOR failed to offer evidence that their taxes won't go up if the contract with ICE is not invalidated. Ans Br on Cross-App at 24. But, of course, it's plaintiffs' burden to prove they have taxpayer standing, not NORCOR's burden to disprove it.

plaintiffs aren't seeking relief under that statute. The second is that that statute doesn't provide the relief they're seeking.

Plaintiffs didn't bring this action under ORS 294.100, which isn't mentioned in their complaint. In the "jurisdiction" part of that pleading, plaintiff said they were proceeding under the UDJA: "The Court has the power to grant the declaratory and supplemental relief sought by Plaintiffs under ORS 28.010, and 28.020, and 28.080." *See* Amended Complaint, ¶ 2. It's too late now for plaintiffs to argue that they were actually proceeding under another, unpled statute. "In this state, a party's pleadings matter, and '[i]t is a theory long in use in the practice of law that the pleadings declare and control the issues to be determined.'" *Kiryuta v. Country Preferred Ins. Co.*, 273 Or App 469, 473-74, 359 P3d 480 (2015), *aff'd*, 360 Or 1, 376 P3d 284 (2016); *see also Wold v. City of Portland*, 166 Or 455, 470-71, 112 P2d 469 (1941) (action tried on negligence theory of liability could not be affirmed on appeal under an unpled nuisance theory).[2]

The reason plaintiffs didn't plead a claim under ORS 294.100 is obvious: it doesn't provide the relief they seek. The statute makes it unlawful for a "public

[2] It should probably go without saying, but plaintiffs can't use the relaxed standing requirements under ORS 294.100 to justify relief under the UDJA. The law doesn't allow that sort of remixing of remedies and requirements. "The source of law that determines [whether a party has standing] is the statute that confers standing in the particular proceeding that the party has initiated." *Kellas v. Dept. of Corrections*, 341 Or 471, 477, 145 P3d 139 (2006); *see Morgan*, 353 Or at 194 ("whether a plaintiff has standing depends on the particular requirements of the statute under which he or she is seeking relief.").

official" to expend unauthorized funds, ORS 294.100(1), and allows "any taxpayer" to bring an action "for return of the money." ORS 294.100(2). NORCOR is not a "public official,"[3] and plaintiffs are not seeking return of money NORCOR *expended*. They are seeking a declaration that NORCOR can't contract to *receive* money from ICE in return for certain services. For that relief – for any declaratory relief – plaintiffs have to proceed under the UDJA, there being no common law action for declaratory relief. Which is just what they were doing until they discovered their standing problem under the UDJA, and started scrambling around for some other theory of liability, never mind that they hadn't pled one.

This court should conclude that ORS 294.100 is not available to plaintiffs because they didn't plead it, and that it wouldn't help them even if it were available because it doesn't authorize the relief they seek or any relief against an entity like NORCOR.[4]

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[3] "Official," as a noun, refers to a person holding office. The term doesn't include what NORCOR is: an "intergovernmental corrections entity," created under ORS 190.265, which was enacted in 1996, long after ORS 294.100 was enacted in 1931. Entities like NORCOR could not have been in the contemplation of the drafters of ORS 294.100 when they used the term "public official."

[4] In *Cruz v. Multnomah County*, 279 Or App 1, 381 P3d 856 (2016), this court held that ORS 181A.820 does not itself provide a right of action for its enforcement. *Id.* at 24. On the way to that holding, the court suggested other possible enforcement mechanisms, including ORS 294.100. *Id.* at 23-24. That does not mean, however, that ORS 294.100 applies to any plaintiff against any defendant for any relief involving ORS 181A.820. ORS 294.100 contains its own requirements that must be met, but aren't met here, as explained above.

That brings us to plaintiffs' double-fallback argument. They claim to have a common law right to seek the declaration they want without having to prove an injury to themselves as taxpayers. This is, again, an unpled theory of liability. It's also an inaccurate one. For one thing, there is no common law action for declaratory relief. That is, of course, why the legislature enacted the UDJA.

To be sure, there were some remedies at common law for unlawful expenditures by a public official (which, again, NORCOR is not). As the Supreme Court explained in *Burt v. Blumenauer*, 299 Or 55, 70, 699 P2d 168 (1985), "[p]rior to 1931" – the year ORS 294.100 was enacted – "Oregon taxpayers had certain limited methods by which to protect themselves against unauthorized expenditures of public funds that might result in increasing their tax burden." They could "sue in equity for the return of money from third persons to whom it was fraudulently dispersed," or to "enjoin unlawful expenditures before they occurred." But, as *Burt* said, taxpayer plaintiffs had to prove that the allegedly unauthorized expenditures "might result in increasing their tax burden." *Id.* That has been settled law in this state since almost as far back as statehood: plaintiffs seeking relief as taxpayers for an allegedly unlawful expenditure of tax-generated funds must prove a "material injury," and not just rely on "[f]anciful, speculative, or even possible evil results":

> "It is the settled doctrine of this state that an individual taxpayer, whose burdens would be increased by the wrongful acts of public

> officers, and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts, and prevent such diversion of the public funds * * *. This doctrine is so well established and sustained by the undoubted weight of authority in the United States that it is unnecessary to enumerate the cases, sustaining it. *The taxpayer must, however, present such a case as will bring him within the ordinary equitable rules which govern when relief by injunction is sought. He must show that some act is threatened or imminent which will result in some material injury to himself, for which there is no adequate remedy at law. It is not sufficient that he apprehends injurious consequences, which neither actually exist nor are threatened. Fanciful, speculative, or even possible evil results are too remote and indefinite upon which to call into requisition the restraining process of a court of equity.* This rule is applicable as well when the state is a party plaintiff as where an individual occupies a like position. * * *"

State ex rel. Taylor v. Pennoyer, 26 Or 205, 206-10, 37 P 906 (1894) (citations omitted) (emphasis added). And what constitutes a material injury to a taxpayer is, of course, an increase in taxation. Thus, at common law, plaintiffs could not invoke equity to enjoin the government from the illegal expenditure of funds unless "it is made to appear" that the act "would increase his burden of taxation." *Sherman v. Bellows*, 24 Or 553, 555, 34 P 549 (1893)

In sum, even under the common law, a taxpayer's inability to demonstrate a larger tax burden from an expenditure of funds doomed a challenge to the expenditure. *See State ex rel Taylor*, 26 Or at 212 (trial court should have sustained demurrer to plaintiffs' challenge to state's purchase of land for insane asylum because they could not show that "burdens of taxation of its citizens will be

increased").[5] It follows that plaintiffs would have no standing to proceed under the common law, even if they had pled a common-law theory.

[5] When *Penoyer* came before the Supreme Court again in a second appeal, now with a different case title, the court explained its earlier ruling as follows;

> "When this case was here before * * *, we held that a private individual could not have public officers enjoined from using public funds, unless it could be shown that some civil or property rights were being invaded, or, in other words, that the individual was going to get hurt by the transaction. Upon that principle it was decided that he should be required to show that the location and building of the branch asylum in eastern Oregon would be attended with greater cost and expense than if constructed at the capital, *thereby increasing the burden of taxation which would be imposed upon him*, with others, whose duty it is to contribute to the support of the government."

State ex rel. Taylor v. Lord, 28 Or 498, 507, 43 P 471 (1896) (emphasis added; citation omitted).

IV. CONCLUSION

The judgment should be vacated and the case remanded with instructions to dismiss.

Respectfully submitted,

s/ Thomas M. Christ

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Certificate of Compliance with ORAP 5.05(2)

Brief length

I certify that this brief complies with the 3,300 word-count limitation in ORAP 5.05(1)(b)(ii)(E) and that the word count of this brief, as described in ORAP 5.05(1)(a), is 2,454 words.

Type size

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 5.03(b).

Dated this 7th day of May, 2020.

s/ Thomas M. Christ

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Certificate of Filing and Service

I certify that I filed the attached Brief on May 7, 2020, using the electronic filing function of the court's eFiling system.

I further certify that, on the same date, I served a copy of this Motion on the following lawyers, using the electronic service function of the eFiling system:

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