

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Personal Injury - Jury Trial

The Millers, an elderly couple traveling home to Las Vegas after visiting family in Washington, suffered injuries when their motor home collided with a 27" diameter and 13' long PVS sewage pipe on I-84 near La Grande, Oregon. The pipe had fallen from a flat-bed tractor-trailer into, and parallel with, the roadway. The Millers sued the truck driver and his employer (collectively "carrier") and the manufacturer of the pipe ("shipper") for negligence which caused them to suffer back injuries. They sought over \$200,000 each for medical expenses, \$75,000 each for loss of consortium, and unspecified amounts for other non-economic damages. The shipper asserted a counterclaim for contributory negligence against Mr. Miller, who was driving the motor home at the time of the accident. The shipper and carrier filed cross-claims against each other for indemnity.

After a six-day trial in Pendleton, Oregon, the jury returned a verdict for the Millers

and for the carrier. The jury concluded that the carrier was not negligent and instead held the shipper liable for negligently bundling and loading the pipes with latent defects in the dunnage and/or banding that could not have been discovered by a reasonable inspection of the load by the carrier. The jury also, however, found Mr. Miller 40% at fault for the accident. Judge Stewart dismissed the indemnity claims on cross-motions for directed verdict, concluding that neither defendant was a passive or secondary actor and that a reasonable jury could only find each defendant liable for its own active negligence.

The jury awarded Mr. Miller \$60,000 in economic and \$20,000 in noneconomic damages and Mrs. Miller \$55,000 in economic and \$20,000 in noneconomic damages. Miller v. J-M Manuf. Co., Civ. No.05-1499-ST (Verdict, April 22, 2009)
Plaintiffs' Counsel: Robert Vannah and Roger Cram
Defense Counsel: Kevin Sampson, Eric Neiman, and Marc Carlton.

Excessive Force

Judge Brown granted in part and denied in part defendant's Motion for Summary Judgment. The Court concluded defendant Sgt. Gorton was entitled to qualified immunity on the issue of excessive force because plaintiff had not established a reasonable officer would have had fair notice that a threat to tase a pretrial detainee in the circumstances of this case amounted to constitutionally excessive force in violation of plaintiff's rights. The Court also concluded Sgt. Gorton's threat to use the taser was not a battery under Oregon law because it was undisputed the particular taser was not capable of being used, but material issues of fact existed that precluded summary judgment as to plaintiff's assault claim against Multnomah County for the actions of Sgt. Gorton.

Although the Court concluded material issues of fact existed that precluded summary judgment as to plaintiff's claim against defendant Deputy Hathaway for malicious prosecution under section 1983, defendant Multnomah County was entitled

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to summary judgment as to plaintiff's claim against the County for malicious prosecution under state law pursuant to ORS 30.650 because plaintiff did not establish he suffered economic damages. The Court also concluded ORS 30.650 either alone or in combination with the Oregon Tort Claims Act did not violate Article I, § 10, or § 17 of the Oregon Constitution.

Evans v. Multnomah County, Civ. No. 07-1532-BR

(Opinion, April 15, 2009)

Plaintiff's Counsel: Benjamin Wright Haile

Defense Counsel: Stephen Lewis Madkour, David A. Landrum

DISCRETIONARY FUNCTION IMMUNITY

On September 8, 2004, the Cape Inscription, a steam powered vessel owned by the United States, docked at the port in Antwerp, Belgium. While it was there, several hundred new Mazda automobiles parked nearby were damaged by oily soot. No witnesses to the contamination have been found, and no surveillance video tapes from the port show the source of the oily soot.

Plaintiffs, who had insured the damaged vehicles, brought this action against the United States under the Suits in Admiralty Act and the Public Vessels Act, alleging that the

Cape Inscription had released the soot. They sought to recover \$1.9 million in damages, the cost of repainting the cars.

Plaintiffs' expert opined that the Cape Inscription had released soot because both of its boilers had been kept "on line," and operating in "low load" conditions while in port. The expert asserted that one boiler should have been shut down, allowing the other to operate at a higher level that allowed for more complete fuel combustion. The expert opined that there were no other causes for the contamination.

At the time of the incident in Antwerp, the Cape Inscription was subject to military operating instructions and contractual provisions requiring that it be maintained in the highest state of readiness so that it could immediately respond to operational orders. No regulation, policy, or contractual provision specifically addressed the number of boilers to be kept on line while the vessel was in port.

Defendant United States moved to dismiss for lack of subject matter jurisdiction on the grounds that, if the soot came from the Cape Inscription, the decision to operate both boilers was subject to the discretionary function exception to government tort liability. Assuming for the purposes of the motion that the Cape Inscription had caused plaintiffs' damages, Magistrate Judge Jelderks agreed with the government, and granted the

motion. He concluded that a decision to keep both boilers on line, which would allow the vessel to leave the port more quickly if ordered to do so by the Navy, was susceptible to the kind of policy analysis to which discretionary function immunity applies. Judge Jelderks also concluded that, in the face of evidence from plaintiff's own expert that operation of both boilers most likely caused a discharge of oily soot, plaintiff could not establish jurisdiction based on *res ipsa loquitur* or some undisclosed theory of causation.

Tokio Marine Nichido Fire Insurance Co., Ltd., et al v. United States of America

Civ. No. 06-929-JE

(Opinion, April 15, 2009)

Plaintiffs' Counsel: William R. Bennett III; Elaine J. Brown
Defense Counsel: R. Michael Underhill

Of Interest:

Karin Immergut, United States Attorney for the District of Oregon and Steve Wax, Federal Defender for the District of Oregon, will speak at the Federal Bar Association's monthly lunch scheduled, Thursday, May 21, 2009, at the University Club, 1225 SW 6th Ave, Portland. Registration to Ann Fallihee, afallihee@barran.com, or you may simply show up!