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## Torts

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## TORTS

*Thomas Brooks Chartered Corp. v. Burnett*, 920 F.2d 634

Author: Judge Brorby

Plaintiffs, Burnett, Wiemeyer, and the National Transportation Safety Board ("NTSB"), appealed an award of summary judgment granted in favor of defendant, Brooks Chartered Corporation ("Brooks"). Thomas Brooks was killed in an airplane crash, and the NTSB refused to allow a representative of Brooks to participate in the investigation. The district court subsequently granted an injunction. This prohibited NTSB from any disassembling of the crashed plane unless a representative of Brooks was also present to observe the investigation. The district court granted summary judgment in favor of Brooks, and NTSB appealed.

The Tenth Circuit reversed the district court order and vacated the injunction imposed on NTSB. The court determined this action was properly reviewable by the district court under the Administrative Procedure Act. The court explained that judicial review was not precluded by Congress, or committed to agency discretion by law. The court held that NTSB barring the Brooks representative from participating in the investigation followed objective criteria and was neither arbitrary and capricious, nor an abuse of discretion. Finally, the court rejected Brooks's claim that barring a representative from attending the investigation was a taking of property in violation of the fifth amendment.

*Creek Nation Indian Hous. Auth. v. United States*, 905 F.2d 312

Author: Judge Tacha

Explosive Transports, Incorporated ("ETI"), a third party plaintiff, appealed a district court order granting summary judgment for defendant, United States. The case arose after an ETI truck, transporting ten 2000 pound bombs under contract with the United States, was rear-ended by a car, causing three of the bombs to explode. On appeal, ETI argued that the district court erred in determining that negligence in designing the bombs fell within the discretionary function exception to 28 U.S.C. § 2680(a).

The Tenth Circuit affirmed the decision of the district court. The court held that the design of the bombs and the government's administration of the truck compliance testing procedures were discretionary functions shielded from liability under § 2680(a).

*Flynn v. United States*, 902 F.2d 1524

Author: Judge Theis, sitting by designation

Plaintiff, Flynn, brought suit alleging that three employees of defendant, United States and the National Park Service ("Employees"),

negligently caused a second automobile accident while rendering assistance at the scene of a previous accident. The first accident was not on National Park land. Specifically, Flynn asserted that the Employees failed to properly position their vehicle and improperly used emergency sirens and lights. Flynn also claimed that the National Park Service failed to instruct the Employees on how to respond to an automobile accident. The district court granted summary judgment for the Employees, and Flynn appealed.

The Tenth Circuit affirmed, stating that the statutory duties of National Park Service employees do not include rendering assistance at automobile accidents occurring outside of the National Park system. Essentially, the Employees were acting as private individuals who were under no duty to stop and render assistance. Moreover, Utah's Good Samaritan Act grants immunity for any acts performed while employees render assistance. The court further held that the government could not be sued for failure to train because the federal government is shielded from any claim based upon failure to perform a discretionary function. Moreover, National Park Service regulations do not mandate training on the proper use of emergency vehicles.

*Haynes v. Manning*, 917 F.2d 450

Per Curiam

Plaintiffs, Joseph and Elaine Haynes (the "Haynes"), brought suit against defendants, Manning and Shawnee Mission Ford ("Ford"), for common law fraud, breach of warranty, and violation of the Motor Vehicle Information and Cost Savings Act. The Haynes alleged that the used vehicle they purchased, which was previously owned by Ford, had 100,000 more miles on it than was indicated by the odometer. The jury found in favor of the Haynes on the fraud claims and against them on the other claims. The district court reduced the Haynes' award to zero. The Haynes appealed, asserting that the district court erred in instructing the jury that: (1) the standard of proof on federal odometer claims was clear and convincing, rather than preponderance of the evidence; and (2) "intent to defraud" is defined as a "specific intent to deceive or cheat," rather than "reckless disregard."

The Tenth Circuit reversed and remanded for a new trial. The court held that the standard of proof on federal odometer claims is preponderance of the evidence, as it is under other, similar federal statutes. The court also ruled that an instruction defining "intent to defraud" should include "reckless disregard." The court reasoned that the majority of courts have concluded that reckless disregard is sufficient to prove intent to defraud, and because the federal odometer statute imposes an affirmative duty on auto dealers to discover defects.

*Key v. Liquid Energy Corp.*, 906 F.2d 500

Author: Judge Conway, sitting by designation

Plaintiff, Key and Outhouse, were injured in a butane condensate

explosion when they attempted to vent the pressurized tanks they were driving for defendant, Liquid Energy Corporation ("Liquid Energy"). Mitchell Energy and Development, ("Mitchell"), parent of Liquid Energy, appealed the district court's failure to direct a verdict or grant judgment notwithstanding verdict in favor of Mitchell. Liquid Energy contended that the district court failed to direct a verdict in its favor on the issues of proximate cause and legal duty. Liquid Energy also challenged the jury instructions on negligence *per se*, future loss of earnings, and proximate cause. Finally, Liquid Energy contended that the district court erred in awarding two separate rates of prejudgment interest.

The Tenth Circuit determined that in order for Mitchell to be liable for the acts of Liquid Energy, Liquid Energy must have established that it was a mere instrumentality of Mitchell, or it must have shown that the use of the separate corporate structures somehow resulted in fraud, illegality, or inequity. The court found that Key and Outhouse did not meet their burden of proof on either issue and, therefore, ruled that the district court abused its discretion in failing to grant the motion for directed verdict and judgment notwithstanding verdict on the issue of Mitchell's liability. On the remaining issues, the court said that: (1) the jury was entitled to conclude that Liquid Energy's act was a proximate cause of the explosion; (2) Liquid Energy owed a legal duty to plaintiffs under 40 C.F.R. §§ 171—172 which regulate the transport of hazardous waste; (3) the jury instructions embody the law applicable to the issues; and (4) the pre-judgment interest rates reflect the applicable Oklahoma law which changed on November 1, 1986.

*Miller v. United States*, 901 F.2d 894

Author: Judge Saffels, sitting by designation

As the driver of a United States Army truck attempted to turn into a lane, it was struck by the vehicle of plaintiff Miller's minor son. The district court stated that the truck's driver should have seen the vehicle's headlights before turning into the lane. Consequently, the district court found defendant, United States, ninety-percent negligent under the Federal Torts Claim Act for injuries suffered by the minor son. The United States was subsequently ordered to pay \$7,065,873. The United States appealed, challenging; (1) the district court's assessment of the parties' relative fault; and (2) the award of damages.

The Tenth Circuit first stated that the district court's assessment of fault and award of damages were not clearly erroneous and, therefore, affirmed the decision. The court stated that the evidence clearly supported the finding that the driver of the truck should have seen the son's vehicle before crossing the highway. Thus, the driver of the truck could have yielded in time. Second, the court stated that the award of damages was proper except the amount of lost future income. The court stated that Miller should not be entitled to recover housing costs as future life care expenses and also recover lost future earnings. In effect, this would amount to double compensation. Consequently, the award

for lost future income was reduced by the amount of housing costs. Moreover, the court stated that even though the impact of future income taxes may be considered in calculating lost future earnings, the United States failed to meet its burden on this issue. Further, the evidence supported the determination that the son's life expectancy would be reduced by only seven years to age sixty-five. Finally, the court stated that the \$1.5 million for pain and suffering was not so excessive as to shock the judicial conscience.

*Palmer v. Krueger*, 897 F.2d 1529

Author: Judge Henley, sitting by designation

Plaintiff, Palmer, executrix of the estate of Virginia Ruth Krueger, appealed the district court's order denying her motion for a new trial in a wrongful death action. On appeal, Palmer argued that the district court erred in: (1) giving instructions on unavoidable accident, assumption of risk, contributory negligence and sudden emergency; (2) failing to give an instruction on *res ipsa loquitur*; (3) refusing to allow Palmer to cross-examine and introduce rebuttal evidence; and (4) refusing to allow Palmer to introduce evidence that Beech had knowledge of other similar incidents involving Beech aircraft.

The Tenth Circuit affirmed the judgment of the district court on all issues. First, the court ruled that Palmer did not object to the jury instructions at trial and, therefore, did not preserve the issue for appeal. Also, the district court did not err in giving the unavoidable accident instruction because such instructions are within the discretion of the trial court. Likewise, with the assumption of risk and contributory negligence instructions, the court ruled that the giving of these instructions was harmless error. The court also held that the giving of the sudden emergency instruction was proper because there was enough evidence in the record to support it. Second, the court found no error in the district court's refusal to give a *res ipsa loquitur* instruction. The court explained that no evidence was established from which negligence could be inferred. Third, the court upheld the district court's decision to deny cross-examination and rebuttal. The court explained that the district court has great discretion in these matters. Finally, the district court properly refused Palmer's introduction of evidence regarding Beech's knowledge of other similar incidents involving Beech aircraft. The court explained that the issue was never in dispute.

*Petrini v. Howard*, 918 F.2d 1482

Per Curiam

Plaintiff, Petrini, brought suit for damages, asserting a *Bivens* claim for interference with her first amendment rights and state tort and contract claims based on New Mexico law. Defendants, Howard and Doler, appealed the district court's denial of their motion for summary judgment. Specifically, Howard and Doler argued that the Civil Service Re-

form Act of 1978 ("CSRA") prevented Petrini from asserting her constitutional claim and state law tort claims.

The Tenth Circuit reversed the district court, holding that the remedies available to Petrini were constrained by the CSRA. The court found that since Petrini could have availed herself of CSRA procedures and remedies, a *Bivens* remedy was unwarranted. The court also decided that Petrini's tort claims were preempted by the CSRA. Although not all state law tort actions by federal employees are preempted by CSRA, when such actions complain of activities prohibited by the CSRA, they are preempted by the CSRA or the Federal Tort Claims Act.

*Shute v. Moon Lake Elec. Ass'n*, 899 F.2d 999

Author: Judge McKay

Plaintiffs, Shute and Mid-Valley Helicopters, Incorporated ("Mid-Valley"), sued defendants, Mountain States Telephone and Telegraph Company ("Mountain States") and Moon Lake Electric Association ("Moon Lake") as a result of an accident in which Mid-Valley's helicopter collided with power lines adjacent to Mountain State's telephone wires. The jury subsequently apportioned the damages: Shute 8%, Moon Lake 32%, and Mountain States 60%. Mountain States appealed, claiming that the district court erred in: (1) not awarding Mountain States judgment as a matter of law because Mountain States owed no duty to the plaintiffs; (2) upholding the verdict in light of the evidence; and (3) instructing the jury on the issue of negligence.

The Tenth Circuit affirmed the district court. The court ruled that: (1) Mountain States did owe a duty of reasonable care to aircraft pilots who encounter its wires because the unique wire-pole configuration created a greater hazard to low-flying aircraft than a normal wire configuration; (2) Shute's accident was foreseeable; and (3) the burden of marking lines where wire-pole configurations are unique does not outweigh the risk and the gravity of harm. The court stated that the jury's verdict was supported by sufficient evidence, and the jury was properly instructed.

*Stevison v. Enid Health Sys., Inc.*, 920 F.2d 710

Per Curiam

Plaintiff, Stevison, requested medical attention from defendant, Enid Health Systems, Incorporated ("Enid"). Plaintiff's mother informed a nurse from Enid that she had no insurance "except welfare." It is undisputed that Stevison left the hospital without medical treatment. Stevison brought suit alleging that her pain became more severe because Enid refused her treatment. The jury found in favor of Enid, and Stevison appealed. On appeal, Stevison contended that the district court's jury instruction improperly shifted the burden of proof. Specifically, the instruction should have stated the burden of proof rested with Enid to show Stevison withdrew her request for medical treatment.

The Tenth Circuit remanded the case for a new trial. The court stated that 42 U.S.C. § 1395dd(2) places the burden upon the health care provider to show that the plaintiff withdrew her request for treatment. Because there was no dispute that a request for medical treatment was made, Stevison satisfied her initial burden of proof. It was then incumbent on Enid to show by a preponderance of the evidence that Stevison withdrew her request. Accordingly, the district court inappropriately shifted the burden of proof.