

November 9, 2006

**Via Facsimile and Regular Mail**

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Re: *Randy Albright v. Tri-County Metropolitan*  
Multnomah County Case No. 050100147

Dear Counsel :

The arbitration in this matter was held on November 3, 2006. This case stems from the events that occurred on the Hawthorne Bridge on January 22, 2004 involving Plaintiff, a TriMet bus driver and an unknown assailant who was a passenger on the bus.

Each party submitted Pre-Hearing Statements of Proof, and three witnesses were called to testify. At the conclusion of plaintiff's case, TriMet moved for a directed verdict. That motion was denied.

I reviewed the written submissions and the video recording of the events that transpired on January 22, 2004. Notably, the video shows the TriMet bus passing within inches of Plaintiff who was riding his bicycle on the east side of the Hawthorne Bridge. The witness statements confirm Mr. Cooper, the TriMet driver, blew his horn as he passed Plaintiff.<sup>1</sup> In frustration, Plaintiff struck the side of the bus with his left hand as it passed him. After the bus passed, Plaintiff testified that he stopped his bicycle and wrote down the bus number and location. He planned to file a complaint against the driver with TriMet when he got to his office later that morning.

Unfortunately for all concerned, Mr. Cooper's bus came to a stop in rush hour traffic on the west side of the Hawthorne Bridge, giving Plaintiff time to catch up to the bus approximately two minutes later. When he was adjacent to the bus, Plaintiff began yelling at Mr. Cooper. Mr. Cooper ignored Plaintiff. After nearly twenty seconds of shouting, Plaintiff stepped into the westbound lane of traffic, crossed in front of the bus (which was stopped because of traffic) and approached Mr. Cooper's side of the bus. Approximately eighteen seconds

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<sup>1</sup> Mr. Cooper passed away from causes unrelated to the current litigation.

later, the unidentified assailant exited the bus and approached Plaintiff who was still standing on the roadway. Approximately 10 seconds later the assailant hit Plaintiff in the mouth and forcibly escorted him to the sidewalk.

I find both TriMet and Plaintiff were at fault for causing Plaintiff's injuries. Mr. Cooper was negligent because he encouraged the unidentified assailant to leave the bus to confront Plaintiff. One witness overheard the assailant tell Mr. Cooper to "let me off I will take care of this..." In response, Mr. Cooper replied "yeah, go ahead I can't do anything but you can." TriMet procedures dictated that Mr. Cooper should have activated an emergency button under these circumstances, which he failed to do. In fact, Mr. Cooper did not notify dispatch until much later.

TriMet argued that its policy allows drivers to permit passengers to disembark buses at unapproved stops. In so arguing, TriMet suggests that Mr. Cooper acted reasonably by allowing the assailant off the bus. However, this policy does not insulate TriMet from responsibility in this instance. Mr. Cooper knew he was contributing to an already deteriorating situation when he opened the door to allow this particular passenger off the bus. Mr. Cooper had other options, including keeping quiet when first approached by the assailant, notifying the police, notifying his dispatcher and keeping the bus door closed.<sup>2</sup>

In making this finding of negligence, I conclude that Plaintiff proved the allegations of Paragraph 4(f) of the Complaint.<sup>3</sup> While Mr. Cooper may not have expected the assailant to physically attack Plaintiff, that outcome was reasonably foreseeable in light of Plaintiff's agitated state, the assailant's comment to Mr. Cooper, and Mr. Cooper's response to the assailant before he disembarked the bus. Further, Mr. Cooper did not close the bus door until after the assailant re-boarded the bus which in my view corroborates the witness statement.<sup>4</sup>

In its Motion for Directed Verdict, TriMet relied on *Buchler v. State of Oregon*, 316 Or 499 (1993). The *Buchler* case is factually distinguishable from this case. In *Buchler*, there was no allegation the State Corrections Division affirmatively facilitated an assault on the victims. Here, the evidence suggests

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2 Mr. Cooper received a thirty day suspension for violating TriMet policy. Mr. Cooper could have been terminated for his actions, but TriMet took into account his 15 years of safe operations when deciding an appropriate punishment.

3 Paragraph 4(f) of the Complaint alleges that TriMet and its driver were negligent "...in facilitating an assault and battery committed by a patron."

4 The witness statement was offered by Plaintiff without objection in his Prehearing Statement of Proof. I find the statement admissible under UTCR 13.180(g), OEC 803 (8)(c) and OEC 804 (3)(c).

Mr. Cooper not only facilitated but encouraged the actions of the assailant. There is no legal justification for Mr. Cooper to have encouraged the passenger to leave his bus under these circumstances.

Plaintiff was negligent because he unlawfully stepped into traffic to block the bus in his unsuccessful effort to talk to Mr. Cooper. Plaintiff already had the information he needed to file his complaint. Plaintiff admitted under cross examination that he acted impulsively by stepping in front of the bus. Moreover, Plaintiff was negligent when he failed to leave the west bound traffic lane when first approached by the assailant. See Paragraphs 9 (a) and (b) of TriMet's Answer and Affirmative Defenses.<sup>5</sup> Plaintiff's actions clearly contributed to the escalation of the events on January 22, 2004.

TriMet and Mr. Albright are equally responsible for Plaintiff's subsequent injuries. Plaintiff's injuries consisted of a split lip requiring one emergency room visit. I award the sum of \$500.00 for general damages. The parties stipulated to the economic damages of \$702.00. The total damages are \$1,202.00, reduced by 50 percent for Plaintiff's comparative fault. My judgment, therefore, is for Plaintiff for \$601.00. I am not aware of any ORCP 54E offers, so it appears Plaintiff is entitled to prevailing fees. Plaintiff has five days to file a cost bill and Defendant has five days thereafter to file any objections.

Sincerely,

Gregory K. Zeuthen  
GKZ:sb

cc: Alice Joy, Willamette Week  
Aimee Green, Oregonian  
Erin Lacour, Portland Mercury

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<sup>5</sup> In Paragraph 9 its Third Affirmative Defense, TriMet alleges Plaintiff was comparatively at fault in two particulars:

“(a) plaintiff instigated the matter by riding his bicycle in front of the bus, forcing the bus to stop, and then by his presence prohibiting the bus from continuing on route – all of which resulted in the operator deboarding at least two passengers one of whom became involved in the altercation with plaintiff; and

“(b) in committing the conduct set out in paragraph 9 (a), *supra* – which conduct constitutes the crime of Interfering with Public Transportation (ORS 166.116) – plaintiff was yelling, swearing, and acting in a threatening manner and thereby provoked the passenger's response.”