

SEPTEMBER 2013

SETTLEMENT - MULTNOMAH COUNTY

DAVID B. SALE, PR FOR THE ESTATE OF DANIELLE NICOLE SALE; ROBERT ERIK GITTINGS; VICKI FLYNN, PR FOR THE ESTATE OF JENEE NICOLE HAMMEL; RYAN HAMMEL AND JAMIE HAMMEL v. TRI-MET; SANDI L. DAY; AND NEW FLYER OF AMERICA, ET AL.

**Number:** 1012-17188 (consolidated)

**Settlement Date:** 8/12/13 (settled hours before trial)

**Plff Atty:** Rick Pope of Kirklin Thompson & Pope for Plffs David Sale, Estate of Danielle Nicole Sale & Robert Gittings; Hala Gores, Attorney at Law for Plff Vicki Flynn & Estate of Jenee Nicole Hammel; Michelle Burrows, Attorney at Law for Plffs Ryan and Jamie Hammel (all Portland)

**Def. Atty:** Kimberly Sewell & Erik Van Hagen, Tri-Met (Portland) and Keith Garza, Law Offices of Keith Garza (Oak Grove) for Def. Tri-Met; Peter Richter, Heather Cavanaugh & Stacey Martinson of Miller Nash (Portland) for Def. New Flyer; Jeffrey Eden & Ryan Boyle of Schwabe Williamson & Wyatt (Portland) for Def. Sandi Day

**Judge:** Hon. Judith Matarazzo

**TRANSIT NEGLIGENCE; PEDESTRIAN ACCIDENT; PRODUCT LIABILITY**

**DEATH (MULTIPLE); FRACTURED FOOT, PELVIS & SHOULDER; DENTAL, HEAD, LEG & LUNG INJURIES; POST TRAUMATIC STRESS DISORDER**

4/24/10 - Plff Danielle Sale, decedent, female age 22, survived by her parents and three siblings, and her partner, Plff Erik Gittings, male age 22; Plff Jenee Nicole Hammel, decedent, female age 26, survived by her parents, fiance, 2-year-old son, and four siblings, including Plff Ryan Hammel; Plff Jamie Hammel, female age 26, and her husband, Plff Ryan Hammel, age 28, newlyweds. On a Saturday night in Portland, Oregon, a group of five people who had just been to a comedy show entered a signaled, marked crosswalk on a "walk" light. As they proceeded through the crosswalk, a Tri-Met bus driven by Def. Sandi Day made an illegal left turn from the far right lane, coming from behind the group, and striking them at approximately 14 mph. The bus, a 2001 New Flyer 40 foot low-floor diesel with an industry standard left A pillar and exterior mirror assembly, knocked newlyweds Ryan and Jamie Hammel aside. The bus dragged Danielle Nicole Sale and Erik Gittings underneath it for 60 feet before it stopped with the two of them caught in the right front wheel well. Erik, face down and immobilized, listened to Danielle die. He survived with critical injuries. The bus dragged Jenee Hammel for 20 feet under its left rear duals, leaving her

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**Facts Cont'd:** wedged in front of them. When the driver backed the bus up to get the tires off of Jenee, passerbys yelled at her to pull forward because she was crushing people in the right front wheel well. When she pulled forward to comply, she ran over and crushed Jenee. Plff contended Def. Sandi Day was negligent for illegally turning left from the right lane across two lanes of traffic; driving too fast through the intersection; and failing to keep a proper lookout, particularly around her left blind spot. The lawsuit also named Def. Tri-Met's former general manager and two safety executives, alleging they negligently supervised their safety and training of employees; allowed a Tri-Met policy of encouraging drivers to commit illegal left turns like the one Def. Day made; allowed trainers to encourage turns by bus drivers faster than Tri-Met's official internal speed limit; and did nothing to remove the known large left blind spot on Tri-Met's fleet of buses. Plffs discovered evidence of 11 previous left-turn crosswalk collisions between Tri-Met buses and pedestrians since 2001, the year that Def. New Flyer sold its bus to Tri-Met. In all collisions, the drivers said they did not see the pedestrian because of the left blind spot. In several of the crashes, Tri-Met's investigator reached the same conclusion. The two estates and Plff Erik Gittings also sued Def. New Flyer of America, Inc., of Crookston, Minnesota, and New Flyer Industries Canada ULC of Winnipeg, Manitoba, the companies that manufactured and sold the bus to Tri-Met, and mounted the exterior left rear-view mirror and mirror assembly. Plffs alleged that the bus was defective and unreasonably dangerous in that the left outside rear-view mirror and A pillar arrangement created a hazardous blind spot for drivers turning left, particularly drivers of short stature such as Def. Sandi Day. They argued the mirror should be raised to an upper mount, or lowered slightly on the bus. Plffs' experts concluded that these mounting positions were safer designs that were feasible and practicable in 2000. Plffs' experts concluded the width of the A pillar could easily and cheaply have been decreased by an inch or more. Plffs' experts also developed a computer model of the crash, and the view obstruction for the driver, from the bus video, police measurements, onsite measurements, and bus measurements taken with the driver in the seated position as she was the night of the collision. Plffs discovered that New Flyer since 2006 has been following and retaining news accounts from across Canada and the United States about serious left turn bus/pedestrian collisions;

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**Facts Cont'd:** that New Flyer's chief safety officer determined there was a safety problems and the driver's field of view should be improved; and that New Flyer's director of new product development refused to make the requested changes. New Flyer's major witnesses agreed that ensuring the best possible vision for a driver is a paramount importance of safety. Plffs also discovered that New Flyer has never done any scientific testing on the impact of the left mirror placement on a driver's field of vision. New Flyer excused that by noting there are no regulations requiring such testing. Plffs countered with evidence that the entire bus transit industry is largely unregulated for safety, and that New Flyer's Trade Association, the American Public Transportation Association (APTA), has lobbied Congress to keep it that way. (In 2012, for the first time ever, Congress authorized the Federal Transit Administration to issue safety regulations covering the public transit industry.) The product liability defendants argued that the incident was solely the fault of Def. Sandi Day, and that a training program known as "rocking and rolling" around view obstructions was sufficient for safety. Plffs' experts disputed the adequacy of rocking and rolling as a safety measure. The bus defendants also argued that Tri-Met had specified the mirror location, which Plffs disputed. Tri-Met admitted the liability of its bus driver, but denied its management was negligent. Tri-Met also asserted a \$1,000,000 aggregate damage limitation under the Oregon Tort Claims Act for all injuries and deaths arising from one occurrence. Plff Gittings asserted his damages were not limited by this cap under decisions of the Oregon Supreme Court holding that it may violate the Oregon Constitution in individual instances to limit damages for a severe injury. All Plffs also brought parallel claims for uncapped damages in Federal Court under 42 U.S.C. § 1983 on the basis of substantive due process. Plffs alleged that Def. Tri-Met caused this collision because it adopted dangerous policies, practices, and training in conscious disregard of a substantial risk of death or great bodily harm. The District Court dismissed those claims on Summary Judgment in July 2013, calling it a close case in its written opinion. The Court held driver liability was a necessary predicate to hold Tri-Met liable, which Plff disputed. The Court also held the proper test for a constitutional deprivation by the driver was an intent to injure, which Plffs also disputed. Plffs agreed the driver did not intend to injure them. Plffs had appealed the dismissal of their civil rights claim.

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**Injuries:** Plff Erik Gittings: Fractured pelvis, scapula, left foot and ribs; partially degloved left foot. Pleural effusion; contusions to both lungs and a collapsed left lung and chest cavity. Ruptured spleen; epigastric artery bleed. Closed head injury with loss of consciousness; loss of three front teeth. Crush injury to the right thigh and groin; multiple bruises, lacerations, contusions and sprains. Post Traumatic Stress Disorder; survivor's guilt and depression. Plffs Ryan Hammel and Jamie Hammel: severe emotional trauma. They were treated and released. Plff Danielle Nicole Sale suffered a fatal head injury and drag injuries over her face and entire body, including gashes in her arms down to the bone. She suffered pre-death pain and suffering as she survived for approximately 30 minutes under the bus. Plff Jenee Hammel died of crush injuries while her brother, Plff Ryan, kneeled next to her.

**Specials:** Plff Erik: Med. \$155,000; Lost Wages - none. Plff Erik discharged himself early from the hospital and went back to work at Winco after fellow employees donated vacation pay to him. Plff Danielle: Lost Wages \$2,000,000 in future net lost earnings based on her intended career as a nurse. Plff Jenee: Lost Wages \$3,000,000 in future net lost earnings and lost services.

**Result:** PLAINTIFF SETTLEMENT for \$4,000,000. (The settlement included \$1,150,000 for the Estate of Danielle Nicole Sale, \$1,200,000 for Plff Erik Gittings, \$1,325,000 for the Estate of Jenee Hammel, and \$325,000 for Plffs Ryan and Jamie Hammel. Of the \$4,000,000 settlement, the manufacturing defendants will pay \$2,000,000 and Def. Tri-Met will pay \$2,000,000.)