

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ASHLEY MARIE ELLWOOD,

Plaintiff,  
TC

Civil No. 07-6225-

v.

FINDINGS & RECOMMENDATION

UNITED STATES OF AMERICA,  
EMPLOYEES AND SUPERVISORS,  
individually and personally,  
L.F. LOCKART, Project  
Construction Engineer for  
B.O.R. Employees, Agents and  
Supervisors for the B.O.R.,  
Unknown John and Jane Does  
1-20, including but not  
limited to U.S. Forest  
Service employees and  
supervisors working as  
agents for B.O.R.,

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Defendants.

THE UNITED STATES OF AMERICA,  
Third-Party Plaintiff

v.

HAYWARD BAKER, INC., a Delaware  
Corp. and CHRISTOPHER DUSCHIK,  
Third-Party Defendants.

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HAYWARD BAKER, INC., a Delaware  
Corp.

Fourth-Party Plaintiff,

ELTING INCORPORATED, an Oregon Corp.,  
JOHN NICHOLSON and Unknown JOHN and  
JANE DOES 1-10,  
Fourth-Party Defendants.

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COFFIN, Magistrate Judge:

This is a premise liability case that arises out of an All-Terrain Vehicle (ATV) accident that occurred at the Wickiup Dam Recreation Area which is owned by the United States Bureau of Reclamation. The plaintiff has brought this claim for negligence against the United States of America and various federal agencies and employees under 28 U.S.C. § 1346(b) of the Federal Tort Claims Act. The United States disputes liability and has brought a third-party complaint for contribution and indemnification against general contractor Hayward Baker, Inc. Hayward Baker subsequently filed a fourth-party complaint for contribution and indemnification against Eliting, Inc. Eliting was the sub-contractor under Hayward Baker. As previously stated, plaintiff has brought this action against the United States; plaintiff has not sued either Hayward Baker or Eliting directly.<sup>1</sup>

Plaintiff alleges that she was injured after the ATV on which she was a passenger was driven off a "concealed cliff" by Christopher Duschik. Plaintiff alleges that she and Duschik were invitees on the berm where the accident took place and that Duschik drove off the cliff because the path they were on was a "well traveled ATV road that led to nowhere" and that it "ended without warning." Plaintiff

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<sup>1</sup>Christopher Duschik and the owners of the ATV were also made parties to this suit via third and fourth-party complaints; however, their presence as defendants in this action is not relevant to the motions presently before the court.

asserts that maintenance of a dangerous condition and the lack of appropriate barricades, signage, and warnings breached a duty of care owed by defendants.

Defendants have filed several motions directed at plaintiff Ellwood's complaint. Pursuant to Fed. R. Civ P. 14 (a)(2)(C), third-party defendants may assert against plaintiff any defense that the third-party plaintiff has to the plaintiff's claim. Presently before the court are third-party defendant/fourth -party plaintiff Hayward Baker Inc.'s motion(#46) for summary judgment; fourth-party defendant Eliting Inc.'s motion(#40)for summary judgment; defendant United States' motion(#51) for joinder in third-party defendant's motion summary judgment; defendant United States' motion (# 52) for joinder in fourth-party defendant's motion for summary judgment; and defendant United States' amended motion (#63) for joinder in fourth-party defendant's motion for summary judgment. Plaintiff Ellwood has also brought a motion (#72) for leave to file an amended complaint.

#### Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the

production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Id. at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); Taylor v. List, 880 F.2d 1040 (9th Cir. 1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Valadingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary

judgment is inappropriate. Sankovich v. Insurance Co. of North America, 638 F.2d 136, 140 (9th Cir. 1981).

### Discussion

#### Plaintiff's Claims Against the United States Are Barred by the Recreational Immunity Statutes

The United States owns the land where the recreational accident in this case occurred. As such, plaintiff's claims against the United States are barred by the applicable recreational immunity statutes.

As stated in ORS 105.676, "it is public policy of the State of Oregon to encourage owners of land to make their land available to members of the public for recreational purposes ... by limiting their liability toward persons entering thereon for such purposes."

ORS 105.682(1) provides, in pertinent part,

[A]n owner of land is not liable in contract or in tort for any personal injury, death, or property damage that arises out of the use of the land for recreational purposes...when the owner of the land either directly or indirectly permits any person to use the land for recreational purposes....

Recreational immunity is afforded to any landowner who "makes no charge for permission to use the land." ORS 105.688 (2) (a). "Charge" is defined as "[t]he admission

price or fee asked by the owner in return for permission to enter or go upon the owner's land." ORS 105.672(1).

Plaintiff Ellwood was clearly using the property for recreational purposes while riding on the back of an ATV driven by Chritopehr Duschik. The United States did not charge plaintiff Ellwood, a member of the general public, an admission fee to use the Wickiup Dam area. A fee is only charged to those who choose to camp overnight near the property. The United States did not charge plaintiff or her companions a general admission fee for permission to enter or go upon the land, and, as such, recreational immunity is applicable. See Coleman v. Oregon Parks Recreation Department, 221 Or. App. 484, 491 (2008)

Plaintiff argues that the United States required ATV operators to have a operating permit from the State of Oregon and that some funds received by the State of Oregon for the permits were given to the United States for ATV trails and that such amounts to a "charge" by the United States. However, ATV permit fees paid to the State of Oregon are not a "charge" as ORS 105.672 (1)(a) defines a charge as "an admission price or fee asked by any owner in return for permission to enter of go upon the owner's land." Id. (emphasis added). As the fee was not asked by the United States, the owner, it is not a "charge" and recreational immunity is applicable. Moreover, the United States received no grants or distributions from the State of Oregon for the development or maintenance of ATV trails in the Wickiup Dam area. In addition, a substantial part

of plaintiff's arguments rely upon a 2007 revision of the language in ORS 105.672(1). The revision relates, among other things, to the definition of "charge" and deletes the language "fee asked by any owner" and replaces it with "fee requested or expected by an owner." Such language is not retroactive and is not applicable to plaintiff's accident in 2003. See ORS 105.672(1) (a-b) and notes thereto.<sup>2</sup>

Based on the above, the United States should be dismissed from this action. In view of the fact the United States should be dismissed, the third and fourth-party complaints, which are based on derivative liability, are moot and should be dismissed without prejudice.

#### Plaintiff's Motion to Amend

Plaintiff moves to amend the complaint to sue certain defendants directly.

Fed. R. Civ P. 15 provides that after a responsive pleading has been filed, "a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Whether to grant or deny a motion to

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<sup>2</sup>Plaintiff also cites Ducey v. United States, 713 F.2d 504 (9th Cir. 1983) for its analysis of Nevada's recreational use law. However, plaintiff ignores the Ducey Court's explicit warning that "case law pertaining to the recreational use statutes of other jurisdictions must be viewed cautiously because of variations from statute to statute." Id. at 514. Reliance on Nevada's statute and Ducey is misplaced and not persuasive in the circumstances of this case. See p. 4 of Hayward's Reply (#68).

amend the pleadings is a matter of the court's discretion. Sweaney v. Ada County, 119 F.3d 1385, 1392 (9th Cir. 1997).

Factors considered in whether to grant a motion to amend include undue delay, bad faith, prejudice to the opposing party, and futility of amendment. Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995), cert denied, 516 U.S. 1051(1996).

In light of the factors and the circumstances of this case, this court exercises its discretion and finds that the amendment should be allowed. Because any futility of the amendment is not clear, defendants' arguments related to futility may be raised in motions against the amended complaint.

All of the parties' other arguments relating to the motions before this court have been considered and found unpersuasive unless otherwise noted.

#### Conclusion

Defendant United States' motion(#51) for joinder in third-party defendant's motion for summary judgment and defendant United States' motion and amended motion (# 52 and #63) for joinder in fourth-party defendant's motion for summary judgment should be allowed, summary judgment in favor of the United States should granted and the United States should be dismissed.

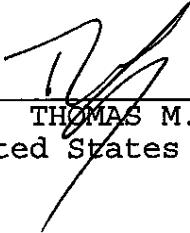
Third-party defendant/fourth -party plaintiff Hayward Baker Inc.'s motion(#46) for summary judgment and fourth-party defendant Eliting Inc.'s motion(#40)for summary judgment should be allowed to the extent the third and



fourth party complaints should be dismissed without prejudice and third-party defendant/fourth party plaintiff Hayward Baker Inc. should be dismissed and fourth-party defendant Eliting Inc. should be dismissed.

Plaintiff Ellwood's motion (#72) for leave to file an amended complaint should be allowed.

DATED this 13<sup>th</sup> day of August, 2009.

  
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THOMAS M. COFFIN  
United States Magistrate Judge