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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 35264-8-II

IN DIVISION II OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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SCOTT ALPRIN, Appellant

v.

CITY OF TACOMA, Respondent

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RESPONSIVE BRIEF OF APPELLANT

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## I. INTRODUCTION

The issue of summary judgment in this matter turns on the proper application of laws. The Respondent, City of Tacoma, basing his conclusion on the proper law on cases that do not address the issue in this case. The issue in this case is a balancing of the duties of each party to determine liability. But to address the Respondent's brief, two points must be examined. The first is the jurisdictional treatment of admiralty cases in federal law, and the second is the treatment of comparative negligence under federal maritime law.

## II. ANALYSIS

### 1. Basis for Summary Judgement in Federal Cases.

The Appellant wants to address the Respondent's misapplication of cases such as *Liner, et. al. v. Dravo Basic Materials Company*, and *Theriot v. United States*. Additionally, the Appellant wishes to clarify the Respondent's misunderstanding of Appellant's remarks regarding *Graves v. US*. It should be remembered that the federal cases, where the United States is a party, are typically dealing with two separate issues.

The first issue is the relative rights and duties of individuals under substantive admiralty law, an analysis based not only in statute, but common law. The second issue, present whenever the United States is a

defendant, is a waiver of sovereign immunity under the Suits in Admiralty Act (SAA), and discretionary function exception. 46 U.S.C. §§741-752. The latter analysis speaks to jurisdiction of the federal court, not the merits of the case.

**A. Liner v. Dravo.**

The Respondent sets forth that this case is one where the relative duties of admiralty are being applied, and summary judgment granted by way of admiralty law analysis. However, the conclusion in this case clearly states that “the Government in this case is entitled to immunity from suit under the discretionary function exception to its waiver of immunity under the SAA, because the decision to mark the barge with an unlighted marker was a discretionary one grounded in policy considerations.” *Liner, et. al. v. Dravo Basic Materials Company*, 162 F.Supp.2d 499, 506 (E.D. La. 2001).

The trial court in this case was granting summary judgment on the jurisdictional question. The discretionary function exception states that the waiver of sovereign immunity provided in the SAA does not waive immunity for discretionary acts of government agencies. *Liner* at 502 citing " *Theriot v. United States*, 245 F.3d 388, 396 (5th Cir.1998) and *Baldassaro v. United States*, 64 F.3d 206, 208 (5th Cir.1995).

The facts in *Liner* may be similar to this case, but the theory is not. *Dravo Basic Materials* was named as a defendant along with the United States. Dravo was dismissed from the suit because the plaintiff could not establish ownership of the alleged hazard. *Liner* at 501, FN 2. This left the United States of America as the sole defendant. As the sole defendant, the United States asserted a lack of jurisdiction based on a failure to establish a waiver of sovereign immunity. The basis was the discretionary function exemption. *Id.* at 502-504.

The analysis of the discretionary function exception has two prongs. First, the conduct must be discretionary, involving an element of judgment or choice on the part of the federal actor. Second, the conduct must be grounded in considerations of social, economic, or political public policy. *Id.* at 503. The next portion of the trial court's decision is an analysis of the discretionary function exception.

The Plaintiff attempted to get around this exception by citing *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). However, there were no facts to establish the reliance on the part of the Plaintiff that would have made the government's conduct an issue. Regardless, this point is only set forth to address an issue of jurisdiction, not an analysis of rights under admiralty law.

**B. Graves v. U.S.**

The Respondent asserts that the Appellant incorrectly asserts that this case is not one of admiralty. However, the Court will note that the while the case involves admiralty law, it is a decision regarding jurisdiction. The final line of the opinion clearly states “(T)herefore, we hold that the district court lacked subject matter jurisdiction to hear this case.” *Graves v. U.S.*, 872 F.2d 133, 138 (6<sup>th</sup> Cir. 1989).

It is additionally interesting to note that the trial court did not dismiss the plaintiff’s case in summary judgment. Rather, the trial court reached a conclusion in trail after viewing the merits of each side. The appellate court did discuss the merits of the case and determined that they were not clearly erroneous. *Graves* at 136-137. The court then went on to determine if the trial court was correct on the issue of jurisdiction. It found that it was not. *Id.* at 137-138.

The *Graves* case cannot be used for a basis of summary judgment based on duties under admiralty law. Rather, it’s significance is one of jurisdiction. In fact, once the jurisdictional hurdle was overcome, the trial court heard the case on its merits, and the appellate court analyzed the decision based on an abuse of discretion standard. Furthermore, the concurring opinion states that there is precedent for judicial scrutiny of

warning systems. *Id.* at 138 citing *Estate of Callas v. United States*, 682 F.2d 613 (7th Cir.1982).

**C. Conclusion Regarding Federal Admiralty Law**

The Respondent is attempting to show that alleged by the Appellant negligence can be proved in this case as a matter of law. However, even if that were true, it does not mean that this case is ripe for summary judgment. The point of the Appellant is that there may be numerous basis for a finding of fact. The Respondent is trying to shield itself using cases such as *Liner*, *Graves*, *Theriot*, and others.

But reliance on these cases does not prove the Respondent's point. Where summary judgment was granted, it was granted on the basis of a jurisdictional question. Once the federal court could not find jurisdiction, it was obliged to dismiss. In other instances, such as *Graves*, the issue was reached on its merits, not by way of summary judgment.

The Respondent is not entitled to use discretionary function analysis to avert a claim of liability. The matter of discretionary function pertains to the sovereign immunity of the federal government, not the City of Tacoma. Therefore, this line of cases does not benefit the Appellant.

**2. The Application of Comparative Negligence in Admiralty.**

The Respondent spends much time pointing to the alleged

negligence of the Appellant. This section of this brief looks at the affect of these allegations in the light most favorable to the Appellant. Therefore, it does not challenge the Respondent's claims of negligence on the part of the Appellant.

The underlying suit by the Appellant alleges negligence by the City. If the Appellant is correct, then there is liability on the part of the Respondent. However, if the Appellant also was negligent in some fashion, the Respondent is not without exposure.

The standard rule of admiralty is that, if there is loss due to the allision of a vessel and a non-vessel because of mutual contributing fault, then the damages are totaled and divided among the parties. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 400, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

In *Reliable Transfer*, the Supreme Court actually modified the old rule of apportioning damages in admiralty cases where there was a contributing negligence. Prior to this, if multiple parties were at fault, damages were divided equally. *Reliable Transfer* at 400-405. The Supreme Court modified the rule to provide for proportional allocation of damages. *Id.* at 411.

In applying this principle, courts have not allowed the defendant to

escape liability based on negligence of plaintiff, even when the ordinary practice of seamen was not observed. *Estate of Callas v. United States*, 682 F.2d 613 (7<sup>th</sup> Cir. 1982). In *Estate of Callas*, the plaintiff sued based on the government's failure to use due care in warning the public. The government sought to extinguish liability based on the discretionary function. However, its secondary defense was the victims failed to maintain a proper lookout and did not observe take prudent precautions. *Id.* at 624.

In this case, the mere fact that there was liability on the part of the plaintiff did not eliminate exposure by the government. The proper result was an allocation of damages based on proportional fault. The basis for the lower court's reexamination on this point was the effect of eliminating certain plaintiff theories based on sovereign immunity. *Id.* at 625.

The Respondent is urging the Court to follow the same path proposed by the government in *Estate of Callas*. However, even if their claims were true, there is no basis for summary judgment. Rather, there must be a finding of fact based on proportional liability.

### **III. CONCLUSION**

The Respondent's reliance on case law justifying summary judgment is misplaced. The basis for the decisions in cases like *Theriot*,

*Graves*, and *Liner* lies in subject matter jurisdiction, not admiralty law analysis. In cases under the SAA, the government's first line of defense is jurisdiction because the federal courts are courts of limited jurisdiction. Without an effective waiver of sovereign immunity, there is no case. But the Respondent here is a city. They are not entitled to the defenses of the United States. Therefore, this line of cases does not benefit them

The Respondent stresses that the Appellant's negligence should shield them from liability. However, substantive admiralty law would suggest otherwise. At best, it would entitle them the benefits of an apportionment of liability. In any event, this is a matter for a finder of fact and not a matter for summary judgment.

The case should be remanded for trial on the issues.

Respectfully submitted this    day of January, 2007



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**CERTIFICATE OF SERVICE**

I certify that on the 27<sup>th</sup> day of January, 2007, I caused a true and

correct copy of this Responsive Brief of Appellant to be served on the following in the manner indicated below:

Elizabeth A. Pauli City Attorney M. Joseph Sloan City of Tacoma 3628 South 35 <sup>th</sup> Street Tacoma WA 98409	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of January, 2007, in Tacoma, Washington

