IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

HENRY MICHAEL FUHRER, Plaintiff, vs. AVIS BUDGET GROUP, INC., AVIS BUDGET CAR RENTAL, LLC, PV HOLDING CORP, AB CAR RENTAL SERVICES, INC, and TADASHI DAVID EMORI, Defendants.	Case No. 19CV38807 **DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT; and ORCP 47F MOTION FOR CONTINUANCE OF PROCEEDINGS**

RESPONSE

Avis Budget Group, Inc., Avis Budget Car Rental, LLC, PV Holding Corp, AB Car Rental Services, Inc. (collectively, the "Avis Defendants"), and Tadashi David Emori ("Emori") (the Avis Defendants and Emori are collectively referred to as "Defendants") hereby respond in opposition to plaintiff Henry Michael Fuhrer's Second Motion for Partial Summary Judgment.

Pursuant to ORCP 47F, Defendants also move for a 60-day continuance of the proceedings relating to the "comparative fault" portion of Plaintiff's Second Motion for Partial Summary Judgment. As explained further below, Defendants are currently unable to timely procure facts essential to their defense of that Motion and require addition time to conduct necessary discovery.

This Response and Defendants' ORCP 47 Motion for Continuance are supported by the Declaration of Iain Armstrong, filed contemporaneously herewith.

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CASE BACKGROUND

A. The Automobile Accident

On September 12, 2017, Plaintiff was a passenger in a shuttle van driven by his then co-worker, Emori, when the van was struck by a car driven by defendant Gaspar David Mateo ("Mateo") near the intersection of N. Columbia Boulevard and N. City Dump Road in Portland (the "Accident"). Just prior to the Accident, Emori was attempting to turn left onto N. Columbia Boulevard when the collision occurred with Mateo, who was traveling west bound on N. Columbia Boulevard at the time.

Following the Accident, police officers arrested Mateo for his role in the accident and charged him with assault and reckless driving.[1] A collision reconstructionist and investigator with the Portland Police Bureau calculated that Mateo was traveling at approximately 67 miles per hour (the posted speed limit was 40 miles per hour) when his vehicle started skidding and he lost control just before the Accident.[2] The police also told Emori that he was not responsible for the Accident and did not issue him any citations or charge him with any crimes.[3] Further, the police concluded in their report that "Mateo's excessive speed caused this collision."[4]

B. Procedural History

1. This Action

Plaintiff initiated this action on September 5, 2019, naming as defendants *inter alios* Mateo and his father, Gaspar David Pablo ("Pablo"). Plaintiff's First Amended Complaint asserted a single claim for common law negligence against Mateo based on his role in causing the Accident,[5] as well as a single claim for negligent entrustment against Pablo for allowing

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[1] Declaration of Iain Armstrong ("Armstrong Declaration"), ¶6, Exhibit A, p. 20.

[2] *Id*. at 19.

[3] *Id*. at ¶7, Exhibit B, 87:24-25; 88:1-9.

[4] *Id*. at ¶6, Exhibit A, p. 20.

[5] First Amended Complaint, p. 4, ¶¶19-21.

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Mateo to drive when Pablo "knew that Mateo was a reckless, incompetent or dangerous driver."[6] Defendants filed their Answer to the First Amended Complaint on November 12, 2019, therein alleging *inter alia*:

- A comparative fault defense under ORS 31.600: "In the event defendants are found at fault and liable for plaintiff's injuries, defendants are entitled to an allocation of fault against all parties responsible or potentially responsible for plaintiff's injuries under ORS 31.600"[7];
- An "exclusive remedy" defense under ORS 656.018[8]; and
- A "negligence of fellow servant" defense under ORS 654.330.[9]

On September 22, 2021, Plaintiff filed his Second Amended Complaint wherein he no longer names Mateo and Pablo as defendants, asserts new legal theories such as an "agency" relationship, asserts new claims for relief, and inexplicably increasing his prayer by $10,000,000.

On October 4, 2021, the court entered a Limited Judgment of Dismissal as to Mateo and Pablo.[10] Defendants presumed that Plaintiff agreed to dismiss Mateo and Pablo pursuant to some sort of settlement agreement between Plaintiff and Mateo/Pablo and/or Allstate, Mateo and Pablo's auto insurance carrier. After all, as articulated in the next section below, Mateo and Pablo's auto insurer, Allstate, filed a separate interpleader relating to the Accident against *inter alios* Mateo, Pablo, and Plaintiff that was ultimately dismissed pursuant to a

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[6] First Amended Complaint, p. 4, line 24, ¶22; p. 5, ¶¶23-25.

[7] Defendants' Answer and Affirmative Defenses to First Amended Complaint, p. 5, ¶27.

[8] *Id*. at p. 5, ¶28.

[9] *Id*. at p. 6, ¶29.

[10] *See generally* Limited Judgment of Dismissal of Defendants Mateo and Pablo. The Judgment reads in part: "[i]t is hereby ordered and adjudged that the above-entitled action be, and the same hereby is, dismissed in its entirety as to defendants Gaspar David Mateo and Gaspar David Pablo only *without costs*" (emphasis added). Further, the judgment does not specify whether the dismissal of Mateo or Pablo was done "with" or "without" prejudice.

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General Judgment of Dismissal without prejudice on November 13, 2019 without an adjudication of the merits (case no. 18CV58803) (the "First Interpleader Action").[11]

However, Defendants learned for the first time on November 19, 2021, when Plaintiff filed the pending Motion for Partial Summary Judgment, that Plaintiff had purportedly *not* reached a settlement agreement with Mateo and Pablo.[12] Rather, as Plaintiff contends in his Summary Judgment Motion, he just voluntarily dismissed Mateo and Pablo from this litigation without any apparent consideration.[13] For these reasons, Plaintiff argues in his Motion that Defendants can no longer ask a jury to allocate fault to Pablo or Mateo, the at-fault driver for the Accident, because ORS 31.600 only allows parties and settled persons to appear on the verdict form.[14]

2. Allstate's Interpleader Action

Prior to the commencement of this action, on or about December 27, 2018, Allstate initiated the First Interpleader Action. Therein, Allstate alleged that it issued an auto policy to Pablo with policy limits of $25,000 per person and $50,000 per accident.[15] Allstate further alleged its "duty to defend its insureds against any such suits or claims and has an obligation to pay on behalf of its insureds all sums that the insured shall become legally obligated to pay as a result of such claims."[16] The First Interpleader Action also alleged that Allstate tendered "into the registry of the court the sum of $50,000, the total amount of proceeds available under

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[11] *See generally* General Judgment of Dismissal entered by the court on November 13, 2019 in the First Interpleader Action.

[12] Armstrong Declaration, ¶2.

[13] *See* Plaintiff's [Second] Motion for Partial Summary Judgment, p. 5, lines 17-19 ("[s]ince no settlement was entered into with Gaspar David Mateo or Gaspar David Pablo, and neither will be parties at the time of trial, there is no basis for the jury to allocate fault with the Defendants [pursuant to ORS 31.600]").

[14] Plaintiff [Second] Motion for Partial Summary Judgment, p. 5, lines 9-19.

[15] Plaintiff Allstate's Complaint in Interpleader in the First Interpleader Action, p. 2, ¶3.

[16] *Id*. at p. 2, ¶6.

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the subject policy of insurance, and plaintiff claims no beneficial interest in such funds."[17] Allstate further alleged its right to an award of its "reasonable attorney fees."[18] The First Interpleader Action was dismissed without prejudice pursuant to a General Judgment of Dismissal on November 13, 2019.[19]

3. Continental Casualty's Interpleader Action

On December 24, 2019, Continental Casualty Company initiated a second interpleader action with this Court relating to the Accident against *inter alios* Plaintiff (case no. 19CV55141) (the "Second Interpleader Action"). As alleged therein, Continental issued an auto insurance policy to defendant Avis Budget Group, Inc. that was in effect at the time of the Accident,[20] and tendered into the registry of the court the sum of $50,000, the total amount of Underinsured Motorist benefits available under that policy.[21] The Second Interpleader Action was dismissed on August 2, 2021, pursuant to a settlement agreement reached between Continental and Plaintiff.[22] Per the specifics terms to that settlement agreement, Plaintiff accepted $25,000 from Continental in exchange for *inter alia* Plaintiff's release of claims against Continental in this case and the Second Interpleader Action.[23]

POINTS AND AUTHORITIES

A. ORS 31.600

Oregon's comparative fault statute, ORS 31.600, provides that the trier of fact shall

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[17] Plaintiff Allstate's Complaint in Interpleader in the First Interpleader Action, p. 3, ¶7.

[18] *Id*. at p. 3, ¶8.

[19] *See* General Judgment of Dismissal, p. 2 (specifying that the First Interpleader Action would be "dismissed without prejudice and *without costs or attorney fees to any of the parties*") (emphasis added).

[20] Plaintiff Continental's Complaint in Interpleader in the Second Interpleader Action, p. 1, ¶3.

[21] *Id*. at p. 2, ¶6.

[22] Armstrong Declaration, ¶8, Exhibit C.

[23] *Id.* The settlement agreement further specifies that Plaintiff's claims for attorney fees and costs against Continental in this case would also be released.

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compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third-party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled. This list is not exhaustive[24] and the statutory language is silent as to the definition of a "settled party."

B. Negligence of Fellow Servant

ORS 654.330 of Oregon's Employer Liability law provides that:

> "In all actions brought to recover from an employer for injuries suffered by an employee, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by
>
> (…)
>
> (2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances."

C. Oregon's "Exclusive Remedy" Provision to Workers' Compensation Law

Oregon's workers' compensation laws provide the exclusive remedy for workers alleging claims against their employer for on-the-job injuries. An employer qualifies for the exclusive remedy provision under ORS 656.018(1)(a) if it maintains assurance with the Director of the Department of Consumer and Business Services that subject workers of the employer will receive compensation for compensable injuries and that the employer is carrier insured.[25]

The duty to maintain workers compensation insurance has been described as a bargain enacted by the legislature.[26] Workers receive a benefit in the form of "no-fault" insurance

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[24] For example, it remains undecided under Oregon law if the phrase "any party against whom recovery is sought" under ORS 31.600 includes a defendant that never appeared in the action and was defaulted. *See Rains v. Stayton Builders Mart, Inc.*, 359 Or 610 (2016) (holding that defendant failed to preserve the issue for appeal).

[25] ORS 656.017(1)(a).

[26] *See Hale v. Port of Portland*, 308 Or 508, 521-522, 783 P2d 506 (1989) (*overruled in part by Smothers v. Gresham Transfer, Inc.*, 332 Or 83. 23 P3d 333 (2001), subsequently

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coverage for all workplace injuries.[27] Employers receive the benefit of the exclusive remedy shielding the employer from liability for workplace injuries which are not occasioned by willful and unproved aggression[28] or from a failure to comply with certain equipment subject to a "red warning notice."[29] The public policy and legislative intent of the workers' compensation scheme is clear - companies that ensure that their workers receive full coverage for any medical bills, lost wages, and future disability occasioned by workplace injuries, regardless of fault, may not be sued for on the job personal injuries.

D. ORCP 47 Motion for Extension of Time

Pursuant to ORCP 47 C, courts have discretion to modify the briefing deadlines and hearings associated with summary judgment motions. A nonmovant who is unable to produce timely evidence may file a declaration explaining its current inability to procure facts essential to its defense of the motion, at which point the court may deny the motion or order a continuance to allow the nonmovant to conduct discovery.[30]

ARGUMENT ON PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Argument on Plaintiff's Request to Strike Defendants' Comparative Fault Defense

The court should deny Plaintiff's request to strike Defendants' comparative fault defense for three reasons. First, Plaintiff misreads ORS 31.600 and fails to cite to any relevant legal authority to support his position that Defendants can no longer seek the apportionment of fault to Mateo and Pablo. Second, Defendants would be subjected to extreme prejudice if fault cannot be allocated to Mateo, the at-fault driver, due to some technicality resulting from

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overruled by *Horton v. Or. Health & Sci. Univ.*, 359 Or 168, 376 P3d 998 (2016).

[27] *Id*.

[28] ORS 656.018(3)(a)

[29] ORS 656.018(3)(c)

[30] ORCP 47F; ORCP 1 E.

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Plaintiff's explicit gamesmanship. Third, by virtue of pleading an ORS 31.600 comparative fault defense throughout the lifetime of this case, Oregon law supports that Defendants nonetheless preserved their right to seek an apportionment of fault to Pablo and Mateo notwithstanding Plaintiff's dismissal of these parties.

1. Plaintiff's Misreading of ORS 31.600 and Misplaced Reliance on *Mills*

Plaintiff relies on the language of ORS 31.600 and the Oregon Supreme Court's opinion in *Mills v. Brown* as the sole sources of legal authority supporting his argument that Defendants' comparative fault defense should be stricken because Mateo and Pablo did not "settle" with Plaintiff and are no longer parties in the case.[31]

First, the statutory language to ORS 31.600 does not define a "settlement." According to Plaintiff's reading of this term, a "settled party" is a defendant who paid settlement money to the plaintiff in exchange for a release of claims and case dismissal. However, Oregon law provides a broader definition of "settlement" than that employed by Plaintiff. Under ORS 17.065(4), a "settlement" means "an agreement to accept as full and complete compensation for a claim, a sum, *or value* specified.[32] As explained below, Defendants move for a continuance under ORCP 47F to allow for additional discovery to determine whether Plaintiff truly did not "settle" with Mateo and Pablo. Nonetheless, there appears to be ample evidence in the record already to create an issue of material fact on this issue because Plaintiff and Mateo/Pablo conferred significant *value* to one another in this case such that a "settlement" was had:

- The end result to Mateo and Pablo's dismissal from this case by Plaintiff is that they no longer face any liability, personal or otherwise, for the Accident despite Mateo's significant role in causing the Accident and Plaintiff's alleged damages;

[31] Plaintiff's [Second] Motion for Partial Summary Judgment, p. 5, lines 17-19.

[32] Emphasis added.

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- By dismissing Mateo and Pablo, Plaintiff obtains a monumental litigation advantage by no longer having to argue the apportionment of liability to two tortfeasors who, upon information and belief, lack sufficient means to pay a judgment in this case and are otherwise "judgment proof"[33];
- Plaintiff's First Amended Complaint alleged, in part, his right to recover costs against Mateo and Pablo.[34] However, the Limited Judgment of Dismissal of Defendants Mateo and Pablo memorializes Plaintiff's apparent agreement to waive costs from Mateo or Pablo – including prevailing party and first appearance fees – to which Mateo and Pablo were both statutorily entitled.[35]

Thus, even if further discovery demonstrates that Mateo and/or Pablo (or Allstate, their insurance carrier) did not pay settlement money to Plaintiff, there is still sufficient evidence to create an issue of fact as to whether Plaintiff truly did not "settle" with Mateo and Pablo.

Second, Plaintiff's reliance on *Mills* is misplaced because that case is distinguishable in key ways. In *Mills*, a case decided over fifteen years before the enactment of ORS 31.600, the court analyzed former ORS 18.470 and 18.480[36] in the context of an auto accident where one of the motorists settled with the other driver on a covenant not to sue.[37] The petitioner argued on appeal that the trial court erred in instructing the jury not to consider the fault of the settled party.[38] Following a lengthy historical analysis of the legislative intent to ORS 18.470 and 18.480, the *Mills* court held that "anyone who settles with the plaintiff under a covenant not to sue does not qualify 'as a person against whom recovery is sought' as described in ORS

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[33] Armstrong Declaration, ¶3.

[34] First Amended Complaint, p. 8, line 6.

[35] Limited Judgment of Dismissal of Mateo and Pablo, p. 2.

[36] When comparing the statutory language to ORS 18.470 and 18.480 with ORS 31.600, there are marked differences, namely, that ORS 31.600 allows for the apportionment of fault to a settled party whereas ORS 18.470 and 18.480 do not.

[37] *Mills v. Brown*, 303 Or 223, 225 (1987).

[38] *Id*.

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18.470 nor as a "party" mentioned in ORS 18.480.[39]

Unlike the present case, *Mills* dealt with a party who *settled* with the plaintiff for $25,000 and a covenant not to sue. Here, Plaintiff asserts that neither Pablo or Mateo entered into a settlement agreement with Plaintiff, nor did they pay any settlement money to Plaintiff. Plaintiff's reliance on *Mills*, therefore, is not relevant to the issue before the court of whether an alleged non-settling, former defendant is not a "party" to whom liability can be apportioned under ORS 31.600.[40]

2. Defendants Would be Extremely Prejudiced by Plaintiff's Gross Manipulation and Abuse of Civil Procedural Rules if Fault Cannot be Allocated to Mateo and Pablo

Plaintiff's eleventh-hour attempt to manipulate Oregon's comparative fault system, if successful, would result in extreme prejudice to Defendants at trial. Defendants have retained liability experts and expended substantial legal costs in preparing a defense to Plaintiff's case, including the strategy of seeking an apportionment of fault to Mateo and Pablo due to their contributory negligence in causing the Accident.

Moreover, should the court grant this component to Plaintiff's summary judgment motion, a grave abuse of Oregon's procedural rules and justice system would result. If the court were to agree with Plaintiff's argument, a new procedural precedence would be set – in every lawsuit in which two or more tortfeasors are named as defendants, it is no longer sufficient to preserve a comparative fault defense by alleging it as an affirmative defense. Rather, a co-defendant would always need to assert one or more crossclaims against the other

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[39] *Mills*, 303 Or at 231.

[40] If Plaintiff entered into a covenant not to sue with Mateo and/or Pablo in this case, ORS 31.815(2) would require Plaintiff to provide notice of all of the terms of the covenant to all persons against whom Plaintiff makes claims – something that Plaintiff has not done to date. Moreover, ORS 31.815(1)(a) specifies that Plaintiff's claims against Defendants would be reduced by the share of the obligations of the tortfeasors who are given the covenant.

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co-defendant to preserve its ability to argue contributory negligence at trial.

3. Defendants' Preserved Their Ability to Seek an Apportionment of Fault to Mateo and Pablo by Virtue of Pleading a Comparative Fault Affirmative Defense

Notwithstanding Plaintiff's dismissal of Mateo and Pablo, Defendants still preserved their ability to seek an apportionment of fault to Mateo and Pablo by pleading a comparative fault affirmative defense since the outset of this litigation. Oregon law is clear that crossclaims are not necessary to preserve a comparative fault argument. "[I]n a comparative negligence case, a defendant that seeks to rely on a specification of negligence not alleged by the plaintiff to establish a codefendant's proportional share of fault must affirmatively plead that specification of negligence and do so in its answer as an affirmative defense and not in a cross-claim for contribution."[41]

Per *Lasley*, Defendants were not required to assert crossclaims against Mateo and Pablo to preserve their ability to seek an apportionment of fault by a trier of fact to Mateo and Pablo. For this reason alone, Plaintiff's request to strike Defendants' comparative fault defense should be denied.

B. Argument on Plaintiff's Request to Strike "Exclusive Remedy" Defense

The crux of this case involves Plaintiff's attempt to apply a loophole and "double dip" by availing himself of *both* the benefit of full no-fault workers' compensation insurance coverage purchased and provided to him by the Avis Defendants, while simultaneously suing Avis Budget Group, Inc. and its wholly owned subsidiaries for injuries suffered on the job. Plaintiff's claims undermine and frustrate the intended purpose of Oregon's workers' compensation law.

Plaintiff's claim echoes the claim brought in *Cortez v. Nacco Material Handling*

[41] *Lasley v. Combined Transport, Inc.*, 351 Or 1, 14 (2011).

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Group, Inc.[42] Following the ruling in *Cortez*, the legislature acted swiftly to explicitly repudiate the ruling of *Cortez* and amend ORS 656.018(1)(a) to reaffirm the intended bargain established by the legislature in enacting Oregon's workers' compensation statutory scheme. The court should follow the legislature's clear intent and deny Plaintiff's motion to strike the Avis Defendants' "exclusive remedy" defense.

1. *Cortez v. Nacco* and Legislative History

In *Cortez*, Antonio Cortez was working for a lumber mill operated by Sun Studs, LLC when he was hit by a forklift and injured.[43] Sun Studs, LLC was a wholly owned subsidiary of Swanson Group, Inc.[44] Swanson Group, Inc. operated Sun Studs, LLC as Sun Studs' sole and managing member.[45] Mr. Cortez, like Plaintiff in this case, received workers' compensation benefits before filing suit against Swanson Group, Inc. alleging liability under the Employers Liability Law.[46] Swanson Group, Inc. argued that the workers compensation exclusive remedy provision applied to Mr. Cortez' claim.[47] The Court of Appeals found that ORS 656.018(1) immunized employers from liability but did not extend immunity to LLC members such as Swanson.[48] The Supreme Court affirmed the Court of Appeals ruling regarding the application of ORS 656.018 as it was written prior to June 24, 2013.[49]

Following the Court of Appeals' ruling, the legislature took immediate action. Senate Bill 678 "extend[ing] exclusive remedy protections of workers' compensation statutes to partners, limited liability company partners, general partners, limited liability partners and

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[42] 356 Or 254, 337 P 3d 111 (2014)

[43] *Cortez*, 356 Or at 256.

[44] *Id.*

[45] *Id.* at 257.

[46] *Id.* at 256.

[47] *Id.* at 260.

[48] *Id.* at 261.

[49] *Id.* at 281.

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limited partners" was introduced on February 26, 2013. At a public hearing and work session April 18, 2013, the Senate Committee on Business and Transportation cited the Court of Appeals' decision in *Cortez* as the reason for the need for an amendment to the workers' compensation statute and stressed the importance of the exclusive remedy provision in Oregon's workers' compensation system.[50] Senate Committee on Business and Transportation passed the bill out of committee by a vote of 6-0-0, and the bill subsequently passed the Senate on April 30, 2013 by a vote of 28 ayes, 2 excused absent, and 0 nays.

On May 22, 2013, the bill was reviewed by the House committee on Business & Labor, which again noted the need to rebuke *Cortez* and passed the bill out of committee by a vote of 10-0-0.[51] In making its decision the committee reviewed a letter from the House Small Business Task Force which stressed the importance extending workers compensation exclusivity to increasingly prevalent corporate forms.[52] As noted by the task force, the workers' compensation deal has been understood for years…pay into the workers compensation system and receive liability protection. On June 12, 2013 the bill passed the house by a vote of 59 ayes, 1 excused absent, and 0 nays.

The Courts' interpretation in *Cortez*, and the immediate legislative rebuke of SB 678, clearly demonstrates the legislative intent embodied by the workers' compensation system. The legislature encourages businesses to provide broad no-fault injury protection to workers by offering liability protection to complying employers in the form of the ORS 656.018(1) exclusive remedy provision.

The ruling in *Cortez* undermined the legislative system because *Cortez* eliminated the incentive for members of limited liability companies to purchase and maintain workers' compensation insurance. Under *Cortez*¸ whether or not the company was insured, LLC

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[50] Armstrong Declaration, ¶9, Exhibit D.

[51] *Id*. at ¶10, Exhibit E.

[52] *Id*. at ¶11, Exhibit F.

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members could be sued for any workplace injury. Thus, there was no incentive to cover workplace injuries occasioned by the employee's own fault in exchange for liability protection from workplace injuries occasioned by the negligence of the employer, because the employer's owner (and thus, indirectly, the employer) could be sued regardless of coverage.

2. Plaintiff's Summary Judgment Motion Frustrates Legislative Intent

The legislature acted decisively to close the loophole created by *Cortez* and explicitly extend the exclusive remedy protections of Oregon's workers' compensation statutes to include partners, limited liability company members, general partners, limited liability partners and limited partners. Plaintiff argues here that, despite the legislature's response to *Cortez*, *Cortez'*s reasoning and holding applies to all wholly owned subsidiary corporations such that parent companies of wholly owned subsidiary corporations are exposed to liability for the workplace injuries suffered by the employees of subsidiary corporations.

Plaintiff has claimed that, by dint of their shared ownership interest and business relationship in AB Car Rental, Inc., all the Avis Defendants are liable for his injuries because they were "engaged in a common enterprise within the meaning of the Employer Liability Law[53]" and controlled the work or instrumentality of the work.[54] Plaintiff's broad reading of the Employer Liability Law, coupled with his narrow reading of what qualifies as an "employer," effectively eviscerates the legislative intent of the workers' compensation statute. Put simply, if Plaintiff's interpretation of the workers' compensation system is correct in this matter, there is no workers' compensation policy available which will grant multi-level corporate entities the benefit of the exclusive remedy provision of the workers' compensation statute. If the court grants Plaintiff's motion, the parent company of every wholly owned subsidiary corporation will be similarly exposed to liability for workplace injuries suffered by the employees of the subsidiary company, regardless of workers' compensation insurance

[53] Plaintiff's Amended Complaint at ¶ 39

[54] *Id.* at ¶ 40.

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coverage. Such a ruling means that parent companies receive no benefit in exchange for the cost of maintaining workers compensation coverage for employees of subsidiaries.

The bargain crafted by the legislature is designed to encourage employers to maintain no-fault workers' compensation insurance for covered workers. This bargain is ineffective if the owner of the employing company is barred from partaking in the bargain based solely upon the ownership interest with the employing company. *Cortez* held that members of LLCs could be liable based solely upon their membership interest in the employing LLC, and the legislature acted quickly thereafter to repudiate *Cortez*. This Court should follow the direction of the legislature, protect the bargain crafted by the legislature in enacting Oregon's workers' compensation system, and hold that the owners and corporate parents of wholly owned subsidiary companies, like the Avis Defendants, are entitled to immunity under the "exclusive remedy" provision to Oregon's workers' compensation laws.

C. Argument on Plaintiff's Request to Strike "Negligence of Fellow Servant" Defense

Plaintiff asserts two arguments why Defendants' affirmative defense of negligence of fellow servant under ORS 654.330 must be stricken as a matter of law – (1) Plaintiff pleads in his Second Amended Complaint that Emori was negligent in operating the subject van; and (2) Defendants admit in their Answer to the Second Amended Complaint that Emori was the "lead driver" in charge of the "operation of the subject van" at the time of the Accident.

However, additional evidence in the record before the court creates genuine issues of material fact sufficient to preclude summary judgment on this issue. Further, Plaintiff should be estopped from advancing this argument based on prior briefing in this case where he asserted contradictory positions.

Plaintiff himself argues in prior briefing that there is an issue of fact as to whether the subject van and the work at issue were under the control of PV Holding Corp and Avis Budget

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Group, Inc. at the time of the Accident.[55] As Plaintiff previously argued:

- "Equipment *under the control* of PV Holding Corp and Avis Budget Group, Inc. was used" at the time of the Accident because the subject van was "purchased and insured by entities" associated with defendant Avis Budget Group, Inc. and "owned by defendant PV Holding Corp."[56]
- There is an issue of fact as to whether Emori controlled the operations of the van at the time of the Accident because "the specific task – driving the van – was conducted under rules promulgated by Avis Budget Group, Inc."[57]
- The employee allegedly in charge of supervising the subject van's operations, Michael Pratt, also has control over employees like Emori and Plaintiff as their direct supervisor.[58]

These excerpts, as supported by the evidence cited in Plaintiff's own briefing, create a genuine issue of material fact that precludes summary judgment on Defendants' affirmative defense of negligence of a fellow servant. Plaintiff should be estopped from advancing this argument since he asserts contradictory positions in prior briefing filed with the court in this case.

ORCP 47F MOTION FOR CONTINUANCE

Pursuant to ORCP 47F, Defendants move for a continuance of the proceedings relating to the "comparative fault" portion of Plaintiff's Second Motion for Partial Summary

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[55] *See generally* Plaintiff's Opposition to Avis Defendants' [First] Motion for Summary Judgment, p. 11, lines 19-13; p. 12, lines 1-9. For purposes of this section, Defendants hereby incorporate by reference the cited excerpts from the Declaration of Sean Stokes and accompanying exhibits in this section of Plaintiff's Opposition to Avis Defendants' [First] Motion for Summary Judgment.

[56] Plaintiff's Opposition to Avis Defendants' [First] Motion for Summary Judgment, p. 11, lines 19-24; p. 12, line 1 (emphasis added).

[57] Plaintiff's Opposition to Avis Defendants' [First] Motion for Summary Judgment, p. 12, lines 2-7.

[58] Plaintiff's Opposition to Avis Defendants' [First] Motion for Summary Judgment, p. 3, lines 4-12.

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Judgment. Defendants are currently unable to procure facts essential to this part of Plaintiff's Motion and, therefore, request a 60-day extension of these proceedings to conduct crucial discovery.[59]

On November 19, 2021, Defendants learned for the first time of Plaintiff's position that he had apparently not "settled" with former defendants Gaspar Mateo and Gaspar Pablo for purposes of ORS 31.600.[60] In support of this position, Plaintiff fails to cite to any revelatory facts in his Motion other than his attorney's sworn statement that "[n]o settlement was entered into between Plaintiff Henry Michael Fuhrer and either Gaspar David Mateo or Gaspar David Pablo."[61]

ARGUMENT

Defendants must be provided additional time to conduct discovery to obtain integral documents and communications to ascertain the truth of Plaintiff's position that he did not settle with Mateo or Pablo.[62]

Plaintiff's position that he did not "settle" with Mateo or Pablo is suspicious for a few reasons. First, Plaintiff already entered into one settlement agreement with another former defendant in this case, Continental Casualty Company, wherein Continental paid $25,000 to

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[59] Armstrong Declaration, ¶4.

[60] Armstrong Declaration, ¶2; Plaintiff's Second Motion for Partial Summary Judgment, p. 5, lines 17-19.

[61] Declaration of Sean J. Stokes in Support of Plaintiff's Motion for Partial Summary Judgment, ¶12.

[62] On December 3, 2021, Defendants' counsel propounded additional discovery requests to Plaintiff for documents supporting Plaintiff's "no settlement" position. As of the date of this Response, Plaintiff has yet to respond to these requests. Given that these requests seek documents relating to settlement agreements and communications, Defendants anticipate objections to these requests from Plaintiff. Additionally, on December 3, 2021, Defendants noticed Plaintiff of their intent to issue subpoenas for similar documents to Allstate, Pablo, and Mateo. Defendants will also conduct further discovery to (1) obtain documentation relating to Plaintiff's offer to dismiss Mateo and Pablo without costs, (2) documentation supporting whether Plaintiff entered into a covenant not to sue with Mateo and Pablo, and (3) depositions of Mateo, Pablo, and their counsel on the limited issue of whether a "settlement" occurred for purposes of ORS 31.600.

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Plaintiff in exchange for a release and dismissal of claims. Yet, Plaintiff apparently turned down Mateo and Pablo's insurance carrier's interpleader money in November 2019 only to continue prosecuting his claims in this case against Mateo and Pablo for nearly two more years. Second, Plaintiff's position that he did not "settle" with Mateo or Pablo is also odd when considering their insurance carrier, Allstate, initiated the First Interpleader Action and requested therein that the court take possession of $50,000 in insurance policy proceeds to be divided, in part, to Plaintiff. Ultimately, there was no adjudication on the merits of the First Interpleader Action, as Allstate apparently agreed to dismiss the Action voluntarily pursuant to a General Judgment of Dismissal without prejudice.[63]

Plaintiff's ambiguous position about settlement raises some key questions currently left unanswered:

A. Did Mateo/Pablo Enter into an Agreement with Plaintiff that Nonetheless Involved Mutual Consideration?

Plaintiff claims that he did not "settle out" with Mateo and Pablo but this phrasing, without more, is ambiguous. If by "settle out," Plaintiff contends that he did not accept any settlement money from Mateo or Pablo, there still could have been an agreement between these parties that conferred mutual consideration and benefit to one another so as to constitute a "settlement." As stated above, the definition of "settlement" does not always involve the transfer of monies. Defendants must be afforded additional time to conduct relevant discovery to determine the veracity of Plaintiff's position.[64]

B. Did Plaintiff Enter into a "Settlement" with Allstate Instead?

Plaintiff may be mincing words when he contends that he did not "settle" with Pablo or Mateo because, technically, Plaintiff may have reached a settlement agreement with their insurance carrier, Allstate, instead.

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[63] *See generally* General Judgment of Dismissal in the First Interpleader Action, entered on November 13, 2019.

[64] Armstrong Declaration at ¶4.

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Regarding the First Interpleader Action, it is strange that Allstate would abandon its efforts to tender its policy limits to wash its hands of the matter and, instead, allow that Action to be dismissed without the finality involved in a dismissal "with prejudice." Moreover, upon information and belief, Allstate's policy paid for Mateo and Pablo's legal representation in this case.[65] Despite Allstate's apparent voluntary dismissal of the First Interpleader Action in November 2019, upon information and belief, Allstate continued to pay for Mateo and Pablo's legal representation in this case (including Mateo's deposition in June 2021 whereat he was represented by counsel) for nearly two more years until Plaintiff purportedly dismissed Mateo and Pablo without a settlement in October 2021.[66]

Accordingly, Defendants request a continuance of these proceedings under ORCP 47F to obtain integral discovery from Allstate, Mateo, and Pablo to determine whether any of them "settled" with Plaintiff.

C. If Allstate Entered into some Type of Agreement with Plaintiff, what were the Terms?

If Plaintiff reached an agreement with Allstate, Defendants must be able to ascertain its terms to verify whether the agreement exacted further benefits to Plaintiff, Mateo, and Pablo. By allowing Defendants a continuance to obtain responsive discovery on this issue, the Court will likely learn of additional evidence creating further issues of fact as to whether Plaintiff truly did not "settle" with Mateo, Pablo, and/or Allstate.

D. If No "Settlement" Occurred, the Appropriate Remedy is to Give Defendants Leave to File Third-Party Claims Against Mateo and Pablo

If, following additional discovery, it turns out that there really was not a "settlement" between Plaintiff and one or more of Mateo, Pablo, or Allstate, then the appropriate remedy for Plaintiff's last-minute decision to unilaterally dismiss Mateo and Pablo would be to give

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[65] Armstrong Declaration at ¶5.

[66] *Id.*; *supra* note 16 (i.e. Allstate's acknowledgment in the First Interpleader Action that Pablo and Mateo's policy required Allstate to provide them with a defense in this case).

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Defendants leave to file a third-party complaint against Mateo and Pablo for contribution.

CONCLUSION

First, for the reasons articulated above, Plaintiff's Second Motion for Partial Summary Judgment must be denied.

Second, pursuant to ORCP 47F, Defendants require additional time to complete discovery on the narrow issue of whether Plaintiff "settled" with Mateo, Pablo, or Allstate. Even if the Court is inclined to deny the "comparative fault" component to Plaintiff's Second Motion for Partial Summary Judgment without granting the requested ORCP 47F continuance, Defendants alternatively request a 60-day continuance on the deadline for completing discovery in this case to obtain the "settlement" related documentation and correspondence sought in their recent requests for production to Plaintiff and subpoenas to Allstate, Mateo, and Pablo.

DATED this 13th day of December, 2021.

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By: */s/ Ben F. Veralrud*

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Oregon that I served the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT; and ORCP 47F MOTION FOR CONTINUANCE** on the following attorneys by the method indicated below on the 13th day of December, 2021:

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